Nos. 08-1763 & 08-2159

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JENNIFER HO,
Petitioner/Cross-Respondent

CHAK MAN FUNG,
Intervenor-Petitioner/Cross-Respondent

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ON BEHALF OF MEKI BRACKEN AND DIANA LIN,
Respondent/Cross-Petitioner

MEKI BRACKEN and DIANA LIN,
Intervenors-Respondents/Cross-Petitioners

ON PETITION FOR REVIEW OF A DECISION OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND CROSS-APPLICATION FOR ENFORCEMENT OF THE AGENCY'S ORDER

BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

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STATEMENT OF JURISDICTION

Neither petitioner's nor intervenor-petitioner's jurisdictional statement is complete and correct. 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). On January 31, 2008, following entry of a default judgment due to Ho's and Fung's failure to respond to a properly served Charge of Discrimination, the ALJ issued

her Initial Decision and Order that awarded damages, a civil penalty, and injunctive relief. That decision became final on March 3, 2008. On March 31, 2008, petitioner timely sought review in this Court pursuant to 28 U.S.C. 2343 and 2344 (No. 08-1763). This Court granted intervenor-petitioner's motion to intervene in petitioner's appeal. On May 9, 2008, the Secretary filed a cross-application for enforcement of the agency's order pursuant to 42 U.S.C. 3612(j) (No. 08-2159), which intervenors-respondents adopted as their own. By order dated May 12, 2008, this Court consolidated the two appeals.

This Court has jurisdiction over the appeals 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 under 42 U.S.C. 3612(i)(2) because the discriminatory housing practice in this case took place in Chicago, Illinois, within the Seventh Circuit.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the ALJ's determination that Ho and Fung violated the Fair Housing Act.

2. Whether the ALJ acted within her discretion in assessing damages, a civil penalty, and injunctive and other equitable relief.

3. Whether the ALJ's default judgment of liability and assessment of damages against Ho comported with due process.

4. Whether the ALJ's default judgment of liability and assessment of damages complied with existing HUD and Circuit precedent.

5. Whether this Court should grant the Secretary's Cross-Application to

Enforce Agency Order.

STATEMENT OF THE CASE

1. Procedural History

On August 22, 2007, following an investigation and determination of reasonable cause, HUD filed a Charge of Discrimination on behalf of Meki Bracken and Diana Lin against Jennifer Ho and Chak Man Fung, alleging a violation of Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601 *et seq*. (Fair Housing Act).[1] Dec. at 1. Specifically, the Charge alleged that Ho and Fung had unlawfully engaged in discrimination on the basis of race (1) by refusing to rent to Ms. Bracken because of her race; (2) by interfering with Ms. Bracken's attempt to take possession of a rental unit because of her race; (3) by making racially discriminatory statements related to Ms. Bracken's attempts to rent; (4) and by intimidating and retaliating against Ms. Lin on account of her having aided Ms. Bracken in the exercise of her fair housing rights, all in violation of 42 U.S.C. 3604(a) and (c) and 42 U.S.C. 3617. *Id.* at 1-2. The Charge and other documents were served upon Ho and Fung by first-class mail, postage prepaid, and by Federal Express (FedEx) at their last known addresses. *Id.* at 2.

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[1] This brief uses the following abbreviations: "Tr. __" for the page number of the transcript of the November 15, 2007, hearing; "Dec. at __" for the ALJ's Initial Decision and Order issued on January 31, 2008; "Ho Br. __" for the page number of Petitioner Jennifer Ho's opening brief filed with this Court; "Fung Br. __" for the page number of Intervenor-Petitioner Chak Man Fung's opening brief filed with this Court; and "Fung Supp. App. __ at __" for the exhibit and page number of Fung's supplemental appendix filed with this Court.

Neither Ho nor Fung filed an Answer to the Charge. *Ibid.* Bracken and Lin intervened in the proceeding before ALJ Arthur A. Liberty. *Ibid.*

As the Charging Party, HUD filed a Motion for Default against Fung on October 1, 2007, and against Ho on October 3, 2007. Dec. at 2. Neither Ho nor Fung filed a response to the Motion for Default. *Ibid.* On October 18, 2007, ALJ Liberty granted the motions for default against Ho and Fung, contingent on the Charging Party establishing the violations alleged. *Ibid.* The ALJ set a hearing date of November 15, 2007, for the presentation of evidence on substantive claims and damages, and transferred the case to ALJ Constance T. O'Bryant. *Ibid.* On November 7, 2007, ALJ O'Bryant modified the default judgment to state that the default decision found Ho and Fung liable for all acts of discrimination alleged in the Charge, and that the hearing would be limited to the introduction of evidence as to damages and a civil penalty. *Ibid.* Copies of the modified default judgment were sent to Ho and Fung by regular mail. Fung Supp. App. C.

The ALJ subsequently held a hearing on November 15, 2007, which neither Fung nor his representative attended. Dec. at 2. Ho appeared unrepresented at the start of the hearing with a note from a lawyer stating that he "intend[ed]" to represent Ho "after today." *Ibid.* Ho requested a postponement of the hearing on the ground that it would be futile for her to attend the hearing without representation and without an interpreter because she understood very little English. *Ibid.* According to Ho, she hired current counsel only a few days prior and did not open any of the correspondence she received from HUD, including the

Charge and the Motion for Default, while she was unrepresented because she would not be able to understand the content of the documents without an attorney's assistance. Ho Br. 9-10.

The Charging Party and intervenors objected to Ho's request for a postponement. Dec. at 2. The Charging Party and intervenors stated that Ho had not requested a delay to obtain counsel or an interpreter before the hearing, despite the Charging Party's informing her several months prior, with an interpreter present, of her need to obtain counsel. *Ibid.* The Charging Party and intervenors also represented that they had reason to believe that Ho's ability to speak and understand English was sufficient for her to proceed without an interpreter. *Ibid.* Based upon these representations, the ALJ denied Ho's request to postpone the hearing, advised her that it was in her best interest to stay through the hearing, and strongly encouraged her to do so. *Id.* at 3. The ALJ allowed Ho to make the decision to leave the courtroom after Ho repeatedly insisted on leaving, and Ho left before any testimony was taken. *Ibid.* The ALJ deemed Ho and Fung to have waived their right to be present at the hearing, and held the hearing in their absence. *Ibid.* At the conclusion of the hearing, the ALJ ordered the remaining parties to file post-hearing briefs. *Ibid.*

Upon receipt of post-hearing briefs filed by the Charging Party and Intervenors Bracken and Lin, the ALJ issued an Initial Decision and Order on January 31, 2008, concluding that Ho and Fung violated 42 U.S.C. 3604(a) and (c) and 42 U.S.C. 3617. The ALJ issued an order for injunctive relief, compensatory

damages to the intervenors, and a civil penalty. The Secretary took no further action, and on March 3, 2008, the ALJ's order became the final agency decision pursuant to 42 U.S.C. 3612(h).[2]

On March 31, 2008, Ho filed a timely petition in this Court for judicial review of the ALJ's order of January 31, 2008 (No. 08-1763). On April 14, 2008, Bracken and Lin moved to intervene as Respondents in this Court. On April 16, 2008, the Court granted Bracken's and Lin's intervention motion. On April 29, 2008, Fung moved to intervene as Petitioner.[3] On May 2, 2008, this Court granted Fung's intervention motion. On May 9, 2008, HUD filed a cross-application to enforce the final agency decision (No. 08-2159), which Bracken and Lin adopted as their own. This Court consolidated the two appeals by order dated May 12, 2008.

2. Facts

At all times relevant to this case, Chak Man Fung was the Asian-American owner of the subject property, a condominium located at 20 North State Street, Chicago, Illinois. Dec. at 3. The condominium consisted of three separate rooms, each with an unrelated lease, that shared a kitchen and bathroom. *Ibid.* Jennifer

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[2] The 30th day following the ALJ's initial decision was March 1, 2008, a Saturday. Accordingly, the ALJ's decision became final on the next business day — Monday, March 3, 2008. See 24 C.F.R. 180.405(a).

[3] Fung also filed a petition for judicial review of the ALJ's order on May 2, 2008 (No. 08-2099), which this Court dismissed for lack of jurisdiction. Bracken and Lin also filed two cross-applications for enforcement (Nos. 08-2182, 08-2230) on May 12, 2008, and May 16, 2008, which they voluntarily dismissed.

Ho is an Asian-American female friend of Fung's who lived in one of the rooms. *Id.* at 4. At all times relevant to the case, Ho acted as an agent for Fung. Fung Supp. App. B at 2. In that capacity, she "performed various tasks related to management of the subject property, including responding to rental inquiries, communicating with prospective renters, showing the subject property, and providing applications." *Ibid.* She also acted as an intermediary between Fung and the other renters, and collected and delivered monthly rent checks to Fung. *Id.* at 2-3.

Diana Lin, an Asian-American woman, rented another of the three rooms at the subject property from Fung. Dec. at 5. Her lease was for nine months and ran from November 2003 to July 2004. *Ibid.* During this period, Lin purchased a condominium that she expected to move into at the end of May 2004, and received permission from Fung to sublet her unit for June and July of 2004. *Ibid.*; Fung Supp. App. G-2-A. Lin posted an advertisement of the sublet on *craigslist* that received a response on May 9, 2004, from Meki Bracken, an African-American woman who had recently graduated from college and was interning for the summer with a law firm in Chicago. Dec. at 5-6.

