**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:15-cv-01044-WYD-MJW

ALVARO J. ARNAL,

Plaintiff/Counterclaim Defendant,

v.

ASPEN VIEW CONDOMINIUM ASSOCIATION, INC., a Colorado nonprofit corporation,

Defendant/Counterclaimant, and

ASPEN SNOWMASS CARE, INC. D.B.A FIRST CHOICE PROPERTIES &MANAGEMENT, INC., a Colorado corporation,

Defendant.

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**UNITED STATES OF AMERICA'S STATEMENT OF INTEREST**

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## I. INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address questions of law raised in Defendants' Motion for Summary Judgment (ECF No. 70) under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*. The FHA requires housing providers to make reasonable accommodations to rules, policies, practices, or services, when such accommodations are necessary for a person to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). The FHA also prohibits retaliation on account of a person having exercised or enjoyed fair housing rights, or on account of having aided or encouraged another person in the exercise or enjoyment of fair housing rights. 42 U.S.C. § 3617.

The United States Department of Justice ("DOJ") and the United States Department of Housing and Urban Development ("HUD") share enforcement authority under the FHA. *See* 42 U.S.C. §§ 3610, 3612(a)–(b), (o), 3613(e), and 3614. For example, the Attorney General may initiate civil proceedings on behalf of the United States in cases alleging a "pattern or practice" of housing discrimination. 42 U.S.C. § 3614(a). Additionally, the Attorney General "shall commence and maintain a civil action" on behalf of an aggrieved person who has filed a complaint of housing discrimination with the Department of Housing and Urban Development ("HUD"), where HUD has made a determination of reasonable cause and the complainant or respondent has elected to proceed in federal court. *See* 42 U.S.C. § 3612(o). Private litigation under the Act is an important supplement to government enforcement. *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). The United States thus has a strong interest in ensuring the correct interpretation and application of the FHA. The United States provides this Statement of Interest to assist the Court in its evaluation of the facts at issue in this case.

## II. BACKGROUND

Plaintiff Alvaro Arnal filed suit on May 18, 2015, alleging, among other things, that Defendants, who are responsible for implementing and enforcing rules at the Aspen View Condominiums, violated the Fair Housing Act, 42 U.S.C. § 3617, by "engag[ing] in retaliation, coercion, intimidation, threats, and interference" because Plaintiff exercised his fair housing rights and aided another in exercising her fair housing rights. Am. Compl., ECF 84, ¶¶ 79-80. Specifically, Plaintiff sought to rent his condominium to Natasha MacArthur, who requested that she be allowed to live with her dog because of a disability. Defs.' Mot. at 2. Plaintiff assisted Ms. MacArthur in requesting an exception to the Defendant Condominium Association's no-dog

policy. Defs.' Mot. at 2-5. Ms. MacArthur told Defendants that she had a disability and that she had a disability-related need for her dog. Defs.' Mot. at 4. Although Defendants claim that they did not deny Ms. MacArthur's request for an accommodation, Defs.' Mot. at 17, they assessed fines and filed at least one lien against Plaintiff's property for fines and fees assessed against Plaintiff for allowing Ms. MacArthur's dog to reside in the condo "without providing reliable documentation of Ms. MacArthur's disability and disability-related need for an assistance dog." The Aspen View Condominium Association, Inc. Board of Managers Resolution Concerning Fines and Fees Assessed Against Unit 201, dated June 5, 2014 (Pl.'s Ex. PP, ECF 83-11, at 5); *see also* Pl.'s Opp'n., ECF 81, at 17 (¶ 76); Defs.' Reply, ECF 86, at 23 (¶ 76). As of April 27, 2016, the fines assessed totaled $8,267.37. Defs.' Reply at 24 (¶ 82); Pl.'s Ex. SS, ECF 83-14, at 1. Defendants filed a motion for summary judgment on May 2, 2016, seeking dismissal of all of Plaintiff's claims.

## III. ARGUMENT

The Fair Housing Act provides protections not only against direct violations of fair housing rights, but also against actions that would serve to suppress the exercise of fair housing rights. The FHA makes it 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 3603, 3604, 3605, or 3606 of [the FHA].

42 U.S.C. § 3617. This section prohibits retaliation against a person for exercising his fair housing rights, or for helping another exercise her fair housing rights.

