UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

FAIR HOUSING OF THE DAKOTAS, INC., LARRY NORSTEDT, BETTY MARTIN, CLARICA MARTIN, LACEY ANDERSON, KRISTINA HILDE, each individually and on behalf of a class of similarly situated persons, Plaintiffs, vs. GOLDMARK PROPERTY MANAGEMENT, INC. Defendant.	)	Case No. 3:09-cv-58

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

I. INTEREST OF THE UNITED STATES

Pursuant to Local Civil Rule 7.1(G), the United States submits this brief as *amicus curiae* in support of Plaintiffs' Response to Defendant's Motion for Summary Judgment ("Pls. Resp").[1] This case concerns whether defendant's policies with respect to assistance animals discriminate on the basis of disability in violation of the Fair Housing Act, 42 U.S.C. 3601 *et seq*. The Department of Justice ("DOJ") and the Housing and Urban Development ("HUD") share enforcement authority under the FHA. 42 U.S.C. 3614(a), 3612(a) & (o). Private litigation under the Act by fair housing organizations and individuals, like plaintiffs, provides an important

[1] Local Civ. Rule 7.1(G) provides that the United States "may file an *amicus curiae* brief without the consent of the parties or leave of court." This Court's October 18, 2010 Minute Order directed the United States to file this brief by November 2, 2010. Doc. No. 141.

supplement to government enforcement under the Act. *See Trafficante v. Metropolitan Life Ins. Co*., 409 U.S. 205, 211 (1972) ("private attorneys general" suits play "an important role in this part of the Civil Rights Act of 1968"). The United States has a substantial interest in ensuring proper enforcement of the Act in private suits like this one. Accordingly, the United States respectfully submits this brief as *amicus curiae.*

II. STATEMENT OF FACTS[2]

A. Parties

Plaintiffs are the Fair Housing of the Dakotas, Inc., and several disabled individuals who reside or sought to reside at properties managed by Goldmark Property Management, Inc. ("Goldmark"). Second Amended Compl. ("Compl.") 1. Individual plaintiffs have mental impairments that substantially limit their major life activities. Ex. 1, ¶ 2; Ex. 2, ¶ 2; Ex. 4, ¶ 2; Ex. 5, ¶ 2; Compl. ¶¶ 18, 23, 28, 33. They receive benefits from the Social Security Administration as a result of their disabilities. *Id.* Following their diagnoses, each of the individual plaintiffs' treating physicians advised that they obtain assistance animals for the purpose of ameliorating the effects of their disabilities. Ex. 1, ¶ 3; Ex. 2, ¶ 3; Ex. 4, ¶ 3; Ex. 5, ¶ 4. Individual plaintiffs have limited incomes, and three receive public benefits in addition to Social Security disability benefits. Ex. 1, ¶¶ 5-7; Ex. 2, ¶¶ 9-12; Ex. 4, ¶ 6; Ex. 5, ¶ 8. Goldmark's fees have caused some of the plaintiffs to look elsewhere for housing. Ex. 1, ¶ 5; Ex. 2, ¶ 7-8; Ex. 3, ¶ 4.

[2] Unless otherwise noted, the exhibits cited herein are attached to the Declaration of Christopher Brancart ("Brancart Decl.") filed with Plaintiffs' Response to Defendant's Motion for Summary Judgment. Doc. 134.

Defendant manages more than 10,000 apartment units in North Dakota, Minnesota, Iowa and Nebraska. Brief In Support of Mot. for Summ. J. ("Br.") 3. Of these, 7,600 are in the "North Dakota region." *Id.* Approximately 3,400 of the units in the North Dakota region have policies that defendant describes as "pet-friendly" and the remaining 4,200 units have "no-pets" policies.[3] Br. 5.

B. Defendant's Pet Policy

Tenants who wish to have a pet in a "pet-friendly" building complete a "Pet Addendum,"[4] and pay a one-time non-refundable pet fee and a monthly pet rental fee, in addition to the regular monthly rent. Affidavit of Brad Williams ("Williams Aff.") ¶ 8, (Doc. 70). For dogs, the non-refundable pet fee and monthly pet rental fees are $300.00 and $30.00 per month, respectively. *Id.* For cats, the fees are $200.00 and $20.00 per month.[5] *Id.* Prior to September 2008, Goldmark did not require disabled tenants who kept an animal as a reasonable accommodation to pay these or any other fees. Williams Aff., ¶ 10.