After meeting with Lin and viewing the unit, Bracken decided the unit was appropriate for her needs, as it was within walking distance to her office. Dec. at 6. Bracken submitted a completed rental application to Lin, and agreed to meet with the two other tenants of the subject property, Ho and an Asian-American woman named Jae Eun Shin, before signing the sublease agreement. *Ibid.* Lin

subsequently informed Ho that she had found someone to sublease her unit, but did not mention Bracken's race. *Ibid.* Ho responded that there was no need for her to see the completed application or to run a credit check because the lease was for a short term. *Ibid.* Ho also agreed to meet Bracken and to call Shin to inform her of the meeting. *Ibid.*

On May 12, 2004, Bracken arrived at the subject property for her meeting with the other tenants and was met by Lin and Ho. Dec. at 6. Ho appeared surprised upon meeting Bracken for the first time and abruptly retreated into her room after briefly speaking to Bracken, leaving Bracken and Lin alone together. *Ibid.* Lin and Bracken talked for about an hour before Lin decided to proceed without Ho's input and gave Bracken the sublet agreement to sign. *Ibid.* Ho emerged from her room at this point to inform Bracken and Lin that Bracken could not sign the agreement until she met with Shin. *Ibid.* Accordingly, the parties agreed to meet again. *Ibid.*

After Bracken left the unit, Ho scolded Lin for considering an African-American applicant, stating that "you should've told me that Meki was black — I would've told you I don't want to rent to blacks." Fung Supp. App. B at 5. Ho further explained to Lin that she could not sublet her unit to Bracken because Shin was "scared of Black people," and because Ho had previously rejected a black applicant who had later accused her of racial discrimination. Dec. at 7. Finally, Ho informed Lin that she was going to start looking for another person to sublet Lin's unit. *Id.* at 7. Shin subsequently arrived at the condominium and told Lin

that she was not interested in meeting the person who would sublease Lin's unit and that the new tenant's race was of no concern to her. *Ibid.* Despite Shin's refutation of Ho's concern about Bracken, Ho refused to meet again with Bracken, which led to a heated argument between Ho and Lin. *Ibid.* During the argument, Lin warned Ho that she could be sued, to which Ho responded, "Fine, sue me." *Ibid.*

Shortly thereafter, both Fung and Ho took out advertisements for the sublease of Lin's unit, and Ho brought a white prospective tenant to view Lin's unit without prior notice to Lin. Dec. at 7. Fung's online advertisement offered the unit for $595/month, $55 less than Bracken had agreed to pay. *Ibid*. Fung also e-mailed Lin, telling her that they could not force Ho to accept Bracken as her roommate and asking Lin to find another individual to sublease her unit. Fung Supp. App. G-2-C. These actions led Lin to conduct research on fair housing laws. Dec. at 8. Based upon her research, Lin concluded that not renting the unit to Bracken would violate local laws, and possibly state and federal laws as well. *Ibid*. Accordingly, Lin had Bracken sign the sublease agreement, and gave Bracken the keys to the entrance of the building and her unit in exchange for checks covering rent for half of May, June, and July. *Ibid.* Lin did not tell Bracken that Ho did not approve of her subleasing the unit, hoping that Ho would accept Bracken after she moved in. *Ibid*.

Lin also hoped that Fung would change his mind about Bracken once he became aware of Ho's race-based opposition to Bracken's sublease. Dec. at 8. To

that end, Lin sent Fung an e-mail in the early morning of May 16, 2004, informing him that Bracken would be moving into the unit. *Ibid*.; Fung Supp. App. G-2-E. In the e-mail, Lin informed Fung that Ho's rejection of Bracken was motivated solely by Bracken's race, and that Fung's refusal to allow Bracken to sublet the unit on that basis would be illegal under various local, state, and federal laws. Fung Supp. App. B at 5; Fung Supp. App. G-2-E. Lin asked Fung to "uphold" Bracken's right to sublease the unit, hoping that Fung would prevent Ho from interfering with Bracken's move into the unit. Dec. at 8-9; Fung Supp. App. G-2-E.

Fung declined Lin's request to allow Bracken to sublet her unit. In an e-mail to Lin later that morning, Fung denied that he was discriminating against anyone and stated that "when you have to live with someone, you can discriminately choose whom you live with." Dec. at 9; Fung Supp. App. G-2-F. He also expressed his belief that it is not illegal for Ho to express her desire not to "live with blacks in the same house" and that it is "wrong morally" to force someone to live with a person with whom she does want to live. *Ibid.*

Unaware of Fung's and Ho's opposition to her, Bracken attempted to move into Lin's unit the afternoon of May 16, 2004. Dec. at 9. Bracken unlocked the unit's front door, and was able to push open the top of the door with the assistance of two acquaintances, but discovered that the bottom of the door would not budge because it was blocked by a heavy object. Dec. at 9; Fung Supp. App. B at 6. In a statement to HUD under oath, Ho admitted that she was the person who blocked

Bracken's entry from inside the subject property. Fung Supp. App. B at 6. Bracken noticed movement and sounds coming from inside the unit, and banged on the door for half an hour, but received no response. Dec. at 9. Both Bracken and Lin repeatedly called Ho and Fung in an attempt to gain Bracken access to the unit, but again received no response. Fung Supp. App. B at 6. After trying for an hour to get in, Bracken finally took her belongings back to her car and left the subject property. *Ibid.*

On May 17, 2004, Fung posted another online advertisement for Lin's unit, again offering it for $55 less than Bracken was willing to pay. Fung Supp. App. B at 6. That same day, he sent Lin an e-mail denying that he had authorized her to sublease her unit. Dec. at 10; Fung Supp. App. G-2-G. The e-mail also claimed that she had violated her lease by failing to give him one month's notice before subleasing her unit, despite the lack of such a notice requirement in her lease. *Ibid*. Fung asked Lin to fax Bracken's rental application to him if she wanted Fung to consider Bracken, and denied Bracken permission to move into Lin's unit until he had made his final decision. *Ibid*. Fung sent Lin another e-mail the following day informing her that he had found another applicant who was ready to move into the unit at the end of May, and requesting that she return her keys to him and surrender the unit. Dec. at 10; Fung Supp. App. G-2-H. Despite his termination of the lease, Fung intended to keep Lin's full May rent payment. *Ibid*. Lin acceded to Fung's request, and her unit remained vacant until July 2004, when it was leased to an individual of East Asian descent. Dec. at 10.

Bracken suffered economic loss, emotional distress, and loss of a unique housing opportunity as a result of Ho's and Fung's discriminatory acts. Bracken felt "shocked" and "incredulous," as this incident was the first time she had been the victim of racial discrimination. Dec. at 10; Fung Supp. App. B at 7. Bracken conducted another search for a suitable summer sublet, which caused her to incur hotel expenses. Fung Supp. App. B at 7. The search was unsuccessful and Bracken ultimately ended up in the "uncomfortable" arrangements of staying most of the summer in the living room of an acquaintance's apartment and the rest of the summer with Lin. Dec. at 10-11. This arrangement left Bracken tired and stressed due to the inadequate sleeping arrangement, and caused her to accrue extra transportation expenses traveling to work from an apartment further from her office than the subject property. Fung Supp. App. B at 7.

Lin suffered economic loss and emotional distress as a result of Ho's and Fung's discriminatory acts. Because she was unable to sublet her unit to Bracken, Lin was forced to pay both the rent for her unit at the subject property and her mortgage, which created a significant economic and emotional burden. Fung Supp. App. B at 7. Fung also never returned her security deposit, causing Lin economic loss. *Ibid.* Because Lin felt guilty about what happened to Bracken, she felt compelled to put Bracken up in her new condominium when Bracken was unable to find alternative housing, which was inconvenient and uncomfortable for Lin. *Ibid.* Finally, Ho's and Fung's overt racial discrimination caused Lin, who views herself as a civil rights advocate, an extraordinary amount of stress and

rekindled unpleasant memories of childhood racial hostilities. *Ibid.*

3. The ALJ's Decision

On the basis of the uncontested evidence, the ALJ determined that Ho and Fung "refused to rent a housing unit to Ms. Bracken because of her race and made racially discriminating statements with regard to her rental application." Dec. at 11. The ALJ also found that Ho and Fung "interfered with Ms. Bracken's exercise of her fair housing rights and attempted to intimidate or coerce Ms. Lin on account of her having aided or encouraged Ms. Bracken in the exercise of Ms. Bracken's fair housing rights." *Ibid.* Based upon these findings, the ALJ concluded that Ho and Fung violated 42 U.S.C. 3604(a) and (c) and 42 U.S.C. 3617, as charged. *Ibid.*

On the basis of these findings and conclusions, the ALJ ordered Ho and Fung, jointly and severally, to pay actual damages in the amount of $49,284 to Bracken and $25,345 to Lin to compensate the intervenors for emotional distress, inconvenience, and out-of-pocket expenses. Dec. at 12-20. The ALJ also found that the maximum civil penalty of $11,000 was warranted against both Ho and Fung. *Id.* at 21. In making this assessment, the ALJ relied particularly upon the egregious and intentional nature of the violations, and the disregard shown by Ho and Fung toward the administrative process and the protections of the Fair Housing Act. *Id.* at 21-23. Finally, the ALJ enjoined Ho and Fung from unlawfully discriminating against persons on the basis of race or violating the Fair Housing Act, from retaliating against Bracken or Lin for their participation in this

case, and from transferring specified pieces of real property until they have satisfied the judgment in the case. *Id.* at 20, 23-24. The ALJ ordered Ho and Fung to make the required payments within 30 days of the date that the order became final. *Id.* at 23-24.

SUMMARY OF ARGUMENT

This Court should deny petitioner's and intervenor-petitioner's petition for review, and grant the Secretary's cross-application for enforcement of HUD's final order.

