IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01019-CMA-SKC

KATHERINE TRUJILLO,

Plaintiff,

v.

AMITY PLAZA, LLC,
HOUSING AUTHORITY OF THE CITY OF LITTLETON dba SOUTH METRO HOUSING OPTIONS, and
FRANK MARTINEZ,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES

I. Introduction

The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517[1] to assist the Court in interpreting the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*, and its application to public housing authorities and "post-acquisition" sexual harassment and other discriminatory conduct. The Attorney General has enforcement authority under the FHA, *see* 42 U.S.C. § 3614, and the Department of Justice has brought sexual harassment claims under the FHA for decades, including against public housing authorities.[2] Therefore, the United States has a strong interest in ensuring the

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."
[2] *See, e.g.*, https://www.justice.gov/crt/sexual-harassment-housing-initiative-news (last

correct interpretation and application of this statute.

Plaintiff Katherine Trujillo alleges that she was sexually assaulted by Defendant Frank Martinez while Martinez was employed by Defendants Amity Plaza, LLC, and the Housing Authority of the City of Littleton (collectively the "Moving Defendants") and Plaintiff was a tenant of the Moving Defendants. Compl. ¶¶ 2-3, ECF No. 1. More specifically, she alleges that Martinez's duties included providing maintenance services and that "under the auspices of making repairs" he "used his ability to access Plaintiff's apartment" to pursue her sexually, culminating in a sexual assault. *Id.* ¶¶ 13, 15-20.

Plaintiff asserts claims under two provisions of the FHA: (1) Section 3604(b), which prohibits discrimination in the terms, conditions, or privileges of the rental of an apartment, or in the provision of services or facilities in connection therewith; and (2) Section 3617, which prohibits coercion, intimidation, threats, or interference with a person's enjoyment of housing rights. *Id.*, First and Second Claims for Relief. The Moving Defendants have moved to dismiss Plaintiff's claims against them. ECF No. 16.

This Statement addresses three questions of law raised in the Moving Defendants' Motion to Dismiss and subsequent Reply (ECF No. 26).[3] First, contrary to the Moving Defendants' assertion, it is well established that Section 3604(b) of the FHA reaches "post-acquisition" sexual harassment – that is, in this context, sexual harassment by a landlord of a tenant after the lease has been signed and during the ongoing rental relationship. Second, defenses in federal actions are controlled by federal, not state, law, and therefore the Colorado Governmental Immunity Act (CGIA),

visited Nov. 7, 2023).

[3] The Moving Defendants raised new arguments in their Reply, and the Court granted Plaintiff the opportunity to file a sur-reply. *See* ECF Nos. 27, 29.

even assuming it would be applicable to state claims, does not protect the Moving Defendants from liability on claims under the FHA. Third, the standard for vicarious liability under the FHA is governed by federal, not state, law, and may be used to hold the Moving Defendants liable under the facts alleged in the Complaint.[4]

II. Argument

A. 42 U.S.C. § 3604(b) Prohibits Post-Acquisition Housing Discrimination, Including Sexual Harassment

Section 3604(b) of the FHA makes it unlawful to "discriminate 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 therewith" because of sex. 42 U.S.C. § 3604(b). The Moving Defendants argue that this provision applies only to the availability and rental of a dwelling and not to any conduct occurring during a tenant's occupancy of a unit. Defs.' Mot. to Dismiss, ECF No. 16 (hereinafter "Mot."), at 11-12. This argument is contrary to the plain language of the statutory text, which clearly prohibits discrimination that occurs after the initial moment of rental, *i.e.*, post-acquisition conduct, the decisions of courts of appeals that have considered the issue, and applicable regulations.

1. The Text of Section 3604(b) Reaches Post-Acquisition Conduct

Section 3604(b) "does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental." *Ga. State Conf. of the NAACP v. LaGrange*, 940 F.3d 627, 632 (11th Cir. 2019). Nor, as Moving Defendants suggest, does Section 3604(b) contain language limiting its application to "availability and access to housing." Mot. at 13. Indeed, the prohibition of

[4] To the extent the Moving Defendants wish to respond to the arguments raised in this Statement of Interest, and request leave from the Court to do so, Plaintiff's counsel has represented to the United States that he will not oppose that request.

discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling" and in the "provision of services or facilities in connection" with such a sale or rental is more naturally read to encompass post-acquisition protection, as these words reflect an ongoing housing relationship with continuing or future obligations.