Defendants argue that they are entitled to summary judgment on Plaintiff's claims under 42 U.S.C. § 3617 because (1) there was no violation of the requirement to provide a reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B), so there can be no claim under 42 U.S.C. § 3617, and (2) Defendants took no action that was "supposedly motivated by the FHA complaint"; instead, its actions were taken because of the plaintiff's and his tenant's "failure to provide the legally required documentation." Defs.' Mot. at 20. Defendants' arguments rest on an incorrect interpretation of the Fair Housing Act. First, a plaintiff may pursue a § 3617 claim regardless of whether a defendant has otherwise engaged in discrimination in violation of the FHA. Second, the activity protected by § 3617 is not limited to the act of filing a complaint, and the imposition of fines "for failure to provide the legally required documentation" may constitute an act of retaliation in violation of § 3617.[1]

**A. Plaintiff Need Not Prove a Violation of § 3604 to Prevail on a Claim under § 3617**

Claims under § 3617 are not dependent on the existence of another FHA violation. Nothing in the text of § 3617 suggests that it is so limited, and courts have held that plaintiffs are entitled to pursue standalone § 3617 claims. *See, e.g.*, *Hidden Vill. LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 528–29 (6th Cir. 2013) ("Section 3617 nowhere says that it comes into play only when a violation of one of these other sections has also occurred."); *Bloch v. Frischholz*, 587 F.3d 771, 781–82 (7th Cir. 2009) ("Coercion, intimidation, threats, or interference with or on account of a person's exercise of his or her §§ 3603–3606 rights can be distinct from outright

[1] Defendant has also argued that plaintiffs' reasonable accommodation claims under 3604(f) should be dismissed. There appears to be a genuine issue of material fact on the § 3604(f) claims, and the United States does not take a position on the merits of those claims. As this Court has already noted, reasonable accommodation claims are highly fact-specific. Order, ECF 54, at 13–14.

violations of §§ 3603–3606."); *United States v. Koch*, 352 F. Supp. 2d 970, 978 (D. Neb. 2004) (holding that § 3617 claims may stand alone and noting that a contrary interpretation would render § 3617 redundant). As the Ninth Circuit stated in *Smith v. Stechel*:

> Section 3617 does not necessarily deal with a discriminatory housing practice, or with the landlord, financer or brokerage service guilty of such practice. It deals with a situation where no discriminatory housing practice may have occurred at all because the would-be tenant has been discouraged from asserting his rights, or because the rights have actually been respected by persons who suffer consequent retaliation. It also deals with situations in which the fundamental inequity of a discriminatory housing practice is compounded by coercion, intimidation, threat or interference.

510 F.2d 1162, 1164 (9th Cir. 1975). Further, an action may violate both § 3604 and § 3617. *See, e.g.*, *Bloch*, 587 F.3d at 781 (noting that the Seventh Circuit has found that, in some cases, "a violation of one necessarily means a violation of the other").

Plaintiff need only show that he had a reasonable belief that he was acting to protect fair housing rights to be entitled to protection from retaliation under § 3617. As a matter of law, even if he were mistaken in his belief that he was protecting fair housing rights, he is still protected from retaliation. *See Broome v. Biondi*, 17 F.Supp.2d 211, 219 (S.D.N.Y. 1997) (holding that a person claiming violation of § 3617 "did not have to establish that the conduct she opposed was in fact a violation of the Federal Fair Housing Act . . . , but only that she had a good faith, reasonable belief that the underlying actions of the [defendants] violated the law." (citation and internal quotation omitted)); *Newell v. Heritage Senior Living, LLC*, No. 12-6094, 2016 WL 427371, at *7 (E.D. Pa. Feb. 3, 2016) (same); *Ponce v. 480 East 21st St., LLC*, No. 12 Civ. 4828, 2013 WL 4543622, at *3 n.4 (E.D.N.Y. Aug. 28, 2013) (same). This understanding is consistent with Title VII and Americans with Disabilities Act case law in this circuit. *See, e.g.*, *Crumpacker*

*v. Kan. Dep't of Human Res.*, 338 F.3d 1163, 1171–72 (10th Cir. 2003) (permitting plaintiffs to maintain retaliation claims based on a "reasonable good-faith belief" that the underlying conduct violated Title VII); *Selenke v. Medical Imaging of Colo.*, 248 F.3d 1249, 1264–65 (10th Cir. 2001) (holding that "a reasonable, good faith belief that the statute has been violated suffices" to support an ADA retaliation claim). Courts generally look to Title VII and ADA precedent in evaluating FHA retaliation claims. *See, e.g.*, *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (relying on ADA and Rehabilitation Act precedent in evaluating FHA retaliation claim); *Walker v. City of Lakewood*, 272 F.3d 1114, 1126 (9th Cir. 2001) (stating that there was "no reason" not to apply principles set forth in Title VII and First Amendment retaliation cases to FHA retaliation claims).