1. Substantial evidence supports the ALJ's determination that Ho and Fung violated the Fair Housing Act. A reasonable trier of fact, considering the uncontested evidence, could find that (1) Ho violated Section 804(a), 42 U.S.C. 3604(a), by refusing Bracken's attempt to sublease Lin's unit on account of Bracken's race, and that Fung violated Section 804(a) by authorizing that discrimination; (2) statements made by Ho and Fung in the course of the events of this case suggested to an ordinary listener that blacks were disfavored as sublessees of Lin's unit, in violation of Section 804(c), 42 U.S.C. 3604(c); (3) Ho coerced, threatened, intimidated or interfered with Bracken on account of her protected activity under the Fair Housing Act in violation of Section 817, 42 U.S.C. 3617, by barring Bracken's entry into the condominium, and that Fung violated Section 817 by supporting Ho's resistance to Bracken's entry; and (4) Fung violated Section 817 with regard to Lin by refusing to return half of her May rent in retaliation for her aiding and encouraging Bracken's exercise of her fair

housing rights.

2. Substantial evidence supports the ALJ's factual findings underlying her awards of damages, a civil penalty, and injunctive and other equitable relief, and thus the ALJ acted within her discretion in ordering those remedies. Substantial evidence supports the ALJ's findings of emotional distress that Bracken sustained as a result of Ho's and Fung's discriminatory conduct, and the loss Bracken suffered in the form of loss of housing opportunity, inconvenience, and out-of-pocket expenses. Substantial evidence also supports the ALJ's findings of Lin's emotional distress and her damages for inconvenience and out-of-pocket expenses. Substantial evidence supports the ALJ's weighing of the factors relevant to the determination of an appropriate civil penalty, and thus her assessment of the maximum civil penalty against Ho and Fung. Finally, substantial evidence supports the ALJ's determination that the need to rectify past harm and deter future violations warrants injunctive and other equitable relief.

3. The ALJ's default judgment of liability and assessment of damages against Ho comported with due process. Due process in this context requires adequate notice and a meaningful opportunity to be heard. Ho received all the process she was due when the Secretary sent to Ho's last known address the Charge of Discrimination and Motion for Default, to which Ho failed to respond, and held a hearing on damages, which hearing Ho voluntarily left before any testimony was taken. Ho's argument that she was deprived of due process because she did not receive actual notice that the Charging Party was seeking the entry of a

default judgment is both legally and factually incorrect. No more persuasive is Ho's contention that the ALJ's conduct prior to the damages hearing, including her denial of Ho's request for a continuance, violated due process. Application of the relevant factors shows that the ALJ acted well within her discretion in denying a continuance. Finally, the ALJ's assessment of the maximum civil penalty against Ho was not incorrect, much less a violation of due process, because Ho failed to carry her burden of introducing evidence of her financial circumstances into the record.

4. The ALJ's default judgment of liability and assessment of damages complied with existing HUD and Circuit precedent. In entering a default judgment of liability and reserving a future hearing to establish damages, the ALJ faithfully followed 24 C.F.R. 180.420(b)'s plain language, which mandates the admission of all factual allegations in a charge of discrimination and gives the ALJ discretion to enter a default judgment in response to a party's failure to answer the charge within 30 days of its service, as well as well-settled HUD precedent providing for such a bifurcated procedure. Contrary to Fung's allegation otherwise, the ALJ's order was also consistent with the default procedure employed by the ALJ in *HUD* v. *Wooten*, No. 05-99-0045-8, 2004 WL 3201000 (HUDALJ Dec. 3, 2004), and the original default order in this case. Because the ALJ did not arbitrarily depart from precedent in precluding Ho and Fung from contesting liability, a remand to HUD for reconsideration of Secretary's order is unwarranted.

5. Because substantial evidence supports the ALJ's determinations on liability and remedies, and the petitions for review are without merit, this Court should grant the Secretary's Cross-Application to Enforce Agency Order.

ARGUMENT

I

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S DETERMINATION THAT HO AND FUNG VIOLATED THE FAIR HOUSING ACT

A. Standard Of Review

Pursuant to the Administrative Procedure Act, this Court "will reverse the Secretary's decision only if it is 'not in accordance with law,' 'without observance of procedure required by law,' or 'unsupported by substantial evidence.'" *Jancik* v. *Department of Hous. & Urban Dev.*, 44 F.3d 553, 555 (7th Cir. 1995) (quoting 5 U.S.C. 706(2)(A), (D) & (E)). Factual findings are reviewable for "[s]ubstantial evidence[, which] is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Ibid.* (quoting *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971)). "Although [this Court] review[s] the entire record, [it] may not decide the facts anew, reweigh the evidence, or substitute [its] own judgment for that of the Secretary." *Id.* at 556 (quoting *Herron* v. *Shalala*, 19 F.3d 329, 333 (7th Cir. 1994)). This Court also "accord[s] considerable deference to the credibility determinations of the ALJ." *Ibid.*

B. The Uncontested Record Amply Supports The ALJ's Determinations On Liability

The Fair Housing Act prohibits discriminating on the basis of race in the

rental of a dwelling, and the making or publishing of any statement or advertisement that "indicates" any preference or limitation based on race. 42 U.S.C. 3604(a), (c). The Act also prohibits coercing, intimidating, threatening, or interfering with any person because that person has exercised a right protected by the Act. 42 U.S.C. 3617. The uncontradicted evidence, which includes the testimony of Lin and Bracken at the damages hearing and the factual allegations in the Charge of Discrimination, see 24 C.F.R. 180.420(b) (deeming factual allegations of an unanswered charge to be admitted), overwhelmingly supports the ALJ's determination that Ho and Fung violated 42 U.S.C. 3604(a) and (c) and 42 U.S.C. 3617.

1. The Uncontested Record Demonstrates That Ho And Fung Violated Section 804(a) Of The Fair Housing Act

Section 804(a) of the Fair Housing Act provides, in relevant part, that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race." 42 U.S.C. 3604(a). A defendant may be held liable for violating this provision by showing that his actions were taken with discriminatory intent. See *Kormoczy* v. *Secretary, U.S. Dep't of Hous. & Urban Dev.*, 53 F.3d 821, 823-824 (7th Cir. 1995).

The factual allegations and testimony adduced at the hearing on damages provide direct evidence that Ho refused Bracken's attempt to sublease Lin's unit because of Bracken's race and did so with discriminatory intent. After meeting

with Bracken, Ho told Lin that she refused to rent to blacks because she had previously rejected a black applicant who then sued her for racial discrimination. Ho also told Lin that she was going to look for another individual to sublease Lin's unit, and brought a white prospective tenant to view the unit without prior notice to Lin. After learning that Bracken was nevertheless going to move into Lin's unit, Ho prevented Bracken from doing so by barring the front door to the unit. A reasonable mind would accept this evidence as more than adequate to support the ALJ's determination that Ho violated Section 804(a) of the Fair Housing Act.

Ho's violation of Section 804(a) is imputed to Fung under principles of vicarious liability. In *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003), the Supreme Court stated that "it is well established that the [Fair Housing] Act provides for vicarious liability" and "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." A property owner is vicariously liable for the racial discriminatory acts of his agent in violation of the Fair Housing Act "regardless of whether the owner specifically authorized the agent to engage in racial discrimination." *Coates* v. *Bechtel*, 811 F.2d 1045, 1051 (7th Cir. 1987). The uncontradicted testimony and factual allegations in the Charge establish that at all times relevant to the Charge, Fung owned the subject property and Ho acted as Fung's agent. In Ho's capacity as agent, she performed various tasks related to management of the property, including responding to rental

inquiries, communicating with prospective renters, showing the subject property, and providing applications. Because Ho's illegal discrimination toward Bracken occurred within the context of her authority to act on behalf of Fung in renting the units within the condominium, Fung is vicariously liable for that discrimination even if he did not specifically authorize Ho to discriminate.

In any event, the testimony and factual allegations in the Charge also demonstrate that Fung did specifically authorize Ho to discriminate against Bracken, thus providing direct evidence of Fung's discriminatory intent. In response to an e-mail from Lin asking him to "uphold" Bracken's right to sublease the unit, Fung told Lin that an individual could choose with whom she wanted to live, and that it was morally wrong to force her to do otherwise. Dec. at 8-9; Fung Supp. App. G-2-F. After Bracken unsuccessfully attempted to move into the unit, Fung denied to Lin that he had authorized her to sublease her unit, denied Bracken permission to move into Lin's unit until he made his final decision on a sublessee for Lin's unit, and told Lin the following day that he had found another applicant. These statements and actions ratified Ho's racially motivated discrimination against Bracken and provide another basis for holding Fung liable for violating Section 804(a).

Fung contends (Fung Br. 20) that he cannot be held liable for violating Section 804(a) or vicariously liable for Ho's actions that violated Section 804(a), because the ALJ's Initial Decision and Order did not explicitly find that he violated that provision or that Ho was Fung's actual or apparent agent. This

argument fails because the ALJ's decision incorporates the factual allegations in the Charge of Discrimination, which were admitted by Fung's non-response to the Charge and expressly make the above factual findings. See 24 C.F.R. 180.420(b). Fung does not, and cannot, dispute that the Charge's factual allegations amply demonstrate that he violated Section 804(a). As discussed above, these allegations show that Fung ratified Ho's racially motivated discrimination against Bracken and that Ho acted as Fung's agent in processing rental applications, communicating with prospective renters, and showing the subject property, thus subjecting him to vicarious liability for her unlawful actions in that capacity.

