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10
11 **IN THE UNITED STATES DISTRICT COURT FOR THE**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 NATIONAL FAIR HOUSING ALLIANCE, et al.,)
14 Plaintiffs,)
15 v.)
16 A.G. SPANOS CONSTRUCTION, INC., et al.)
17 Defendants.)
18 _____)

C.A. No. C07-3255-SBA

Hearing Date: Sept. 23, 2008
Time: 1:00 p.m.
Dept: Courtroom 3

19
20 **AMICUS BRIEF OF THE UNITED STATES OF AMERICA**

1 **I. Interest of the United States**

2 In 1988, Congress amended Section 804 of the Fair Housing Act (“FHA”) to, *inter alia*,
3 make it unlawful to discriminate against any person in housing on the basis of handicap and
4 defined “discrimination” to include the failure to design and construct certain multi-family
5 dwellings so that they would be accessible and usable by persons with disabilities. *See* 42
6 U.S.C. §§ 3604(f)(3)(C). The United States has important enforcement responsibilities under the
7 FHA. For instance, the Attorney General may initiate civil proceedings on behalf of the United
8 States in “pattern or practice” cases, 42 U.S.C. § 3614(a), or on behalf of an aggrieved person,
9 following a determination by the Department of Housing and Urban Development (“HUD”) of
10 reasonable cause and an election by either the complainant or respondent to a complaint of
11 housing discrimination filed with HUD to proceed in federal court. *See* 42 U.S.C. § 3612(o).¹
12 Furthermore, under the FHA private litigation is an important supplement to government
13 enforcement. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); 42 U.S.C.
14 § 3616a (authorizing the Secretary of HUD to contract with private, non-profit fair housing
15 organizations to conduct testing, investigation, and litigation under the FHA).

16 **II. Background and Procedural Posture**

17 Plaintiffs have alleged that Defendant A.G. Spanos Construction, Inc., and related
18 companies (“Spanos Defendants”), have designed and constructed approximately 82 properties
19 since 1991 pursuant to a “continuous pattern and practice of discrimination against people with
20 disabilities in violation of the FHA.” First Am. Compl. ¶ 3. Specifically, Plaintiffs allege that
21 the Spanos Defendants have committed “serial and frequent” violations of the design and

22
23 ¹ HUD has also been charged with providing technical assistance to implement the
24 requirements of Section 804(f)(3)(C), *see* 42 U.S.C. § 3604(f)(5)(C), and issuing rules to
25 implement the Act. 42 U.S.C. § 3614a. To that end, HUD has issued regulations, 24 C.F.R.
26 §100.205, implementing the accessibility provisions of the Act, and more detailed Fair Housing
27 Accessibility Guidelines. *See* 56 Fed. Reg. 9472 (Mar. 6, 1991).

1 construction requirements of the FHA, 42 U.S.C. § 3604(f)(3)(C), since those went into effect in
2 1991, rendering “tens of thousands of units inaccessible to people with disabilities.” *Id.* ¶¶ 5, 7.
3 For example, Plaintiffs allege the existence of “internal thresholds at balconies, patios, and front
4 doors or in transition from room to room” that make dwellings inaccessible in at least 19 Spanos
5 properties built between 1995 and 2007 in four different states. *Id.* ¶ 51. They similarly allege
6 that 15 properties built between 1996 and 2006 across five states have “environmental controls,
7 fire alarms, electrical switches and/or electrical outlets placed beyond the reach of a wheelchair
8 user” making them inaccessible. *Id.* ¶ 52.

9 Plaintiffs further contend that these inaccessible feature have been replicated in other
10 Spanos properties. *Id.* ¶ 51-52. In addition, they allege that the Spanos Defendants used “the
11 same or similar floor plans in the design and construction of thousands of ‘covered units’ at the
12 Subject Properties.” *Id.* ¶ 50. Comparing all the observed barriers to accessibility at the subject
13 properties, Plaintiffs assert that the “frequency and similarity of these violations demonstrates
14 that the A.G. Spanos Defendants have engaged in a pervasive pattern and practice of designing
15 apartment communities in violation of the FHA accessibility design requirements.” *Id.* ¶ 45