The logic of applying § 3617's protections whether or not there is a violation of another provision of the FHA is particularly strong in the context of a reasonable accommodation request. In many cases, it may not be obvious that the person seeking an accommodation has a disability that entitles her to an accommodation until the process of requesting documentation of her disability and her disability-related need for the accommodation is complete. Furthermore, there can be no doubt that protecting conduct that helps establish whether an accommodation is needed furthers the purposes of the Fair Housing Act. In this case, Plaintiff would have risked violating the FHA himself if he had failed to take seriously his tenant's representation that she had a disability and needed an accommodation. Plaintiff's retaliation claim is thus not dependent on the existence of an underlying claim of discrimination in violation of the FHA.

**B. 42 U.S.C. § 3617 Broadly Protects Activities that Aid or Encourage the Exercise of Fair Housing Rights**

A plaintiff may establish a *prima facie* case of retaliation under § 3617 by establishing that (1) the plaintiff engaged in a protected activity, (2) the plaintiff suffered an adverse action, and (3) there was a causal link between the two. *See, e.g.*, *Walker*, 272 F.3d at 1128. Defendants argue that they are entitled to summary judgment because "Plaintiff's FHA claims were filed long after MacArthur moved out and fines were imposed," and thus the Defendants took no action "supposedly motivated by the FHA complaint." Defs.' Mot. at 20. However, this argument is based on an erroneous reading of § 3617, which in fact provides protection for a broad range of conduct from actions that would discourage or thwart the exercise of Fair Housing rights.

As to the first prong of the *prima facie* case, Section 3617 prohibits retaliation in response to a broad range of activities, not only the filing of complaints. Section 3617 uses inclusive language, making it unlawful to "coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of [his FHA rights] or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" the FHA. 42 U.S.C. § 3617. Courts have routinely found that Section 3617 thus prohibits retaliation against individuals who have engaged in a broad range of activity related to promoting the fair housing rights of others, such as encouraging another person to file a FHA complaint, refusing to discriminate against prospective renters, and asking for a reasonable accommodation. *See, e.g.*, *Hidden Vill.*, 734 F.3d at 528-29 (hypothetical where eavesdropper threatens to assault a person who tells a prospective homebuyer to sue under the FHA if they ever face

discrimination would violate § 3617); *Gonzalez v. Lee Cnty. Hous. Auth.*, 161 F.3d 1290, 1305 (11th Cir. 2008) (firing an employee for refusing to rent public housing in a racially discriminatory manner violated § 3617); *Viens v. Am. Empire Surplus Lines Ins. Co.*, 113 F.Supp.3d 555, 563-64 (D. Conn. 2015) (allegations that insurance company charged higher premiums and cancelled coverage for landlords who accepted Section 8 vouchers stated § 3617 claim); *see also Linkletter v. W. & So. Fin. Grp., Inc.*, No. 15-CV-162, 2016 WL 659136, at *4 & n.5 (S.D. Ohio Feb. 18, 2016) (collecting cases).

In *Chavez v. Aber*, 122 F.Supp.3d 581 (W.D. Tex. 2015), for example, the court held that parents' efforts to obtain a reasonable accommodation for their child were protected from retaliation by § 3617. *Id.* at 599-600. So too here. Plaintiff's allowance of Ms. MacArthur's dog in his unit and his assistance in helping her seek an exception to the Condominium Association's no-dog policy as a reasonable accommodation are protected activities under § 3617.

As to the second prong of the *prima facie* case, the imposition of fines or other financial penalties is an adverse action. Adverse action can take a variety of forms, so long as it is sufficiently harmful that it would deter a reasonable person in the plaintiff's circumstances from engaging in the protected activity. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (Title VII case). This includes the issuance of fines. *See, e.g. Lee v. McCreary*, No. 09-cv-2271, 2010 WL 925173, at *6 (N.D. Ga. Mar. 8, 2010) (allegations of "levying frivolous fines" supported FHA retaliation claim); *Cox v. Nat'l Football League*, 29 F.Supp.2d 463, 471 (N.D. Ill. 1998) (Title VII retaliation claim); *cf. Kromenhoek v. Cowpet Bay West Condo. Ass'n*, 77 F.Supp.3d 462, 475 (D.V.I. 2014) (no adverse action for FHA retaliation claim because fines for violation of condo association's "no dogs" policy were waived).