No more persuasive is Fung's argument (Fung Br. 21-22) that the ALJ erred legally in failing to analyze whether he and Ho were exempted from liability under Section 804(a) by Section 803(b), which provides, in relevant part, that Section 804(a) does not apply to "any single-family house sold or rented by an owner: *Provided*, That such private individual owner does not own more than three such single-family houses at any one time." 42 U.S.C. 3603(b)(1). Fung's argument rests upon his mistaken view that the Charging Party must establish the absence of any exemptions from a Fair Housing Act provision before the ALJ can enter a default judgment finding a defendant liable for violating that provision. Contrary to Fung's contention otherwise, the case he cites (Fung Br. 21) for this proposition — *HUD* v. *Wooten*, No. 05-99-0045-8, 2004 WL 3201000, at *5 (HUDALJ Dec. 3, 2004) — makes no mention of the burden of proving exemptions from the Fair Housing Act. The ALJ in *Wooten* merely required the Charging Party make a

prima facie case of liability before he would enter a default judgment. Accordingly, *Wooten* affords no basis for deviating from the general rule, acknowledged by Fung (Fung Br. 21), that defendants bear the burden of such proof.[4] See *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005) (characterizing Section 803(b)(2) "Mrs. Murphy" exemption to Fair Housing Act as affirmative defense); cf. *e360 Insight* v. *The Spamhaus Project*, 500 F.3d 594, 599 (7th Cir. 2007) (district court not required to raise sua sponte affirmative defenses to liability on behalf of appearing party that elects not to raise defenses).

2. The Uncontested Record Demonstrates That Ho And Fung Violated Section 804(c) Of The Fair Housing Act

Section 804(c) of the Fair Housing Act provides, in relevant part, that it is unlawful "[t]o 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 race * * * or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. 3604(c). A defendant is thus liable under this provision if (1) he made a statement; (2) the statement was made with respect to the sale or rental of a dwelling; and (3) the statement indicated a preference, limitation, or

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[4] In any event, it is unlikely that the subject property qualifies as a "single-family house" to which the exception in Section 803(b)(1) applies. The Fair Housing Act does not define "single-family house," and the Fifth Circuit has concluded that a fourplex — a property similar to the subject property in this case — does not fall within this term's coverage. See *Lincoln* v. *Case*, 340 F.3d 283, 287-288 (5th Cir. 2003).

discrimination against an individual on the basis of her race. See *White* v. *United States Dep't of Hous. & Urban Dev.*, 475 F.3d 898, 904 (7th Cir. 2007). To determine whether a statement indicates impermissible discrimination on the basis of race, an "ordinary listener" standard is applied. See *id.* at 905. That standard asks whether the statement at issue suggests to an ordinary listener "that a particular [protected group] is preferred or dispreferred for the housing in question." See *Jancik*, 44 F.3d at 556 (quoting *Ragin* v. *New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), cert. denied, 502 U.S. 821 (1991)). "The ordinary listener 'is neither the most suspicious nor the most insensitive of our citizenry.'" *White*, 475 F.3d at 906 (quoting *Jancik*, 44 F.3d at 556 n.4).

The factual allegations and testimony adduced at the hearing on damages demonstrate that both Ho and Fung made statements suggesting to the "ordinary listener" that blacks were disfavored for the sublease of Lin's unit. After meeting with Bracken, Ho told Lin that she refused to rent to blacks because she had previously rejected a black applicant who then sued her for racial discrimination. Lin was unable to persuade Ho to change her mind about Bracken, and sent Fung an e-mail asking him to "uphold" Bracken's right to sublease the unit. Fung refused, replying in an e-mail that "when you have to live with someone, you can discriminately choose whom you live with," that it is not illegal for Ho to express her desire not to "live with blacks in the same house," and that it is "wrong morally" to force someone to live with a person with whom she does want to live. Dec. at 9; Fung Supp. App. G-2-F. A reasonable mind would accept this evidence

as adequate to support the ALJ's determination that Ho and Fung violated Section 804(c) of the Fair Housing Act. Fung is also vicariously liable for Ho's discriminatory statements to Lin. See Argument Part I.B.1, *supra*.

Fung argues (Fung Br. 23, 25-26) that he is not liable for violating Section 804(c) because HUD's liability finding "lack[ed] any of the factual analysis required by * * * firmly-established precedent" and because his statements to Lin "can be construed variously" that, in context, "suggest[] that Fung maintained a diplomatic, patient approach." The first argument fails because the ALJ's decision incorporates the detailed factual allegations in the Charge, which were deemed admitted by Fung's non-response to the Charge. See 24 C.F.R. 180.420(b). The second argument misapprehends this Court's standard of review for factual findings. This Court does not view the statements at issue de novo to determine whether they violate Section 804(c), but rather determines whether substantial evidence — *i.e.*, evidence that a reasonable mind might accept as adequate — supports the determination that they violate Section 804(c). Given the context of the statements at issue — a defiant response to Lin that Ho had carte blanche to decide to whom Lin's unit could be subleased — a reasonable mind could interpret Fung's statements as endorsing Ho's illegal discrimination against Bracken on the basis of her race.

No more persuasive is Fung's contention (Fung Br. 26-27) that HUD's legal analysis is defective because it failed to expressly enunciate and apply the "reasonable listener" test, and that a proper analysis would have raised the

possibility that holding landlords liable for statements advertising transactions that are exempt from liability under Section 803(b)(1) runs afoul of the First Amendment. The premise of Fung's argument is incorrect. In reviewing an ALJ's decision for substantial evidence, this Court merely requires that an ALJ "explain his analysis of the evidence with enough detail and clarity to permit meaningful appellate review." *Briscoe ex rel. Taylor* v. *Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005). The ALJ's decision on Section 804(c) easily met this standard. After setting forth the facts of the case in detail, including the statements at issue and the context in which they were made, the ALJ determined that "[t]he uncontested evidence shows that Respondents * * * made racially discriminating statements with regard to [Bracken's] rental application." Dec. at 11. The ALJ's decision gave this Court sufficient detail and clarity to determine whether the statements would suggest to an ordinary listener that Bracken was disfavored for the sublease because of her race.

Not only is a more detailed explication of the ALJ's Section 804(c) decision not required under this Court's precedents, it would not have assisted Fung in this case. In support of his contention (Fung Br. 27) that a detailed analysis "likely would have raised an even graver problem," Fung cites dictum from *Chicago Lawyers' Committee for Civil Rights Under Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008), stating that holding landlords who are exempt from liability under Section 804(a) liable for a discriminatory statement under Section 804(c) raises serious First Amendment concerns. Fung acknowledges (Fung Br.

23) that this passage is a "suggest[ion]," not a holding, of this Court, and fails to explain why non-binding dictum raising a possible problem with certain applications of the statute in a different context should control the ALJ's decision. In any event, the dictum does not apply to Fung's situation, as he waived the opportunity to assert the exemption in Section 803(b)(1) by failing to file a response to the Charge of Discrimination.

3. The Uncontested Record Demonstrates That Ho And Fung Violated Section 817 Of The Fair Housing Act

Section 817 of the Fair Housing Act provides, in relevant part, that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section * * * 3604 * * * of this title." 42 U.S.C. 3617. A defendant is thus liable under this provision if (1) an individual is a protected individual under the Fair Housing Act; (2) that individual engages in the exercise or enjoyment of her fair housing rights or encourages another person to do so; (3) the defendant was motivated in part by an intent to discriminate; and (4) the defendant coerced, threatened, intimidated, or interfered with the protected individual on account of her protected activity under the Act. See *East-Miller* v. *Lake County Highway Dep't*, 421 F.3d 558, 563 (7th Cir. 2005).

The factual allegations and testimony adduced at the hearing on damages

provide direct evidence that Ho and Fung coerced, threatened, intimidated, or interfered with Bracken on account of her protected activity under the Fair Housing Act. It is undisputed that Bracken is a protected individual under the Act by virtue of her race, and that she engaged in the exercise of her fair housing rights by attempting to sublease Lin's unit. As discussed above, see Argument Part I.B.1, *supra*, both Ho and Fung were motivated in part by an intent to discriminate against Bracken. When Ho barred Bracken from moving into the condominium, she interfered with Bracken's exercise of her fair housing rights. Ho's interference with Bracken's exercise of her fair housing rights is imputed to Fung under principles of vicarious liability. See Argument Part I.B.1, *supra*. Fung, moreover, interfered with Bracken's exercise of her fair housing rights by supporting Ho's interference against Bracken's entry, as evinced by his subsequent advertisement of the unit for less than Bracken was willing to pay. A reasonable mind would accept this evidence as adequate to support the ALJ's determination that Ho and Fung violated Section 817 of the Fair Housing Act with regard to Bracken.

The evidence also demonstrates that Fung coerced, threatened, intimidated, or interfered with Lin on account of her aiding or encouraging protected activity under the Fair Housing Act. Lin aided and encouraged the exercise of fair housing rights by a protected individual, Bracken, by determining that it would be unlawful not to sublease her unit to Bracken, and by giving Bracken her keys in exchange for rent payments. One day after Bracken unsuccessfully attempted to move into

Lin's unit, Fung claimed that Lin had violated her lease by failing to give him one month's notice before subleasing her unit, despite the lack of notice requirement in her lease. One day later, Fung demanded that Lin return her keys and surrender her unit. Fung kept Lin's May rent payment despite his termination of the lease. Given the short period of time between Lin's attempt to sublease her unit to Bracken and Fung's punitive actions, a reasonable mind could view the latter as a response to Lin's aiding and encouraging Bracken's exercise of her fair housing rights, in violation of Section 817 of the Fair Housing Act.

Fung's challenges to the ALJ's default judgment of liability on Section 817 are without merit. First, he argues (Fung Br. 23) that he is not liable for violating Section 817 because HUD's liability finding "lack[ed] any of the factual analysis required by * * * firmly-established precedent." Next, Fung contends (Fung Br. 24) that in any event, his interaction with Lin "could just as easily support a conclusion that Lin abrogated her lease and Fung acted properly under local landlord-tenant law." These arguments fail for the same reason that Fung's other fact-based challenges fail. The ALJ's decision incorporates by reference the detailed factual allegations in the Charge, which were deemed admitted by Fung's non-response to the Charge. See 24 C.F.R. 180.420(b). Indeed, Fung does not even attempt to argue that a reasonable mind could not conclude that these facts demonstrate that he terminated Lin's lease, asked her to surrender her keys, and kept her security deposit in retaliation for Lin's aiding and encouraging Bracken's exercise and enjoyment of her fair housing rights.