"When a term goes undefined in a statute," courts give "the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Here, the dictionary definition of "conditions" includes "[a]ttendant circumstances . . . as [in], living conditions," suggesting that Section 3604(b)'s reference to "conditions" of a rental encompasses ongoing housing conditions. *See Webster's New International Dictionary of the English Language* 556 (2d ed. 1958). Similarly, the ordinary meaning of the word "privileges" includes a "right or immunity granted as a particular benefit, advantage or favor." *Id.* at 1969. One unquestionable "privilege" of the sale or rental of a dwelling is the right to inhabit that dwelling. *See, e.g., Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) ("[T]he right to inhabit the premises is a privilege of sale.") (internal quotation marks and citation omitted).

Section 3604(b)'s use of the word "rental" also suggests an ongoing relationship between landlord and tenant, as the signing of a rental agreement is often the beginning, not the end, of a relationship with a housing provider. *See, e.g.*, *Richards v. Bono*, No. 5:04cv484, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) ("Because the plain meaning of 'rental' contemplates an ongoing relationship . . . § 3604(b) . . . prohibits discrimination at any time during the landlord/tenant relationship[.]"). Finally, the statute's reference to the "provision of services or facilities in connection" with a rental also indicates its application to post-acquisition conduct, as few "services" are

provided before or at the moment of rental, and "facilities" must necessarily refer to something other than the "dwelling" that is the subject of the rental. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) (holding that § 3604(b) "encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling").

Of course, not every housing-related service necessarily falls within the scope of Section 3604(b). For example, the Moving Defendants cite to several cases where courts found the alleged discriminatory provision of services not sufficiently connected to housing. *See Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (determining that city's failure to prevent dumping at an illegal site was not connected to the sale or rental of a dwelling under § 3604(b)); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999) (finding that § 3604(b) does not apply to city's decision to locate a highway near particular dwellings because a highway is not a "service"). However, in *Cox*, the court left open the possibility that post-acquisition conduct could be actionable under Section 3604(b), if it was established that the discrimination was connected to the sale or rental of a dwelling. *See* 430 F.3d at 746-47. And in *Jersey Heights*, the court specifically acknowledged that garbage collection and other municipal services, which by their nature are provided during a term of rental, *are* housing-related services covered by Section 3604(b). *See* 174 F.3d at 193. Contrary to the Moving Defendants' suggestion, these cases do not hold that Section 3604(b) can *never* be applied to post-acquisition conduct but rather reflect courts' unwillingness to extend the "provision of services" language to particular circumstances very different from those alleged in this case.

2. Caselaw Supports Post-Acquisition Application of Section 3604(b)

Section 3604(b)'s application to post-acquisition discrimination is further supported by the weight of the caselaw. In fact, the Tenth Circuit has already found that Section 3604(b) bars post-acquisition sexual harassment. *See Honce v. Vigil*, 1 F.3d 1085, 1088-90 (10th Cir. 1993). In *Honce*, the court analyzed a plaintiff's claim that she was sexually harassed by her landlord after they had arranged for her to rent a lot in his mobile home park and she had moved her mobile home onto the property. *Id.* at 1087. While the court ultimately found that the evidence did not rise to the level of actionable harassment, it held that "[t]he Fair Housing Act prohibits gender-based discrimination in the rental of a dwelling, or in the provision of services in connection with a rental," citing Section 3604(b). *Id.* at 1088. The court went on to describe the two types of sexual harassment prohibited under the FHA – quid pro quo and hostile housing environment – in terms that make clear that the covered conduct may occur post-acquisition.

First, the court explained that "[q]uid pro quo harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors." *Id.* at 1089. As one example, the court cited to *Grieger v. Sheets*, No. 87-C-6567, 1989 WL 38707 (N.D. Ill. Apr. 10, 1989), where summary judgment was denied on a tenant's claim of sexual harassment based on her landlord's refusal to make repairs after she rejected his demands for sex. The *Grieger* court held that the landlord's "promised repairs may constitute 'terms' of tenancy, which the plaintiffs lost because of sexual harassment." 1989 WL 38707, at *5. The *Honce* court's explanation of quid pro quo harassment recognizes that this harassment may occur after a tenant has begun renting a unit.