16 The Spanos Defendants filed a motion to dismiss arguing, among other things, that
17 42 U.S.C. § 3613(a) barred claims concerning any allegedly inaccessible property completed
18 more than two years before Plaintiffs’ complaint was filed. In doing so, they conceded that
19 claims concerning at least eight of the properties identified by Plaintiffs were timely. *See Doc.*
20 48, p. 10. This Court denied the Spanos Defendants’ motion to dismiss, relying largely on
21 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), and concluding that Plaintiffs had
22 successfully alleged that Defendants had engaged in a continuing violation of the FHA that
23 extended into the statute of limitations period. *Spanos*, 542 F. Supp. 2d at 1062. The Spanos
24 Defendants now seek reconsideration of this Court’s prior decision in light of the Ninth Circuit’s
25 *en banc* decision in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008), *petition for cert. filed*,

1 2008 WL 3165825 (U.S. Jul. 31, 2008) (No. 08-140).²

2 **III. Argument**

3 **This Court’s Order Denying the Spanos Defendants’ Motion To Dismiss Remains**
4 **Correct After *Garcia v. Brockway*.**

5 This Court’s original order was correct and supported by the Supreme Court’s holding in
6 *Havens*. It was also consistent with an unbroken line of district court cases that have similarly
7 held that a plaintiff adequately pleads a continuing violation of the FHA by alleging that a
8 defendant has engaged in a pattern or practice of discrimination by repeatedly designing and
9 constructing similar multifamily dwellings that do not comply with 42 U.S.C. § 3604(f)(3)(C).
10 As discussed below, the facts in *Garcia* did not concern the type of ongoing pattern or practice
11 of discrimination alleged in this case, and therefore *Garcia* does not control.

12 In *Garcia*, the Ninth Circuit considered two consolidated claims, each alleging design
13 and construction violations at one apartment complex.³ Plaintiffs in *Garcia* argued that their
14 claims were timely even though the apartment complexes had been completed more than two
15 years before their complaints were filed because the buildings remained inaccessible into the
16 statute of limitations period. The *Garcia* plaintiffs alleged that the mere existence of an
17 inaccessible apartment complex into the statute of limitations period constituted a continuing
18 violation. *Id.* at 461. They did not allege, as Plaintiffs have here, that defendants designed and
19 constructed multiple multifamily dwellings with similar or identical inaccessible features, and
20 that these activities continued into the limitations period. With the design and construction of
21 only one allegedly inaccessible property at issue, the Ninth Circuit concluded that “[a]lthough

22 ² The petition for *certiorari* was filed in *Thompson v. Turk*, the case consolidated with
23 *Garcia v. Brockway* in the Ninth Circuit.

24 ³ The legal issues in both cases were identical, but the two apartment complexes were
25 not otherwise related. They were designed and constructed in different cities, at different times,
26 by different parties. *See* 526 F.3d at 459-60.

1 the ill effects of a failure to properly design and construct may continue to be felt decades after
2 construction is complete, failing to design and construct is a single instance of unlawful
3 conduct.” *Id.* at 463. In other words, the “single instance of unlawful conduct” in *Garcia* was
4 the design and construction of a single, inaccessible apartment complex.

5 In this case, Plaintiffs allege that the Spanos Defendants have engaged in a practice of
6 designing and constructing similar inaccessible apartment complexes, and that the practice
7 continued into the limitations period. This Court correctly recognized in its original order that
8 these allegations fall squarely with the continuing violation theory of liability that is well-
9 accepted under the FHA.

10 The United States Supreme Court has concluded that under the FHA continuing
11 violations “should be treated differently from one discrete act of discrimination” because
12 “[w]here the challenged violation is a continuing one, the staleness concern disappears.”⁴