Equally misplaced are Fung's legal challenges to the ALJ's finding of liability on the Section 817 claim. First, Fung contends (Fung Br. 24) that a Section 3617 claim is not viable without an underlying Section 3604 violation, and cites (Fung Br. 24-25) dictum in *Halprin* v. *Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004), criticizing the viability of stand-alone Section 3617 claims. Aside from the non-binding character of the passage Fung cites, *Halprin* does not assist Fung's case because, as he acknowledges (Fung Br. 25), it is readily distinguishable on the facts. Unlike *Halprin*, where plaintiffs had no Section 804 claim, substantial evidence supports the ALJ's determinations that Ho and Fung violated Sections 804(a) and (c) of the Fair Housing Act. See Argument Part I.B.1, I.B.2, *supra*. With two separate Section 804 violations underlying the Section 817 claim, the issue of the viability of a stand-alone Section 817 claim is not before this Court to decide. See *Church of Scientology* v. *United States*, 506 U.S. 9, 12 (1992) (federal court lacks jurisdiction "to declare principles or rules of law which cannot affect the matter in issue in the case before it").

Next, Fung argues (Fung Br. 25) that the ALJ failed to undertake a legal analysis adequate to determine that his conduct was sufficiently egregious to violate Section 817. As with the Section 804(c) claim, however, the ALJ set forth the facts of the case in great detail, including the intimidating conduct and its context, before concluding that "Respondents also interfered with Ms. Bracken's exercise of her fair housing rights and attempted to intimidate or coerce Ms. Lin

on account of her having aided or encouraged Ms. Bracken in the exercise of Ms. Bracken's fair housing rights." Dec. at 11. This analysis includes enough detail and clarity to give this Court the ability to exercise meaningful appellate review of this claim. See *Barnhart*, 425 F.3d at 351.

II

THE ALJ ACTED WITHIN HER DISCRETION IN ASSESSING DAMAGES AND A CIVIL PENALTY

A. Standard Of Review

An ALJ's award of damages, a civil penalty, and equitable relief is reviewed for abuse of discretion, and her analysis of the factors relevant to the imposition of such remedies are factual findings reviewed for substantial evidence. See *Morgan* v. *Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1461 (10th Cir. 1993). This Court will not reverse an estimate for intangible injuries such as emotional distress and inconvenience unless the estimate is clearly erroneous. See *City of Chicago* v. *Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1099 (7th Cir. 1992), cert. denied, 508 U.S. 972 (1993). It will not reduce the amount of damages awarded unless that amount is clearly excessive, *ibid.*, "or there is no rational connection between the evidence on damages and the verdict," *Littlefield* v. *McGuffey*, 954 F.2d 1337, 1348 (7th Cir. 1992) (internal quotation marks and citation omitted).

B. The ALJ Acted Within Her Discretion In Awarding Bracken And Lin Damages For Emotional Distress And Tangible Losses

The Fair Housing Act permits an ALJ, upon finding a violation of the Act,

to award "actual damages suffered by the aggrieved person." 42 U.S.C. 3612(g)(3). Compensable damages include damages for emotional distress caused by housing discrimination, see *United States* v. *Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993), alternative housing costs and inconvenience, see *Krueger* v. *Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997), and out-of-pocket expenses, see *Phillips* v. *Hunter Trails Cmty. Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982). The ALJ awarded Bracken $30,000 for emotional distress, $15,000 for loss of housing opportunity, $3,000 for inconvenience, and $1,284 to cover out-of-pocket expenses. The ALJ awarded Lin $22,400 for emotional distress, $2,500 for inconvenience, and $445 for out-of-pocket expenses.

The ALJ's awards in this case are rational and fully supported by the evidence. With regard to Bracken's award for emotional distress, the ALJ set forth in detail the evidence of emotional distress and the circumstances that caused that distress. See Dec. at 13-15. Before coming to Chicago, Bracken had lived a sheltered life and had not experienced overt racial discrimination. Learning that Ho had walked away from the tenant meeting and had barred the door to the subject property because Ho did not want to live with a black woman had a significant detrimental effect on Bracken. Bracken withdrew within herself and lost enthusiasm for both her job and her summer experience, to the point where she refused to consider a return to Chicago for a full-time job. The discriminatory episode also irrevocably altered Bracken's world view, leading her to wonder for the first time whether other people were judging her on the basis of her race, and

this "pain and self-consciousness" has remained with her. *Id.* at 14-15. Judge O'Bryant's opinion describes vividly that emotional distress caused by Ho's and Fung's actions, which "inflicted a deep wound that changed the way [Bracken] regarded herself and her surroundings and continues to affect her today." *Ibid.* This testimony on the effect of Ho's and Fung's racial discrimination on Bracken is more than sufficient to support the ALJ's award of damages to her for emotional distress. See *Krueger*, 115 F.3d at 492 (upholding $20,000 award for emotional distress to tenant sexually harassed by landlord); *Balistrieri*, 981 F.2d at 932 (conclusory evidence of emotional distress sufficient to uphold award for "inherently degrading or humiliating" conduct such as racial discrimination).

Substantial evidence also supports the ALJ's awards to Bracken for lost housing opportunity and inconvenience. See Dec. at 15-16. Subleasing Lin's unit was the perfect summer housing arrangement for Bracken, as the time remaining on Lin's lease was the approximate time Bracken was staying in Chicago, and the unit was located close to Bracken's place of work in a safe neighborhood. Losing the opportunity to sublease Lin's unit caused Bracken significant inconvenience, including ten hours spent unsuccessfully looking for alternative housing, time spent living in cramped conditions with virtual strangers, and extra money and time spent traveling to and from work. The discriminatory episode also changed Bracken's plans to return to Chicago, where she has family connections. Finally, as a consequence of Ho's and Fung's discrimination, Bracken was inconvenienced by the need to spend time pursuing a Fair Housing Act claim against them. The

testimony and evidence on this matter justified the ALJ's awards for loss of housing opportunity and inconvenience. See *Krueger*, 115 F.3d at 492-493 (concluding that ALJ was entitled to make reasonable estimate, based upon evidence before him, of complainant's alternative housing costs, and rejecting challenge to award for petitioner's inconvenience, which included housing search and living in crowded conditions).

Finally, substantial evidence supports the ALJ's award to Bracken for her out-of-pocket expenses. See Dec. at 16-17. The ALJ catalogued the evidence of the costs Bracken incurred as a result of Ho's and Fung's discrimination, which included monthly bus passes at $75 each to commute to and from work, $30 in banking fees for the canceled money orders to Lin, $1,225 for the cost of eating out twice a day to avoid inconveniencing the acquaintance with whom she stayed for much of the summer, and $640 for missing work to attend the hearing in this case. In making this award, the ALJ did not rubberstamp Bracken's request for relief, refusing to order compensation for parking tickets as unconnected to the act of discrimination in question, and reducing the airline fare for her father to attend the hearing in Chicago and the cost of a one-night hotel stay in Chicago because those costs were excessive.

Lin's award for damages for emotional distress is also fully supported by the evidence. See Dec. at 18-19. As with the award for emotional distress to Bracken, the ALJ set forth in detail the evidence of Lin's emotional distress and the circumstances that caused that distress. Lin's background and painful

childhood memories of being a victim of racial hostility led her to become a civil rights advocate on behalf of racial minorities. The egregious racial discrimination of Ho and Fung caused Lin great anger, outrage, embarrassment, and shame, which manifested itself in crying spells, loss of appetite and sleep, and poor work performance. Lin suffered further embarrassment and guilt when she had to admit to Bracken that Ho and Fung had discriminated against Bracken on the basis of her race, and Lin continues to feel guilty about what happened to Bracken. That Bracken suffered discrimination at the hands of Lin's fellow Asian-Americans further deepened Lin's anguish; her parents discouraged her from filing the claim and she believed that her suit would make her unpopular in certain circles within the Asian-American community. This testimony on the intangible effect of Ho's and Fung's racially discriminatory conduct justifies the ALJ's award to Lin for emotional distress. See *Balistrieri*, 981 F.2d at 932.

Substantial evidence also supports the ALJ's awards to Lin for inconvenience. See Dec. at 20. At the time of Ho's and Fung's discriminatory conduct, Lin was in the process of closing on her condominium, and the time she spent dealing with the discrimination taxed her scarce time. Lin suffered further inconvenience when she gave Bracken a place to stay for the month of July because she felt guilt and responsibility for Bracken's predicament. Finally, like Bracken, Lin was inconvenienced by the time she spent pursuing a legal remedy for Ho's and Fung's discrimination. The testimony and evidence on this matter justified the ALJ's award for inconvenience. See *Krueger*, 115 F.3d at 492.

Finally, substantial evidence supports the ALJ's award to Lin for her out-of-pocket expenses. See Dec. at 20. As with the award to Bracken, the ALJ catalogued the costs Lin incurred as a result of Ho's and Fung's discriminatory actions. Bracken's inability to sublease Lin's unit, and Fung's retaliatory termination of Lin's lease, cost Lin half her May rent and bank fees when Bracken's checks were returned as unpaid. Lin also had to pay her attorney additional fees for time her attorney spent assisting her with closing when Lin was dealing with the discrimination at issue.