C. Defendant's Assistance Animal Policy

On or around September 2008, Goldmark adopted a new policy in the "North Dakota region only" for disabled persons seeking an assistance animal as a reasonable accommodation in pet-friendly and no-pet buildings. Williams Aff., ¶¶ 9-10. Goldmark's new policy

[3] The terms "pet-friendly" and "no pets" are used by Goldmark and are not otherwise defined.

[4] The Pet Addendum is a two-page form that sets forth the conditions upon which Goldmark will allow a pet. These conditions include, among others, that pets be properly inoculated, neutered or spayed, not exceed thirty pounds, and not disturb other residents. Williams Aff., Ex. A.

[5] Property managers may sometimes waive the "one-time pet fee" as a rental incentive "to attract pet owners, based upon vacancy levels." Supplemental Affidavit of Brad Williams ("Supp. Williams Aff."), ¶ 14 (Doc. 88).

distinguishes between animals that are "specially trained," by which Goldmark means "service animals," [6] and those that are "non-specially trained," by which Goldmark means "support" or "companion" animals.[7] Br. 12-13. Goldmark imposes fees and certain requirements only on non-specially trained animals or companion animals, and not on specially trained animals or service animals. Br. 5-6.

Tenants who wish to have non-specially trained animals must pay a one-time $200.00 non-refundable assistance animal fee and a $20.00 monthly rental fee for dogs, and a one-time $100.00 non-refundable assistance animal fee and a $10.00 monthly rental fee for cats. Br. 6. Since March 2009, these tenants must also pay an extra $30.00 fee to have their request for an accommodation processed by Goldmark's contractor, Advantage Credit Bureau ("Advantage Credit"). Br. 8. These fees are in addition to the one-month security deposit and monthly rental fee that all tenants must pay as part of their Lease Agreement. Williams Aff. Ex. G., p. 2.

Tenants or prospective tenants who wish to have non-specially trained animals must satisfy several additional requirements, which, by the plain terms of the assistance animal policy, apply only to animals for "companionship/comfort purposes" and not to specially-trained

[6] By "service animal," Goldmark means animals that are "specially trained to help with residents who are seeing impaired, hearing impaired and those with diabetes." Ex. 16, p. 2; Ex. 7, 90:10-16 (service animal is "a guide dog, hearing impaired animal that'll assist with hearing impaired [sic], or if the individual uses a animal [sic] to assist with diabetes* * *If they can hit a button or if they can ring a phone * * *). *See also* Br. 13 ("service animal" is a "guide dog, signal dog, or other animal individually trained to do work or perform tasks * * *.").

[7] *See* Ex. 15, p. 1 ("The fees are charged for companion animals (not Service Animals)"); Ex. 16 (distinguishing "service animals" and "companion animals").

animals.[8] Williams Aff., Ex. B. These include obtaining at least $100,000 in liability insurance.[9] Williams Aff., Ex. B. ¶ 13. Tenants must also submit a medical questionnaire that must be completed by a "physician, psychiatrist or psychologist" (Ex. 7, p. 78), who must verify that if the tenant's condition involves a mental impairment, it meets the criteria of the Diagnostic and Statistical Manual, Fourth Edition Revised ("DSM IV").[10] Williams Aff., Ex. E. In addition, tenants or prospective tenants must complete an "Assistance Animal Agreement," which, among other conditions, requires tenants to verify that their assistance animal is for "companionship/comfort" purposes, agree to the same terms set forth in the Pet Addendum, and agree that the animal may be removed if it "is no longer necessary for companionship/comfort purposes."[11] William Aff., Ex B, ¶ 15.