14 ⁴ The conclusion in *Havens* that staleness ceases to be a concern when a violation is
15 continuing is particularly apt for claims based on violations of 42 U.S.C. § 3604(f)(3)(C). The
16 features of an inaccessible building do not fade with time. For example, a ground-floor
17 apartment that is inaccessible because of steps leading to its entrance remains inaccessible until
18 those steps are removed. Inaccessible features can be observed and measured, and proof of
19 liability does not rely upon the memory of witnesses or the availability of documents. Indeed,
20 courts have recognized that in “design and construct” cases “intent is not relevant to the Court’s
21 determination of whether a pattern or practice of discrimination exists.” *United States v. Quality*
22 *Built Const., Inc.*, 309 F. Supp. 2d 756, 760 (E.D.N.C. 2003) (noting that pattern or practice of
23 discrimination alleged consisted of “numerous features planned and constructed in over one
24 hundred units at two separate developments”); *see also United States v. Shanrie Co., Inc.*, No.
25 05-CV-306-DRH, 2007 WL 980418 at *9 (S.D. Ill. Mar. 30, 2007) (holding with respect to an
26 alleged pattern or practice of design and construction violations that “[t]he FHA holds parties
27 liable regardless of their intent”); H.R. Rep. 100-711, at 25 (“housing discrimination against
28 handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have
the effect of causing discrimination can be just as devastating as intentional discrimination. A
person using a wheelchair is just as effectively excluded from the opportunity to live in a
particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted
sign saying ‘No Handicapped People Allowed’.”).

1 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). Congress reaffirmed *Havens* when
2 it amended Section 813 of the Fair Housing Act in 1988 to allow suits no later than two years
3 “after the occurrence *or the termination* of an alleged discriminatory housing practice.”⁵
4 42 U.S.C. § 3613(a)(1)(A) (emphasis added); *see also* H.R. Rep. 100-711, at 33 (1988), *as*
5 *reprinted in* 1988 U.S.C.C.A.N. 2173, 2194 (“The latter term is intended to reaffirm the concept
6 of continuing violations, under which the statute of limitations is measured from the date of the
7 last asserted occurrence of the unlawful practice.”)

8 In *Havens*, plaintiffs alleged five different and specific discriminatory acts, four of which
9 occurred outside the limitations period. *See* 455 U.S. at 380. The acts – providing different
10 information about the availability of housing to persons on account of their race – were “based
11 not solely on isolated incidents involving the two respondents, but a continuing violation
12 manifested in a number of incidents. . . .” *Id.* at 381. The construction of any one inaccessible
13 multifamily dwelling, like failing to provide information about the availability of housing to a
14 person because of his race, is independently actionable and subject to its own statute of
15 limitations. Under the FHA, it is also actionable if it occurs outside the limitations period as part
16 of “a continuing policy and practice of unlawful” conduct that continues into the limitations
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20 ⁵ The addition of “termination” to 42 U.S.C. § 3613(a)(1)(A) distinguishes the FHA
21 statute of limitations from Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e-5(e)(1). (“A
22 charge under this section shall be filed within one hundred and eighty days after the alleged
23 unlawful employment practice occurred. . . .”) Thus, the Supreme Court’s holding under Title
24 VII that “discrete discriminatory acts are not actionable if time barred, even when they are
25 related to acts alleged in timely filed charges,” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S.
101, 113 (2002), does not foreclose a continuing violation here. *See Wallace v. Chicago Hous.*
Auth., 321 F. Supp. 2d 968, 972-73 (N.D. Ill. 2004) (finding that *Morgan*, read in the context of
Havens and § 3613, “recognizes that prior acts may be timely under the continuing-violations
theory where the asserted claim necessarily arises from a pattern of unlawful conduct.”)

1 period.⁶ *Id.*

2 Where a continuing policy or practice is alleged, the statute of limitations begins to run
3 upon the last act of that policy or practice. The Spanos Defendants do not contest that at least
4 eight buildings identified by Plaintiffs as having been designed and constructed under the alleged
5 discriminatory policy or practice were completed in the limitations period.⁷ Accordingly, the
6 FHA’s two-year statute of limitations, 42 U.S.C. § 3613(a), does not bar relief for claims
7 concerning other buildings allegedly designed and constructed under the same pattern or
8 practice.⁸

9 _____
10 ⁶ In their motion for reconsideration, Defendants argue that *Garcia* supports a distinction
11 between violations of 42 U.S.C. § 3604(f)(1) and (2), which they claim are similar to the type of
12 FHA violation in *Havens* and therefore may be “saved” by the continuing violations doctrine,
13 and § 3604(f)(3)(c), which are not. *See* Doc. 126 at 3. *Garcia* makes no such distinction, and is
14 not susceptible of such a reading. *Garcia* recognizes that Congress codified the continuing
15 violation theory in *Havens* where the continuing violation is “‘manifested in a *number of*
16 *incidents* – including at least one . . . that [wa]s asserted to have occurred within the [limitations]
17 period.’” *Garcia*, 526 F.3d at 462 *quoting Havens*, 455 U.S. at 381 (emphasis in *Garcia*).
18 Plaintiffs here have alleged at least eight “incidents” of discrimination – the design and
19 construction of an inaccessible multifamily dwelling pursuant to a pattern or practice of
20 designing and constructing similar, inaccessible dwellings – within the limitations periods.