C. The ALJ Acted Within Her Discretion In Assessing The Maximum Civil Penalty Against Ho And Fung And Equitable Relief

The Fair Housing Act authorizes an ALJ to assess a civil penalty against a violator of the Act "to vindicate the public interest." 42 U.S.C. 3612(g)(3). The Act sets the maximum penalty at $11,000 for a party, such as Ho or Fung, who "has not been adjudged to have committed any prior discriminatory housing practice." 42 U.S.C. 3612(g)(3)(A); see 24 C.F.R. 180.671(a)(1) (2005). According to the legislative history of the Act, ALJs should consider the following factors in determining the appropriate amount of the penalty: the nature and circumstances of the violation; the degree of culpability; any history of prior violations; the financial circumstances of the violator; and the need for deterrence, and other matters as justice may require. H.R. Rep. No. 711, 100th Cong., 2d Sess. 37 (1988).

The record contains substantial evidence supporting the ALJ's conclusion

that the maximum civil penalty was warranted as to both Ho and Fung. With regard to the nature and circumstances of the violations, a reasonable reading of the record clearly supports the ALJ's determination that the violations were "egregious" and "intentional." See Dec. at 21. Ho's actions and statements indicated that she rejected Bracken's application solely on the basis of her race, and went so far as to bar Bracken from entering the unit. Fung's statements and actions evinced support for Ho's discriminatory conduct. Independent of Ho, Fung terminated Lin's lease in retaliation for Lin's attempt to uphold the law, and demonstrated his aversion to having a black woman sublet Lin's unit by repeatedly advertising the unit for an amount less than Bracken was willing to pay.

The second factor, degree of culpability, also supports the ALJ's decision. See Dec. at 21. Fung was a licensed real estate agent who can be presumed to know the requirements of the Fair Housing Act. Moreover, Lin made clear to Ho and Fung that refusing to rent the unit to Bracken would violate various fair housing laws. Although they knew that the actions they were about to take were illegal, Ho and Fung consciously chose to disregard the law and engage in unlawful discrimination. They therefore bear a high degree of culpability for their conduct.

Finally, the need for deterrence and other factors also support a maximum civil penalty. See Dec. at 22-23. Ho's and Fung's willingness to put their desire to discriminate ahead of their economic interests indicates that a severe sanction is necessary to discourage future discriminatory conduct. A severe sanction is also

warranted for Ho's and Fung's intransigent conduct throughout the proceedings. Fung refused to participate in the legal proceedings since the filing of the complaint, evincing contempt for the Fair Housing Act. Ho demonstrated a belated interest in the legal proceedings, but her repeated and egregious discriminatory conduct evidence her disregard for the Act. In sum, the ALJ acted well within her discretion in concluding that application of the relevant factors warranted the maximum civil penalty, even though Ho and Fung had no history of prior violations and the record contained no evidence of their financial circumstances. See *Secretary, U.S. Dep't of Hous. & Urban Dev.* v. *Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (egregious nature of respondent's actions, high degree of culpability, and need for deterrence supported maximum civil penalty even in absence of evidence of respondent's financial condition).

The Fair Housing Act also authorizes an ALJ to order "injunctive or other equitable relief" for a violation. 42 U.S.C. 3612(g)(3). "[A]ffirmative injunctive relief for past discriminatory practices is appropriate where the trial court believes that 'the vestiges of prior discrimination linger and remain to be eliminated.'" *United States* v. *Di Mucci*, 879 F.2d 1488, 1498 (7th Cir. 1989) (quoting *United States* v. *Hunter*, 459 F.2d 205, 220 n.21 (4th Cir.), cert. denied, 409 U.S. 934 (1972)). Proof that the defendant has engaged in discriminatory conduct carries over into the remedial phase of proceedings and establishes the presumption that affirmative injunctive relief is warranted, which can be rebutted by the defendant's showing that relief is unnecessary because there is little or no danger of current

violations. See *ibid.* Given the failure of Ho and Fung to respond at all to the Charge or Motion of Default, and the egregiousness of the violations, the ALJ acted well within her discretion in ordering injunctive and other equitable relief to rectify past harm and deter future violations.

III

THE ALJ'S DEFAULT JUDGMENT OF LIABILITY AND ASSESSMENT OF DAMAGES AGAINST HO COMPORTED WITH DUE PROCESS

A. Standard Of Review

This Court reviews a claim that an ALJ's actions violated a party's due process rights de novo. *Keith* v. *Barnhart*, 473 F.3d 782, 787 (7th Cir. 2007). An ALJ's procedural decision, such as denial of a continuance and entry of a default judgment, is reviewed for abuse of discretion. See 5 U.S.C. 706 (Administrative Procedure Act); *NLRB* v. *Pan Scape Corp.*, 607 F.2d 198, 202 (7th Cir. 1979) (continuance); *Merrill Lynch Mortg. Corp.* v. *Narayan*, 908 F.2d 246, 250 (7th Cir. 1990) (entry of default judgment).

B. The ALJ Gave Ho All The Process She Was Due By Providing Notice And A Meaningful Opportunity To Be Heard Before Entering The Default Judgment Of Liability And Assessing Damages

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. "Due process requires that before the government can take enforcement action against persons charged with unlawful conduct, it must inform such persons of the basis of the complaint and give them a

meaningful opportunity to meet the complaint." *NLRB* v. *Complas Indus., Inc.*, 714 F.2d 729, 733 (7th Cir. 1983) (citing *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 350 (1938)). What due process mandates in any given case is not fixed, as it "is a flexible concept where the requirements 'vary with the type of proceeding involved.'" *Cooper* v. *Salazar*, 196 F.3d 809, 814 (7th Cir. 1999) (quoting *Hannah* v. *Larche*, 363 U.S. 420, 440 (1960)). To determine whether administrative procedures are constitutionally sufficient, the Supreme Court has directed courts to consider "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The above propositions make clear that due process in the administrative context merely requires adequate notice and a meaningful opportunity to be heard, not an actual hearing on the merits. *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). Because a defendant charged with unlawful conduct is not entitled to a hearing to answer a complaint, his failure to make a timely appearance after receiving adequate notice of the hearing warrants a finding of waiver and an entry of a default judgment against him. See *id.* at 378-379; *Fern* v. *Thorp Pub. Sch.*, 532 F.2d 1120, 1134 (7th Cir. 1976) (holding that defendant's "failure to accept

the offer of a hearing constituted a waiver of the claim that he might have presented at such hearing"); 24 C.F.R. 180.615 ("A default decision may be entered against a party failing to appear at a [HUD administrative] hearing unless such party shows good cause for such failure."). In that instance, the judgment stems from the defendant's "own wilful failure to avail [him]self of [his] opportunity to be heard" and does not violate due process. *Wienco, Inc.* v. *Katahn Assocs., Inc.*, 965 F.2d 565, 568 (7th Cir. 1992).

Applying these principles to this case, it is clear that Ho received adequate notice and a meaningful opportunity to respond before the ALJ entered a default judgment of liability against her and assessed damages. The Secretary sent Ho the Charge of Discrimination, which advised her of the nature of the charge against her and its factual basis, to Ho's last known address by first-class mail, postage prepaid, and FedEx. Ho did not answer the Charge even though, by her own admission, she received it. Ho also received the Motion for Default, which she did not answer, and the modified default judgment, which included notice that a hearing on damages would be held on November 15, 2007. Ho attended the hearing at its commencement, but voluntarily left before any testimony was taken after being warned by the ALJ (Dec. at 2) that it would be in her best interest to stay. Under these circumstances, Ho received all the process she was due. See *Davis* v. *Hutchins*, 321 F.3d 641, 645-646 (7th Cir. 2003) (rejecting defendant's argument that default judgment violated due process, where defendant received motion for default, knew motion would be argued at hearing, and simply failed to

attend hearing).

C. Ho's Arguments That The ALJ Denied Her Due Process Are Unavailing

Ho argues that the ALJ denied her due process at several points in the proceedings: (1) when the ALJ entered a default judgment of liability; (2) when the ALJ denied her request for a continuance and failed to inform her of her right to counsel and the consequences of not testifying prior to the start of the damages hearing; and (3) when the ALJ assessed the maximum civil penalty against Ho in her absence. None of these arguments has any merit.

1. The ALJ's Entry Of A Default Judgment Of Liability Against Ho Comported With Due Process

Ho first argues (Ho Br. 18-20) that the ALJ denied her due process by entering a default judgment on liability in the absence of "adequate, fair or actual notice" being given to Ho that the Charging Party was seeking the entry of a default judgment. Ho's argument is foreclosed by Supreme Court precedent and its progeny from this Court. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Supreme Court eschewed the requirement of actual notice, holding instead that due process merely required notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." To satisfy this requirement, the government need only "act[] reasonably in selecting means likely to inform the persons affected." *Krecioch* v. *United States*, 221 F.3d 976, 980 (7th Cir.) (quoting *Weigner* v. *City of New York*, 852 F.2d 646,

649 (2d Cir. 1988), cert. denied, 488 U.S. 605 (1989)), cert. denied, 531 U.S. 626 (2000). HUD regulations provide that service of filed documents "may be made to the last known address by first-class mail or other more expeditious means, such as * * * [o]vernight delivery." 24 C.F.R. 180.400(a)(2)-(ii). Such "written notice * * * satisfies due process, even if the [individual] does not receive actual notice," so long as the government does not know or have reason to know that notice would be ineffective. *Lobzun* v. *United States*, 422 F.3d 503, 507 (7th Cir. 2005) (forfeiture case).