D. Goldmark's Explanation for its Fees on Assistance Animals

Goldmark states that the "sole purpose" of the assistance animal fees is to "recoup a portion of the costs associated with keeping non-specially trained animals" in its buildings. Br. 6. According to Goldmark, these costs include, among other items, "steam cleaning," "carpet replacement," "subfloor resealing" and "common area cleaning." *Id.* Goldmark did not conduct

[8] These additional requirements are not addressed in this brief because they were not the subject of Defendant's Motion for Summary Judgment.

[9] Goldmark revised its Pet Addendum to require proof of $100,000 in liability insurance for all pet owners in February 2010. Williams Aff., Ex. A.

[10] The questionnaire requires verification that the "assistance animal [is] necessary for the patient's enjoyment" of their unit; that the "assistance animal [is] necessary if the patient has others living" in the unit; and that there are no "other medical options that will serve the same purpose" as the assistance animal. Williams Aff., Ex. E.

[11] By its own terms, the Assistance Animal Agreement applies only to tenants wishing to have "companionship/comfort" animals. Williams Aff., Ex. B.

a study or analysis to determine the amount of fees needed to recoup the costs associated with non-specially trained animals for these items. Ex. 6, pp. 60-62, 92. Goldmark's standard Lease Agreement requires tenants to provide a general security deposit, pay for steam cleaning of carpets at the end of the lease term, and reimburse Goldmark for other "property damage, or cost of repairs or services" incurred during the tenancy. Williams Aff., Ex. G, p.2. The Assistance Animal Agreement provides that tenants must reimburse Goldmark for all "damages caused by the animal" including "cost of cleaning of carpets and draperies and/or fumigation of the unit[] * * * within thirty (30) days of invoice from Landlord." Williams Aff., Ex. B, ¶ 12.

Goldmark states that "over the 24 month period of 2008-2009 in the areas of grounds, custodial flooring, painting, repairs and maintenance, turn cleaning and caretaker expense, Goldmark-managed properties expended $353,153 more in its pet-friendly buildings [3,400] than its non-pet friendly buildings [4,200] in the North Dakota Region." Williams Aff., ¶ 14; Br. 27. Goldmark did not conduct any analysis to determine whether the $353,153 cost difference between pet and non-pet buildings is due to damage caused by animals or to other factors. Ex. 8, pp. 11-12, 15-16, 27; Ex. 11, ¶¶ 15-21. Nor does Goldmark have an accounting system or other practice for attributing an expenditure to damage caused by animals. Ex. 8, pp. 11, 16.

Goldmark cites a "review of 47 North Dakota Region Residents over a six-month period" who lived in pet-friendly buildings and who left owing "$65,086 for maintenance and/or repairs." Williams Aff., ¶15; Br. 27. Goldmark's Director of Operations, Janel Stephan, who specified the criteria for selecting the 47 residents, did not determine whether these residents had

an animal in the unit.[12] Ex. 7, p. 204. Furthermore, even assuming each resident had an animal, Goldmark's Chief Financial Officer, Ken Bollman, acknowledged that over $45,000 of this figure is not caused by animals, but instead attributable to unpaid rent ($33,436), move out fees ($11,716.65), and other costs totaling several hundred dollars that are not animal-related.[13] Ex. 8, pp. 24-27. Six costs for carpet change totaling approximately $4,600 are designated as "pet related" on Goldmark's records. William Aff., Ex. D, p. 1 ("cpt rpl/rpr"). Mr. Bollman could not verify whether any of the remaining $15,000 was attributable to damage caused by animals.[14] Ex. 8, pp. 24-27, 91.

III. ARGUMENT

Goldmark's motion advances two principal arguments: (1) the FHA requires that "only [] trained assistance animals be accepted as [reasonable] accommodations" and that therefore Goldmark's fees on "non-specially trained assistance animals do not implicate the FHA." Br. 12-16; and (2) the FHA does not require waiver of Goldmark's fees as a matter of law because its fees are "generally applicable" to all tenants with animals and are intended to "recoup the cost of repairing damage" caused by animals. Br. 17-29.

These arguments are in error. First, the FHA does not require that an animal have training to be accepted as a reasonable accommodation under the statute. It is well-established that emotional support animals, which are not trained, may be necessary accommodations under

[12] A repair or maintenance cost was noted as "pet related" for six of the 47 residents. Williams Aff., Ex. D., page 1 (last column).