Second, the *Honce* court explained that a hostile housing environment occurs

when a defendant's "offensive behavior unreasonably interferes with use and enjoyment of the premises" and the harassment is "sufficiently severe or pervasive to alter the conditions of the housing arrangement." 1 F.3d at 1090. The references to "use and enjoyment of the premises" and "alter[ing] the conditions of a housing arrangement" suggest an ongoing relationship between a landlord and a tenant and an ongoing obligation for a landlord to avoid unlawful harassment during that relationship. The court also cited examples of a landlord's behavior during tenancy that could contribute to a hostile housing environment, such as "making sexual remarks to a tenant, requesting sexual favors, and using the pass key to observe the tenant showering." *Id.*

The reasoning of the Tenth Circuit in *Honce* is consistent with the findings of other courts of appeals that the plain language of Section 3604(b) prohibits discrimination with respect to terms, conditions, or privileges and in the provision of services or facilities after a property is acquired or leased. *See, e.g.*, *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1224 (11th Cir. 2016) (finding apartment complex violated FHA § 3604(f)(2), which extends § 3604(b) to persons with disabilities, by restricting plaintiff's access to certain facilities); *Bloch*, 587 F.3d at 779-80 (finding condominium association discriminated against plaintiff in its adoption and enforcement of rules in violation of § 3604(b))[5]; *City of Modesto*, 583 F.3d at 715 (reinstating claims under § 3604(b) related to the city's provision of certain services to residents).[6]

[5] The Moving Defendants rely heavily on *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327 (7th Cir. 2004), which predates *Bloch*. Mot. at 12-13. The court in *Bloch* distinguished *Halprin* as holding only that Section 3604(b) does not provide a "blanket 'privilege' to be free from all discrimination from any source," such as isolated acts of discrimination by other private property owners. 587 F.3d at 780.

[6] *See also Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364-65 (8th Cir. 2003) (holding plaintiff stated a claim under § 3604(f)(2) where ongoing disability harassment by building management "was sufficiently severe to deprive [plaintiff] of his right to enjoy

The FHA's application to post-acquisition discrimination is especially clear in sexual harassment cases, which frequently involve allegations of harassment during a plaintiff's tenancy. Numerous courts that have considered the application of Section 3604(b) to sexual harassment claims have found post-acquisition harassment covered by the statutory text. *See, e.g.*, *Fox v. Gaines*, 4 F. 4th 1293, 1294-96 (11th Cir. 2021) (finding harassment both before and during tenancy could constitute actionable discrimination under § 3604(b)); *Richards*, 2005 WL 1065141, at *4 ("[S]exual harassment is actionable under § 3604(b) in the context of a rental arrangement even where the harassing conduct occurred after the initial rental of the property."); *United States v. Koch*, 352 F. Supp. 2d 970, 972-73 (D. Neb. 2004) (holding "post-residence acquisition claims" of sexual harassment were cognizable under § 3604 (b)).[7]

3. HUD Regulations Support Post-Acquisition Application of Section 3604(b)

The FHA's implementing regulations, promulgated by the Department of Housing and Urban Development (HUD),[8] further support applying Section 3604(b) to the

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his home"); *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.* 929 F.2d 714, 720 (D.C. Cir. 1991) (explaining that sections 3604(b) and (f)(2) "address habitability" and "are directed at those who provide housing and then discriminate in the provision of attendant services or facilities").

[7] *See also United States v. Webb*, Case No. 4:16-cv-1400-SNLJ, 2017 WL 633846 (E.D. Mo. Feb. 16, 2017) (denying motion to dismiss claims under § 3604(b) based on allegations of sexual harassment, all of which occurred post-acquisition); *West v. DJ Mortg. LLC*, 271 F. Supp. 3d 1336, 1351-61 (N.D. Ga. 2017) (denying summary judgment on plaintiff's claims of sexual harassment under § 3604(b) which included conduct occurring post-acquisition); *Rich v. Lubin*, No. 02 Civ. 6786 (TPG), 2004 WL 1124662, at *4 (S.D.N.Y. May 20, 2004) (analyzing a claim for sexual harassment during the plaintiff's tenancy and holding "[s]exual harassment constitutes discrimination in the terms, conditions, or privileges of rental of a dwelling on the basis of sex").