21 ⁷ In the context of a Title VII employment discrimination claim, the United States
22 Supreme Court recently clarified that the statute of limitations “is triggered when a discrete
23 unlawful practice takes place.” *Ledbetter v. Goodyear Tire and Rubber Co.*, 127 S. Ct. 2162,
24 2164 (2007) (“A new violation does not occur, and a new charging period does not commence,
25 upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting
26 from the past discrimination.”) *Ledbetter* is consistent with the application of the continuing
27 violation theory under these facts. Given the pattern or practice of discrimination alleged, the
28 construction of eight inaccessible properties pursuant to that practice within two years of the
complaint being filed represents eight discrete discriminatory acts within the limitations period.

⁸ The Attorney General, when acting pursuant to his authority to bring suit when a
defendant has “engaged in a pattern or practice of resistance” to rights guaranteed by the FHA,
or if a “group of persons has been denied any [FHA] rights. . . and such denial raises an issue of
general public importance,” 42 U.S.C. § 3614(a), operates under different statutes of limitations.
Actions seeking damages are subject to a three-year statute of limitations and claims for civil

1 At least four district courts, in addition to this one, have relied on *Havens* to conclude
2 that the FHA’s two-year statute of limitations does not limit the type of claim alleged here.

3 In *Equal Rights Center v. Lions Gables Residential Trust et al.*, C.A. No. 07-cv-2358
4 (Aug. 13, 2008) (D. Md.), the court denied defendants’ motion to dismiss claims against 41
5 properties allegedly designed and constructed outside the two-year statute of limitations period.⁹
6 Plaintiff in *Lions Gables* alleged that defendants had designed and constructed at least 45
7 residential complexes pursuant to a “pervasive pattern and practice of designing, constructing,
8 controlling, managing, and/or owning apartment properties in violation of FHA . . . accessibility
9 design requirements.” Compl. ¶ 10, 20.¹⁰ Plaintiff further alleged that a “pattern and practice”
10 of discrimination had occurred because all of the properties shared “common elements of
11 design,” most notably in kitchens and bathrooms, and many had “virtually identical floorplans.”
12 *Id.* at ¶ 36-37. In rejecting defendants’ “cramped view of the viability of the continuing
13 violations doctrine,” the court concluded that “the mere fact that a property was completed more
14 than two years prior to the filing of the FHA claim does not automatically bar suit.” *Lions*
15 *Gables* at 13. Notably, *Lions Gables* was decided after the Ninth Circuit’s *en banc* decision in
16 *Garcia*.

17 The same theory was adopted in *Equal Rights Center v. Archstone Smith Trust*, Civ. C.A.
18 No. 04-cv-3975 (Nov. 17, 2005).¹¹ In *Archstone*, plaintiffs alleged a “pervasive practice of
19 _____
20 penalties must be commenced within five years of the date when the claim first accrued. *Garcia*,
21 526 F.3d at 460. Actions by the Attorney General seeking injunctive relief are not subject to a
time limit. *Id.*

22 ⁹ A copy of this order is attached as Exhibit A.

23 ¹⁰ A copy of the Complaint in *Lions Gables* is attached as Exhibit B.

24 ¹¹ A transcript of the hearing at which defendants’ motion to dismiss was denied is
25 attached as Exhibit C.

1 systemic and continuous violation of the FHA” that included 111 apartment buildings located in
2 17 states and the District of Columbia. *See Archstone* Compl. ¶ 53 and Addendum A.¹²
3 Plaintiffs alleged that the various properties shared “common design elements,” *id.* ¶ 52, akin to
4 Plaintiffs’ allegations in this case. The court denied a motion to dismiss claims against
5 properties completed outside the statute of limitations period concluding that plaintiffs had
6 alleged a sufficient “nexus” between properties completed within and outside the statute of
7 limitations—a nexus in location, time, and entities involved with the design and construction—to
8 survive a motion to dismiss. *Id.* at 35. The court went on to allow further discovery on
9 defendants’ policies and practices. *See id.*

10 In *Silver State Fair Hous. Council, Inc. v. ERGS*, 362 F. Supp. 2d 1218, 1221-22 (D.
11 Nev. 2005), the Court concluded that the two-year statute of limitations did not prevent plaintiff
12 from obtaining relief for the inaccessible design and construction of an apartment complex
13 completed more than two years before the complaint was filed where a second complex was
14 completed within the limitations period. The court found the two developments followed
15 “seamlessly in time” and “featured the same alleged FHA violations which continued up until
16 the very moment plaintiff filed suit.” *Id.* at 1222.