In this case, the Secretary satisfied due process by sending the Charge of Discrimination and Motion for Default by first-class mail, postage prepaid, and FedEx to Ho at her last known address. Because the Secretary did not know or have reason to know that notice would be ineffective — indeed, FedEx confirmed delivery and the first-class mail was not returned to the Charging Party as undeliverable — these means of communication would satisfy due process even if Ho did not receive actual notice. But Ho did receive actual notice. She acknowledges (Ho Br. 19) that she received written communications from the Secretary, but contends that she did not open them because she was fearful of the government and could not understand the documents without the assistance of an attorney. Ho presents no precedential authority — and we could find none — to support her assertion that an individual may defeat actual notice by wilfully disregarding communications from the government. Cf. *Eschweiler* v. *United States*, 877 F.2d 634, 637 (7th Cir. 1989) (remanding for further factual findings to

determine, *inter alia*, whether the taxpayer "actually received or intentionally avoided receiving the notice of deficiency").

2. The ALJ's Conduct Prior To The Start Of The Damages Hearing, Including Her Denial Of Ho's Request Of A Continuance, Comported With Due Process

Ho contends (Ho Br. 20-23, 25-27) that the ALJ denied her due process by denying her request for a continuance prior to the beginning of the November 15, 2007, hearing on damages to allow her to acquire counsel and an interpreter. "In deciding whether to grant a continuance, the ALJ may consider: (1) the length of the delay requested; (2) the potential adverse effects of the delay; (3) the possible prejudice to the moving party if denied a delay; and (4) the importance of the testimony that may be adduced if the delay is granted." *Fitzhugh* v. *Drug Enforcement Admin.*, 813 F.2d 1248, 1252 (D.C. Cir. 1987); see *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 226 (1938). "It is well established that the grant or denial of a continuance is within the discretion of the ALJ and will not be overturned absent a clear showing of abuse," which requires a demonstration that the denial of a continuance "clearly prejudice[d] the appealing party." *Pan Scape*, 607 F.2d at 201. Furthermore, to constitute a violation of due process, the denial of the continuance must be arbitrary given the circumstances presented to the ALJ. See *United States* v. *Jones*, 369 F.2d 217, 220 (7th Cir. 1966), cert. denied, 386 U.S. 944 (1967).

Application of the relevant factors demonstrates that the ALJ's denial of Ho's request for a continuance was not a clear abuse of discretion, much less so

arbitrary as to violate due process. With regard to the length of the delay requested, Ho argues (Ho Br. 22) that the note she tendered from an attorney "suggested that he could be available on short notice after November 15, 2007." Given the note's vague wording that the attorney "intend[ed]" to represent Ho "[a]fter today," however, the ALJ reasonably determined that it would be "speculat[ion]" to surmise when he would be prepared for a hearing in the case. Dec. at 3. The second factor, the adverse effects of the delay, also favors the ALJ's decision. Lin and Bracken had already experienced considerable inconvenience in preparing the case, see Argument Part II.B, *supra*, and a continuance for an unspecified period of time would further inconvenience their lives and delay vindication of their claims.

As to the third factor, possible prejudice to the moving party if denied a delay, it is clear that the denial of the continuance did not prejudice Ho. Contrary to her contention (Ho Br. 22) that the ALJ's denial of a continuance prevented her from being represented by retained counsel, from presenting testimony that contravened that of Bracken and Lin, and from cross-examining Bracken and Lin, what precluded Ho's participation in the proceedings was her affirmative decision not to participate. See *Pan Scape*, 607 F.2d at 201. Ho's decision not to participate was preceded by her failure to request a delay before the hearing to obtain counsel or an interpreter, despite her knowledge for several months that the hearing would be held. Finally, with regard to the testimony that would be adduced if a delay was granted, Ho's contention (Ho Br. 22) that her testimony

"would be very important" is belied by her opening brief, which fails to identify any testimony she would have offered to contravene Bracken's and Lin's testimony on damages. Under these circumstances, neither the ALJ's decision to proceed in Ho's absence, nor her refusal to grant a continuance, was an abuse of discretion.[5]

Ho's claim of a "right" to counsel and an interpreter does not enhance her argument. With regard to her desire for counsel, Ho readily concedes (Ho Br. 21) that she did not have the constitutional right to counsel at the hearing, but argues that 42 U.S.C. 3612(c) confers upon her a statutory right to an attorney. Ho is mistaken. Section 812(c) of the Fair Housing Act provides, in relevant part, that "[a]t a hearing under this section, each party may * * * be represented by counsel." 42 U.S.C. 3612(c). This provision's usage of the permissive "may" merely gives parties the option to be represented by counsel, and does not impose an affirmative obligation on the government to ensure that parties have counsel of their choosing. Compare 42 U.S.C. 406(a)(1) (statutory right to counsel where attorney in good standing admitted to bar "shall be entitled to represent claimants before the Commissioner of Social Security"); 8 U.S.C. 1362 (statutory right to counsel where alien in removal proceeding "shall have the privilege of being represented" by counsel of choosing), with 42 U.S.C. 2000e-5(f)(1) (no statutory right to

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[5] Ho's accusation (Ho Br. 23) that the ALJ's real reason for denying Ho's request for a continuance was her desire to avoid delaying her retirement is unsubstantiated speculation to which this Court should give no credence.

counsel where "the court may appoint an attorney for [a Title VII] complainant and may authorize the commencement of the action without the payment of fees, costs, or security"). The ALJ therefore did not deprive Ho of a statutory right to counsel by denying her request for a continuance.

Ho's contention (Ho Br. 25-27) that the ALJ denied her due process by failing to order HUD to provide her a Chinese/Cantonese interpreter, or by failing to continue the hearing to allow her to obtain the services of an interpreter, is also misplaced. Based upon Lin's testimony, the ALJ determined (Dec. at 3 & n.2) that "there is reason to believe that [Ho] understands English far better than she admitted" and "Ho read, spoke and wrote English without difficulty." In support of the latter conclusion, the ALJ cited (Dec. at 3 n.2) Lin's extensive conversations in English with Ho during the time Lin lived at the subject property, Ho's ability to read the lease agreement in English with Lin, and Ho's placement of an advertisement in English of Lin's unit in a local publication. These factual findings, and the ALJ's underlying determination that Lin was a credible witness in testifying to these facts, are supported by substantial evidence and warrant deference from this Court. The ALJ also engaged in an extensive colloquy with Ho prior to the hearing, which revealed the adequacy of her English skills. See Tr. 6-9, 12-14, 17-18. Under these circumstances, the ALJ acted well within her discretion in determining that Ho did not need interpretation services, and the absence of such services did not deprive Ho of a meaningful opportunity to be heard. See *Drobny* v. *INS*, 947 F.2d 241, 244-245 (7th Cir. 1991) (no abuse of

discretion for immigration judge to determine that alien did not need translator services, where judge adequately explored alien's English skills).

Aside from the ALJ's denial of a continuance, Ho argues (Ho Br. 23-25) that the ALJ denied her due process prior to the start of the hearing by failing to inform her that she had a statutory right to be represented by an attorney, and by failing to apprise her of the probable consequences of not testifying. Neither of these contentions has any merit. Because Ho did not have a statutory right to counsel at the hearing before the ALJ, she cannot predicate her due process claim on the failure of the Charging Party or the ALJ to notify her of that "right." Ho's claimed "right" to be informed that a damages award could be entered against her based solely on Bracken and Lin's testimony is similarly devoid of any precedential foundation. In any event, the ALJ specifically advised Ho that it would be in her best interest to stay at the hearing and strongly encouraged her to do so, only allowing Ho to make the decision to leave the courtroom after Ho's repeated insistence that she wanted to leave. Ho fails to explain how a more detailed entreaty from the ALJ would have changed her decision.

3. The ALJ's Assessment Of The Maximum Civil Penalty Against Ho Comported With Due Process

Finally, Ho argues (Br. 27-28) that the ALJ denied her due process by imposing the maximum civil penalty on her pursuant to 42 U.S.C. 3612(g)(3)(A) in the absence of evidence of her financial condition. Ho's argument is foreclosed by well-settled agency precedent, which places the burden on a respondent in a

Fair Housing Act case, not the Charging Party, to introduce evidence regarding her financial circumstances into the record because such evidence is peculiarly within her knowledge. See, *e.g.*, *HUD* v. *Lewis*, No. 04-94-0227-8, 1996 WL 418887, at *4 (HUDALJ Apr. 19, 1996); *HUD* v. *Colber*, No. 05-93-0510-1, 1995 WL 72442, at *6 (HUDALJ Feb. 9, 1995). If the respondent fails to produce credible evidence militating against assessment of a civil penalty, the ALJ may impose the civil penalty without consideration of her financial circumstances. See *Campbell* v. *United States*, 365 U.S. 85, 96 (1961); *HUD* v. *Blackwell*, No. 04-89-0520-1, Fair Housing - Fair Lending (P-H) P 25,001, at *14 (HUDALJ Dec. 21, 1989), aff'd, 908 F.2d 864 (11th Cir. 1990). Ho voluntarily left the damages hearing before any testimony was taken, and thus did not present any testimony or evidence concerning her financial circumstances to indicate that payment of the maximum civil penalty would cause her financial hardship. Because the absence of any evidence of Ho's financial condition in the record was the result of Ho's conduct, the ALJ's imposition of the maximum civil penalty against Ho was not incorrect, much less a violation of due process.

Ho's reliance on *Morgan* v. *Secretary of Housing & Urban Development*, 985 F.2d 1451, 1460-1461 (10th Cir. 1993), her lone citation in support of her contention that the civil penalty should be vacated for want of evidence of her financial condition, is misplaced. In *Morgan*, the Tenth Circuit made no mention of the respondent's financial condition. Instead, the court determined that substantial evidence did not support the ALJ's finding that the respondent's

conduct was serious and egregious, and therefore the ALJ abused his discretion in awarding the maximum civil penalty. *Id.* at 1460-1461. Thus, *Morgan* merely states and applies well-settled precedent on the factors an ALJ should consider in assessing a civil penalty, which as applied to this case demonstrate that the ALJ acted well within her discretion in assessing the maximum civil penalty against Ho. See Argument Part II.C, *supra*.