[13] These include "replacement keys," "replacement screens or windows," garage door "transmitters," and stove "drip pans." Williams Aff., Ex. D, p. 1; Ex. 8, pp. 24-27.

[14] The remaining cost items include painting, apartment cleaning, steam cleaning of carpets, replacing blinds, and replacing carpets. Ex. 8, pp. 24-27.

the FHA. Second, contrary to Goldmark's position, the FHA may require waiver of generally applicable pet fees for non-trained assistance animals where necessary to afford the disabled an equal opportunity to use and enjoy a dwelling. Moreover, although the FHA plainly allows a landlord to recover the costs of damage caused by assistance animals, Goldmark has not established beyond dispute that there is any direct connection between Goldmark's fees and the damage caused by assistance animals. Finally, Goldmark's stated fee policy is not generally applicable but instead discriminates by its terms against those persons with mental disabilities who need emotional support animals.

A. The Fair Housing Act Does Not Require That An Animal Have Special Training to Be Accepted as a Reasonable Accommodation

1. Whether an animal must be accepted as a reasonable accommodation is determined solely by the reasonable accommodation analysis developed under the FHA and applicable case law. The FHA makes it unlawful to discriminate "in the * * * rental, or to otherwise make unavailable or deny" a dwelling based on the "handicap" of the renter. [15] 42 U.S.C. 3604(f)(1). It also bars disability based discrimination "in the terms, conditions, or privileges of * * * rental of a dwelling." 42 U.S.C. 3604(f)(2). The Act defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such

[15] "Handicap" includes both "physical or mental impairment[s] which substantially limits one or more of such person's major life activities[.]" 42 U.S.C. 3602(h)(1). This brief uses the terms "disability" and "disabled" except when quoting the statutory language, which uses "handicap." The two terms are used interchangeably. *See Helen D. v. DiDario*, 46 F.3d 325, 330 n. 8 (3d Cir. 1995) ("The change in nomenclature from 'handicap' [in the Rehabilitation Act] to 'disability' [in the ADA] reflects Congress' awareness that individuals with disabilities find the term 'handicapped' objectionable.").

accommodations may be necessary to afford [a disabled] person equal opportunity to use and enjoy a dwelling[.]" 42 U.S.C. 3604(f)(3)(B). As the text indicates, the controlling question for determining whether an accommodation is required is whether it is "reasonable" and "necessary" to afford a disabled person an "equal opportunity to use and enjoy a dwelling." *Id.*

An accommodation is "reasonable" where it does not impose "undue financial and administrative burdens" or constitute a "fundamental alteration in the nature of [defendant's] program." *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1157 (9th Cir. 2003) (quoting *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979)); *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101 (8th Cir.1999). An accommodation is "necessary" if its refusal would "cause an interference with [] use and enjoyment" of a dwelling. *United States v. California Mobile Home Park Mgmt. Co. (California Mobile Home II)*, 107 F.3d 1374, 1381 (9th Cir. 1997); *cf. Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996); *Shapiro v. Cadman Towers*, 51 F.3d 328, 335 (2d Cir. 1995). An animal that "affirmatively enhances a disabled [person's] quality of life by ameliorating the effects of the disability," may be "necessary" under the Act. *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995); *North Dakota Fair Hous. Council, Inc. v. Allen*, 319 F. Supp. 2d 972, 980 (D.N.D. 2004). Furthermore, the reasonable accommodation analysis is a "highly fact-specific [inquiry], requiring case by case determination." *California Mobile Home Park Mgmt. Co. (California Mobile Home I)*, 29 F.3d 1413, 1418 (9th Cir. 1994); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) ("individualized inquiry must be made to determine" whether a modification for a disability "would be reasonable under the circumstances as well as necessary" for that person).

2. Nothing in the text, legislative history or regulations supports Goldmark's position that "only [] trained assistance animals" must be accommodated. Br. 16. Neither the text of the FHA nor its legislative history refer to accommodations for assistance animals, much less suggest that whether an animal is trained controls whether an accommodation may be required. The legislative history confirms that the key question in evaluating any type of proposed accommodation is whether it is "reasonable" and "necessary" to ensure "equal use and enjoyment" of a residence:

> A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.