[8] HUD's implementing regulations were issued pursuant to Congressional authority. *See* 42 U.S.C. § 3614a. HUD's interpretation of the FHA is entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Meyer v. Holley*, 537 U.S. 280, 287-88 (2003).

conduct alleged in this case. HUD regulations interpreting Section 3604(b) prohibit, among other things, "[f]ailing or delaying maintenance or repairs of sale or rental dwellings" because of a protected characteristic; "[l]imiting the use of privileges, services or facilities associated with a dwelling" because of a protected characteristic; and "[d]enying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors." 24 C.F.R. §§ 11.65(b)(2), (4), (5). These regulations prohibit discrimination in connection with the use or occupancy of a dwelling and are not limited to the dwelling's initial sale or rental.

A contrary interpretation would produce "odd" or "absurd" results that Congress could not have intended when enacting the FHA. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994). It would mean, for example, that a landlord could refuse to make a repair to a female tenant's unit because she would not have sex with him. Or that a landlord could terminate a tenant's water service because the tenant had a Muslim houseguest, so long as the tenant already resided in the home for some period of time. Congress enacted the FHA to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This purpose could not be achieved if housing providers could avoid liability by merely delaying discriminatory treatment until after a tenant has taken possession of a property.

In sum, the Court should give the text of Section 3604(b) its plain meaning and find, in accordance with the weight of the caselaw and HUD's regulations, that it applies to the type of post-acquisition sexual harassment alleged by the Plaintiff in this case.

B. The CGIA Does Not Provide the Moving Defendants an Immunity from Federal Fair Housing Act Claims

The CGIA, a state statute, does not apply to claims brought under the federal

Fair Housing Act. The CGIA bars actions against a public entity "for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant." C.R.S. § 24-10-108. The Moving Defendants argue that because Plaintiff seeks to hold them vicariously liable for Martinez's conduct, and vicarious liability lies in tort, Plaintiff's claims are barred by the CGIA. *See* Defs.' Reply in Supp. Of Mot. to Dismiss, ECF No. 26 (hereinafter "Reply") at 7. The Moving Defendants' reliance on the CGIA blurs the important distinction between federal and state claims, ignores the operation of the Supremacy Clause, and is contrary to HUD regulations, which reject state-law defenses to FHA claims.

Numerous courts in this district have found that the CGIA does not apply to claims brought pursuant to federal civil rights laws. *See, e.g.*, *Federspill v. Denver Pub. Schs.*, No. 17-cv-01480-WJM-STV, 2018 WL 6051335, at *6 (D. Colo. Sept. 12, 2018), *report and recommendation adopted*, 2018 WL 4846507 (D. Colo. Oct. 4, 2018); *Vaughn v. Rhea*, No. 04-MK-1002(CBS), 2005 WL 950629, at *1 (D. Colo. Apr. 12, 2005) (citing cases).[9] For example, in *Federspill*, a public-school counselor alleged racial harassment by a school principal and brought claims under Title VII and state law claims of civil conspiracy, assault, and defamation. 2018 WL 6051335, at *1. The court found that the state law claims were barred by the CGIA but the Title VII claims were not, agreeing with the plaintiff that the "CGIA does not apply to claims based on federal civil rights violations." *Id.* at *6 (internal quotation marks and citation omitted).

The CGIA is a state law, and under the Supremacy Clause, it cannot provide immunity for federal FHA claims beyond the defenses already provided under federal

[9] *See also Martinez v. El Paso Cnty.*, 673 F. Supp. 1030, 1031 (D. Colo. 1987); *Miami Int'l Realty Co. v. Town of Mt. Crested Butte*, 579 F. Supp. 68, 77 (D. Colo. 1984).

law. U.S. Const., Art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The Supremacy Clause makes clear state laws do not and cannot limit the scope of a federal statute. *Anderson v. Carkins*, 135 U.S. 483, 490 (1890) ("The law of [C]ongress is paramount; it cannot be nullified by direct act of any state, nor the scope and effect of its provisions set at naught indirectly."); *Williams v. Eaton*, 443 F.2d 422, 429 (10th Cir. 1971) ("And if the plaintiffs establish a[n] . . . entitlement to relief under the Federal civil rights acts, the Wyoming Constitution may not immunize the defendants and override the Federal constitutional principles in view of the Supremacy Clause."). If a state could immunize parties against federal law liability by simply passing a state statute, federal law could be frustrated at every turn.