IV

THE ALJ DEFAULT JUDGMENT OF LIABILITY AND ASSESSMENT OF DAMAGES COMPLIED WITH EXISTING HUD AND CIRCUIT PRECEDENT

A. Standard Of Review

This Court has the authority to set aside, on legal grounds, a HUD enforcement action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Pozzie* v. *United States Dep't of Hous. & Urban Dev.*, 48 F.3d 1026, 1029 (7th Cir. 1995) (quoting 5 U.S.C. 706(2)(A)). A decision is arbitrary and capricious only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Mahler* v. *United States Forest Serv.*, 128 F.3d 578, 582 (7th Cir. 1997) (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "The 'arbitrary or capricious' standard of review is a deferential one which presumes that agency

actions are valid as long as the decision is supported by a 'rational basis.'" *Pozzie*, 48 F.3d at 1029. This deference includes "[a]n agency's interpretation of its own regulation[, which] must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Green* v. *Shalala*, 51 F.3d 96, 100 (7th Cir. 1995) (quoting *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)). "In addition, '[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *Dehainaut* v. *Pena*, 32 F.3d 1066, 1074 (7th Cir. 1994) (quoting *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971)), cert. denied, 514 U.S. 1050 (1995).

B. The Applicable HUD Regulation Authorized The ALJ To Enter A Default Judgment On Liability And Limit The Hearing To Damages

24 C.F.R. 180.420(b) provides that "[f]ailure to file an answer [to a charge of discrimination] within the 30-day period following service of the charge or notice of proposed adverse action shall be deemed an admission of all matters of fact recited therein and may result in the entry of a default decision." This regulation's plain language mandates the admission of all factual allegations in a charge of discrimination and gives the ALJ discretion to enter a default judgment in response to a party's failure to answer the charge. ALJ O'Bryant's order, which entered a default judgment of liability and reserved a future hearing to establish damages, see Fung Supp. App. C, thus accorded with 24 C.F.R. 180.420(b)'s plain language. It also followed well-settled HUD precedent. See, *e.g.*, *HUD* v.

Godlewski, No. 07-034-FH, 2007 WL 2110325, at *2 (HUDALJ July 6, 2007) (granting Government's motion for default judgment, finding respondent to have violated Fair Housing Act, and reserving future hearing for establishing damages and civil penalty); *HUD* v. *Senior Nevada Benefits Group, L.P.*, No. 09-01-0380-8, 2003 WL 22436126, at *8 (HUDALJ Oct. 17, 2003) (noting that default decision was entered and limiting issue to be determined to appropriate amount of damages); *HUD* v. *Tucker*, No. 04-98-0332-8, 2002 WL 31018606, at *6 (HUDALJ Aug. 14, 2002) (same); *HUD* v. *Cabusora*, No. 09-90-1138-1, Fair Housing - Fair Lending (P-H) P 25,026, at *4-5 (HUDALJ Mar. 23, 1992) (same), aff'd, 9 F.3d 1550 (9th Cir. 1993). Because the ALJ's interpretation of 24 C.F.R. 180.420(b) was not incorrect, much less "plainly erroneous or inconsistent with the regulation," *Green*, 51 F.3d at 100, this Court must give that interpretation controlling weight.

Against this overwhelming weight of precedential authority demonstrating that the ALJ acted properly, Fung cites (Fung Br. 16-18) *HUD* v. *Wooten*, No. 05-99-0045-8, 2004 WL 3201000, at *4 (HUDALJ Dec. 3, 2004) to support his argument that the ALJ arbitrarily contravened HUD precedent by entering a default judgment on liability. Fung's reliance upon *Wooten* is misplaced. In that case, the ALJ concluded that a default judgment on liability required (1) non-responsiveness on the part of the Respondent, and (2) a demonstration of a *prima facie* case of liability by a preponderance of the evidence, and held a hearing to determine the latter. 2004 WL 3201000, at *4. The ALJ in *Wooten* merely

exercised the discretion the applicable regulation afforded him to enter a default decision in deciding *not* to enter a default decision before holding a hearing. Thus viewed, the ALJ's decision in *Wooten* is fully consistent with the decision of the ALJ in this case, who properly exercised her discretion to enter a default judgment after determining without a hearing that the admitted factual allegations in the Charge sufficed to establish liability for the violations charged.

To the extent that Fung interprets the ALJ's decision in *Wooten* to mandate a hearing to determine liability in every instance where a party fails to answer a charge of discrimination, his interpretation finds no support in the precedents the *Wooten* ALJ cited to support the conclusion that this Court "has long held that for a default judgment to impose liability, at least a *prima facie* case of the charge's validity must be demonstrated." 2004 WL 3201000, at *4. Those cases merely reiterate the well-established legal propositions that "upon default, the well-pleaded allegations of a complaint relating to liability are taken as true," and "a default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint." *Di Mucci*, 879 F.2d at 1497; accord *Narayan*, 908 F.2d at 253; *Dundee Cement Co.* v. *Howard Pipe & Concrete Prods.*, 722 F.2d 1319, 1323 (7th Cir. 1983). In other words, the cases provide guidance as to the consequences of a default judgment, but provide no guidance as to the process of entering a default judgment. The ALJ in this case thus acted consistently with this Court's precedents when she entered a default judgment as to liability against Ho and Fung upon their failure to file an answer to

the Charge.

ALJ O'Bryant's order is also not inconsistent with the order it modified — ALJ Liberty's default order — contrary to Fung's contention (Fung Br. 18) otherwise. In his order, ALJ Liberty granted the Charging Party's motions for default against Ho and Fung. Fung Supp. App. D at 3. The order then explained:

> Although a Default Judgment will be entered against Respondents, the Charging Party must ensure that the record both a) establishes the violation alleged in order for the Charging Party to prevail, and b) supports the requested damages. This may be accomplished by a combination of documents already in the record and the upcoming hearing, at which Charging Party may present both substantive and damages evidence or testimony. Respondents will have no opportunity to submit evidence or testimony, or to rebut Charging Party's claims, as to liability, although Respondents may submit evidence and testimony on the matter of damages.

Ibid. Like the ALJ's order in *Wooten*, ALJ Liberty's order effectively required the Charging Party to demonstrate a *prima facie* case of liability at a hearing. ALJ Liberty gave the Charging Party the options of using documents already in the record and using hearing testimony to support the charged violations and the requested damages at the hearing. In modifying ALJ Liberty's order, ALJ O'Bryant merely relieved the Charging Party of the obligation of ensuring that the record established the violations alleged, after determining that the documents in the record had already accomplished that task. Thus, ALJ Liberty exercised his discretion under the regulation not to enter a default judgment on liability until after the damages hearing, while ALJ O'Bryant exercised her discretion to enter a default judgment on liability before the damages hearing. Neither action violated

HUD's regulation.

Fung's claim of prejudice resulting from ALJ's entry of a default judgment of liability is also meritless. Fung contends (Fung Br. 19) that the ALJ's determination that Ho and Fung "will have no opportunity to submit evidence or testimony or to rebut Charging Party's claims as to liability" at the hearing was an "unexplained procedural departure" that deprived him of the right to claim exemption from liability. Contrary to Fung's contention, a default judgment establishes liability as a matter of law, and an ALJ is not required to hear affirmative defenses to liability. See, *e.g.*, *e360 Insight*, 500 F.3d at 599, 602. Indeed, allowing a party against whom default judgment is entered to contest liability would defeat the purpose of default judgment, which "is to allow [ALJs] to manage their dockets efficiently and effectively." *Narayan*, 908 F.2d at 253. For these reasons, ALJ Liberty's original default order also precluded Ho and Fung from submitting evidence or testimony, or rebutting the Charging Party's claims, as to liability. ALJ O'Bryant's modification of ALJ Liberty's default order thus was not an "unexplained procedural departure." Fung Br. 19.

In sum, ALJ O'Bryant adhered to HUD's existing precedent in entering a default judgment of liability against Ho and Fung and holding a hearing limited to damages. Accordingly, this Court should deny Fung's request (Fung Br. 27-29) that it remand the Secretary's order to HUD for further consideration.

V

THIS COURT SHOULD GRANT THE SECRETARY'S CROSS-APPLICATION TO ENFORCE AGENCY ORDER

A. Standard Of Review

Upon the filing of an application for enforcement of an ALJ's order by the Secretary, 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 To Enforce Agency Order Should Be Granted

For the reasons explained above, substantial evidence supports the ALJ's findings of liability and damages, and the petition for review is without merit. This Court should therefore affirm the ALJ's order, which became a final agency order, and grant the Secretary's Cross-Application To Enforce Agency Order.

CONCLUSION

The Court should deny the petition for review, and grant the Secretary's cross-application to enforce HUD's final order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 28.1(e)(2)(B)(i). The brief was prepared using WordPerfect 12.0 and contains no more than 14,674 words of proportionally spaced text. The type face is Times New Roman, 14-point font. I also certify that the PDF version of this brief, which has been burned to CD-ROM and sent by overnight delivery to the Court, has been scanned with the most recent version of McAffee VirusScan Enterprise (version 8.0i) and is virus-free.

_____
CHRISTOPHER C. WANG
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Date: January 14, 2009

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2009, an original and 14 copies of the foregoing BRIEF FOR THE RESPONDENT/CROSS-PETITIONER and a CD-ROM containing a PDF version of the same were filed by FedEx overnight delivery with the Clerk of the United States Court of Appeals for the Seventh Circuit. I further certify that on January 14, 2009, two copies of the brief and a CD-ROM containing a PDF version of the same were served by FedEx overnight delivery to each of the following individuals:

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