Finally, with regard to the third prong of the *prima facie* case, the factfinder must evaluate whether there is a causal link between the protected activity and the adverse action. "[A] causal connection is established where the plaintiff presents evidence of circumstances that justify an inference of retaliatory motive…." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1091 (10th Cir. 2007) (citations and quotations omitted) (Title VII case). The undisputed facts in this case establish that the fines stemmed from the fact that Plaintiff permitted his tenant to keep a dog in his unit. The Resolution Concerning Fines and Fees Assessed Against Unit 201 ("Resolution"), as well as the Aspen View Residency Rules, set forth a $50 daily fine for non-compliance with the Residency Rules, one of which is the no-dogs policy. Specifically, the Aspen View Residency Rules state that "[t]enants are not permitted to have pets," Defs.' Ex. D, ECF 70-4, at 3, ¶ 6, and that "NON-COMPLIANCE DICTATES A DAILY FINE TO OWNERS OF FIFTY ($50) DOLLARS." *Id*. at 2. The Resolution states that "dogs are not permitted on the premises of Aspen View Condominium Association," Pl.'s Ex. PP, at 3, ¶ 4, and references the Aspen View Residency Rules, which "provide that non-compliance dictates a daily fine to owners of fifty ($50.00) dollars." *Id*. ¶ 5. Defendants attempt to defeat the causation prong by arguing that they imposed fines because of Plaintiff's "failure to provide the legally required documentation" of a disability Defs.' Mot. at 20, and not because Plaintiff allowed his tenant to have a dog as an accommodation. Defendants' argument is unsupported by the relevant documents. There is no basis in the Residency Rules for imposing a $50 daily fine on the owner of a unit for his tenant's failure to provide documentation of a disability. Moreover, the Resolution specifically ties the fines to the fact that "[t]he dog was…kept in Unit 201." Pl.'s Ex.

PP, at 5, ¶ 2. Thus, the record evidence indicates that the fines were imposed because Plaintiff permitted his tenant to keep a dog in the unit.[2]

Moreover, a housing provider may not issue fines solely for a failure to provide sufficient documentation of a disability. Housing providers are required to engage in an interactive process with a tenant with a disability to determine whether a reasonable accommodation should be provided. *See Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996), *as amended* (Aug. 26, 1996) ("If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue."); *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1287 (11th Cir. 2014) (same). The requirement to engage in this interactive process, however, does not mean that a housing provider is permitted to seek information beyond what is necessary to "apprise them of the disability and the desire and possible need for an accommodation." *Bhogaita*, 765 F.3d at 1287 (affirming summary judgment on the basis that condominium association's additional requests for information it already had or that was not relevant to their determination constituted constructive denial of the requested accommodation). If Defendants here failed to engage in the necessary interactive process, cut that process short, or delayed the process by asking for information they neither needed nor were entitled to, such conduct may constitute denial of the accommodation and provide further evidence that the imposition of fines was retaliatory in violation of § 3617.

[2] Defendants contend that they did not deny the tenant's request to keep the dog as a reasonable accommodation, Defs.' Mot. at 17. They also contend that they were justified in imposing fines on Plaintiff – after the tenant moved out – for allowing the tenant to keep the dog without providing what they considered to be reliable documentation. These positions are inconsistent.

In sum, because it appears that Plaintiff engaged in a protected activity (permitting his tenant to keep a dog as a reasonable accommodation and assisting her in requesting an accommodation of the Defendants' no-dogs policy), and because Defendants' imposition of fines was an adverse action that was explicitly tied to the protected activity, Plaintiff has set forth a *prima facie* case under 42 U.S.C. § 3617.

**CONCLUSION**

The relevant case law establishes that 42 U.S.C. § 3617 is an independent cause of action that does not depend on an underlying violation of the FHA, and § 3617 provides broad protection against retaliation in response to a range activities that seek to advance Fair Housing Act rights. The United States respectfully encourages the Court to evaluate the facts of this case in light of the legal principles discussed herein.

Dated: July 15, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of July, 2016, a copy of the foregoing Statement of Interest was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

s/ Alan A. Martinson
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