Moreover, any conflict between the CGIA and the federal FHA claims would be governed by the principle of conflict preemption under which, "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). Conflict preemption includes "instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012) (internal quotation marks and citation omitted). Thus, the CGIA cannot stand as an obstacle to the enforcement of federal law and is preempted if it does so.

As the Moving Defendants recognize, in *Meyer v. Holley*, the Supreme Court held that the FHA incorporates traditional rules of vicarious liability. *See* Reply at 6. The Supreme Court in *Meyer* also explained that "[w]here Congress, in other civil rights statutes, has not expressed a contrary intent, the Court has drawn the inference that it

intended ordinary rules to apply." 537 U.S. at 287. Because there is no indication that Congress intended to immunize public entities from FHA liability, traditional rules of vicarious liability may be applied to hold such entities liable for the conduct of their agents, and the CGIA does not apply. Indeed, when implementing its FHA regulations, which incorporate traditional agency principles of vicarious liability, HUD specifically rejected a comment urging that the regulation incorporate "state law-derived defenses from liability." 24 C.F.R. § 100.7(b); 81 F.R. 63065. Accordingly, state law defenses do not shield the Moving Defendants from liability from the federal claims raised here.

Notably, the Moving Defendants do not cite to a single case where the CGIA has been used to bar *any* claim under federal law. They primarily rely on state cases to advance their argument that the CGIA bars the court from finding them liable here.[10] *See* Mot. at 3-4, 9; Reply at 8. And the two federal cases they do cite are inapposite, as they are applying the CGIA to *purely state* tort claims. *Schmitz v. Colorado State Patrol*, 841 F. App'x 45, 59 (10th Cir. 2018) (dismissing state tort claim against state patrol for failure to provide appropriate medical attention); *Aspen Orthopaedics v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 836 (10th Cir. 2003) (analyzing the CGIA's notice provisions as they apply to state law claims for negligence and tortious interference).

In sum, the CGIA does not shield the Moving Defendants from FHA liability.

C. The Moving Defendants May Be Held Vicariously Liable Under the FHA for the Conduct Alleged in the Complaint

In their Reply, the Moving Defendants argue for the first time that Plaintiff's FHA

[10] Although the Moving Defendants' opening brief appears to raise an Eleventh Amendment immunity argument under the guise of an argument under the CGIA, *see* Mot. at 10-11, the Moving Defendants appear to concede in their reply that they are not arguing that Eleventh Amendment immunity bars liability here, *see* Reply at 5.

claims should be dismissed because the Complaint does not sufficiently allege vicarious liability. Reply at 8-11. The Moving Defendants do not dispute that Martinez was their agent. Instead, they argue that they cannot be held liable for his alleged sexual harassment of Plaintiff because he was not acting within the scope of his employment and they did not expressly authorize his actions. *Id.* The Moving Defendants apply the wrong standard for vicarious liability.

HUD regulations set forth both direct and vicarious liability theories that may apply to FHA violations. *See* 24 C.F.R. § 100.7. Vicarious liability is based on principles of agency law. *Id.* § 100.7(b). "A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, consistent with agency law." *Id.*

As an initial matter, "[t]he question whether an agency relationship exists for purposes of the Fair Housing Act is determined under federal law, not state law." *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999).[11] Federal law governs not just the existence of an agency relationship but also the principal's liability under the FHA for its agent's actions. *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974); *see also Whyte v. Alston Mgmt., Inc.*, No. 10-81041-CIV, 2011 WL 12450319, at *5 (S.D. Fla. Nov. 1, 2011) ("This 'common law' [of vicarious liability] comes from federal court decisions, rather than any particular state's law."). Thus, the state cases cited by the Moving

[11] *See also Cabrera v. Jakabovitz*, 24 F.3d 372, 386 n.13 (2d Cir. 1994); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992); *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1354 n.13 (5th Cir. 1979); *Metro. Fair Hous. Council of Okla., Inc. v. Pelfrey*, 292 F. Supp. 3d 1250, 1252 (W.D. Okla. 2017); *Marya v. Slakey*, 190 F. Supp. 2d 95, 100 (D. Mass. 2001).