17 Finally, in *Memphis Cent. for Indep. Living v. Makowsky Constr. Co.*, No. 01-2069
18 (W.D. Tenn. filed Jul. 24, 2003) (unpublished),¹³ plaintiff alleged violations of § 3604(f)(3)(C) at
19 three different complexes built by the same developer, and filed its complaint within two years
20 of the completion of the last phase of the newest complex. Plaintiff also alleged that the design
21 of the three complexes was “essentially the same” with each having the same unit floor plans.

23 ¹² A copy of the complaint in *Archstone* is attached to this *amicus* brief as Exhibit D.

24 ¹³ A copy of the court’s unpublished decision was attached by Plaintiffs as Exhibit 3 to
25 Doc. 74.

1 *Id.* at 2. All three complexes were designed by the same architectural firm and principal
2 architect, owned and developed by the same entities, and constructed by the same construction
3 company. Denying defendants’ motion for summary judgment, the court concluded that
4 plaintiffs “sufficiently established that Defendants engaged in a pattern or practice of alleged
5 discrimination” based on the similarity of the designs of the three complexes, and the same
6 entities having been involved in the design and construction of each. *Id.* at 6.

7 Each of these cases correctly recognizes that the repeated design and construction of
8 similarly inaccessible multifamily dwellings can, in and of itself, constitute a discriminatory
9 pattern or practice. Where such a pattern or practice is established, the completion of any one
10 inaccessible property within the limitations periods makes timely claims for relief for others
11 completed outside the limitations period. As this Court recognized in its previous decision, the
12 fact that an aggrieved person could bring a FHA claim concerning any one of those inaccessible
13 properties has no bearing on whether an aggrieved person can successfully allege a pattern or
14 practice of discrimination, like Plaintiff has here.

15 Defendants argue that *Havens* can be distinguished because the “practice” of
16 racial steering “by definition continues over time,” whereas the alleged “practice”
17 here – the construction of each of the allegedly noncompliant 82 complexes – is
18 really just a series of discrete, individual FHA violations, and therefore the statute
19 of limitations begins to run at the completion of the construction of each complex.
20 [] This argument is unpersuasive: a single incident of “steering” constitutes an
21 actionable violation of the FHA, just as the construction of each complex
22 constitutes an actionable violation of the FHA. That more than one incident of
23 steering occurred only demonstrates a pattern of such violations, not that each
24 incident, standing on its own, is not a violation of the FHA. Defendants have
25 offered no intelligible argument as to why the reasoning of *Havens* is not
26 applicable to an alleged pattern or practice of construction-based violations of the
27 FHA.

28 *Spanos*, 542 F. Supp. 2d at 1061-62. Indeed, as discussed above, every court that has considered
this type of pattern or practice claim has concluded that a continuing violation theory applies to
the statute of limitations.

Plaintiffs allege that the *Spanos* Defendants have engaged in a long-term and ongoing

1 pattern and practice discriminating against persons with disabilities by designing and
2 constructing similar, inaccessible multifamily dwellings. Taking all allegations in Plaintiffs'
3 favor, as this Court must on a motion to dismiss, they have adequately alleged a discriminatory
4 practice that extends into the limitations period. This claim is factually different from the one
5 addressed by the Ninth Circuit in *Garcia v. Brockway* and that case does not control.
6 Accordingly, this Court should deny the Spanos Defendants' motion for reconsideration.

7 **IV. Conclusion**

8 For the reasons stated above, the United States respectfully requests that this Court deny
9 the Spanos Defendants' motion for reconsideration.

10 Respectfully submitted,
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22 Dated: September 2, 2008

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 2, 2008, I electronically filed with the Clerk of the
3 Court this *Amicus* Brief as an exhibit to the United States' Motion for Leave to File *Amicus* Brief
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