Defendants, Reply at 9-10, are irrelevant to the question of their liability under the FHA.

Under the FHA, owners of rental property are vicariously liable for the discriminatory conduct of their agents when the agents are acting within the scope of their authority, regardless of whether the owner participated in or authorized the discriminatory conduct. *Meyer*, 537 U.S. at 285. In addition, "[a] principal may be vicariously liable where the agent 'was aided in accomplishing the tort by the existence of the agency relationship.'" *Pelfrey*, 292 F. Supp. 3d at 1252 (quoting *West*, 271 F. Supp. 3d at 1355 and Restatement (Second) Agency § 219(2)). In the context of sexual harassment, the existing agency relationship may facilitate harassment where a property manager or maintenance worker "used his power . . . as a vehicle through which to perpetrate his unlawful conduct." *Boswell v. Gumbaytay*, No. 2:07-CV-135-WKW, 2009 WL 1515872, at *5 (M.D. Ala. June 1, 2009); *see also West*, 271 F. Supp. 3d at 1356 (evaluating whether employee "exercise[d] his authority and power [from the agency relationship] to try to leverage sexual favors" from a tenant).

Courts, including other district courts in the Tenth Circuit, have routinely found that property owners may be held vicariously liable under the FHA when an employee used the agency relationship to facilitate sexual harassment. *See United States v. Cao*, Case No. 17-1310-EFM, 2019 WL 5576954, at *2 (D. Kan. Oct. 29, 2019) (holding wife could be liable for husband's sexual harassment because "although [he] performed the management responsibilities, [her] status as an owner of the property exposes her to vicarious liability by virtue of the owner-manager agency relationship"); *Pelfrey*, 292 F. Supp. 3d at 1253-54 (finding that trustee of trust that owned properties would be liable if property manager sexually harassed tenants because "such sexual harassment would

have been aided and abetted by the agency relationship that necessarily existed to manage the properties"). For example, in *Boswell v. Gumbaytay*, the court found a property owner liable for a property manager's sexual harassment where "it was the agency relationship that facilitated [the manager's] conduct." 2009 WL 1515872, at *5. Among other things, the court found that the harasser's position "essentially gave him unfettered access to communicate with and personally visit" the plaintiff. *Id.* Similarly, in *Richards v. Bono*, the court found that a property owner could be liable for sexual harassment by an agent where several of the alleged acts were "facilitated" by the agent's role including the fact that "he used his key to enter the plaintiff's residence, sometimes under the guise of making repairs." 2005 WL 1065141, at *7.

Here, the facts alleged in the Complaint establish that Martinez's alleged sexual harassment of Plaintiff was aided by the existence of his agency relationship with the Moving Defendants. The Complaint alleges that: (1) Martinez's duties as an agent of the Moving Defendants included providing maintenance services; (2) Martinez had access to the residents of Amity Plaza, including Plaintiff, in his capacity as an agent of the Moving Defendants; (3) Martinez used his access to Plaintiff's residence to pursue her sexually, under the auspices of making repairs; and (4) Martinez sexually assaulted Plaintiff while inside her residence. Compl. ¶¶ 13-15, 17, 20. Assuming the truth of these allegations for this motion to dismiss, the Moving Defendants are liable for Martinez's sexual harassment of the Plaintiff.

III. Conclusion

For the reasons stated above, the United States respectfully requests that the Court deny the Moving Defendants' Motion to Dismiss Plaintiff's FHA claims.

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Respectfully submitted,

COLE FINEGAN
United States Attorney

s/ *Zeyen Wu*
ZEYEN WU
Assistant United States Attorney
1801 California Street, Suite 1600
Denver, CO 80202
Tel: (303) 454-0238
Fax: (303) 454-0400
Zeyen.Wu@usdoj.gov

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

s/ *Katherine Raimondo*
CARRIE PAGNUCCO
Chief
TIMOTHY MORAN
Deputy Chief
KATHERINE RAIMONDO
Trial Attorney
United States Department of Justice
Housing and Civil Enforcement Section
Civil Rights Division
950 Pennsylvania Ave. NW – 4CON
Washington, DC 20530
Tel: (202) 353-5897
Fax: (202) 514-1116
Katherine.Raimondo@usdoj.gov

Attorneys for the United States of America