See H.R. Rep. No. 711, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, at *2186 (footnotes omitted).

Nor do the FHA's implementing regulations (24 C.F.R. Part 100) require that assistance animals be specially trained. Rather, those regulations confirm that mental and emotional disabilities must be accommodated. 24 C.F.R. 100.201(a)(2) (disability includes "any mental or psychological disorder" including "emotional or mental illness"). The regulation on "reasonable accommodations" restates the statutory language and provides two examples that further confirm that the reasonable accommodation analysis governs all types of accommodations, including assistance animals. 24 C.F.R. 100.204, Examples 1 and 2.

Defendant improperly construes the examples provided in 24 C.F.R. 100.204 as limitations, rather than illustrations, of the types of accommodations that are required under the Act. Br. 12. Example 1 states "[i]t is a violation of section 100.204 for the owner * * *to refuse

to permit the applicant to live in the apartment with a seeing eye dog *because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling*" (emphasis added). Example 2, which concerns a parking space for a mobility impaired tenant, states that "[w]ithout a reserved space, [tenant] might be unable to live in [the apartment] at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. *The accommodation therefore is necessary to afford [tenant] an equal opportunity to use and enjoy a dwelling*" (emphasis added). Both of these examples, which are illustrative and not exhaustive, are intended to emphasize that the threshold question in assessing any accommodation is whether the accommodation is necessary to afford "an equal opportunity to use and enjoy a dwelling." The fact that the regulation uses an example of a seeing eye dog does not mean housing providers are not required to accommodate other types of assistance animals. *Cf. Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (list of major life activities in ADA regulation is "illustrative, not exhaustive").

3. Other HUD regulations governing HUD-assisted housing exempt assistance animals from any policies that prohibit or limit pet ownership, irrespective of whether such animals have training. Those regulations state that "[p]roject owners and [housing authorities] may not apply or enforce any [pet] policies * * * against animals that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities." 24 C.F.R. 5.303(a) ("Pet Ownership for the Elderly or Persons with Disabilities"); 24 C.F.R. 960.705(a) ("Pet Ownership in Public Housing") (same). Neither regulation includes a training requirement. *Id.* HUD explained that these regulations reflect its position that "animals necessary as a reasonable accommodation do not necessarily need to have specialized training. Some animals

perform tasks that require training, and others provide assistance that does not require training." *See* 73 Fed. Reg. 63834, 63835 (Oct. 27, 2008) ("Final Rule on Pet Ownership for the Elderly and Persons with Disabilities"). HUD made explicit that these regulations include "emotional support animals." *Id*. at 63836.

Although these regulations are binding only in HUD assisted housing, the regulations reflect HUD's considered interpretation that animals necessary as a reasonable accommodation under the FHA, including emotional support animals, need not have special training. HUD's regulations are its reasonable interpretation of the Act and therefore entitled to deference.[16] *See Meyer v. Holly*, 537 U.S. 280, 287-288 (2003) (because HUD was the "the federal agency primarily charged with the implementation and administration of the [FHA]" courts "ordinarily defer to [its] reasonable interpretation of [the] statute").

4. Courts that have considered whether assistance animals must be trained have rejected a training requirement. The Eighth Circuit has not considered the issue. However, in *Bronk v. Ineichen*, the Seventh Circuit vacated a jury verdict for a landlord after concluding that a jury instruction on reasonable accommodation may have caused the jury to "infer [] that without school training, a dog cannot be a reasonable accommodation." 54 F.3d at 430. The court ruled that "there is no basis for imputing [a training requirement] into a text [of the FHA] that is silent on the subject." *Id.* An accommodation of an assistance animal need only "facilitate a disabled individual's ability to function" and "survive a cost-benefit balancing that takes both parties' needs into account. On one side of the equation is the degree to which [the animal] aids the

[16] Moreover, as explained *infra* pp.15-16, this interpretation is consistent with HUD's long-standing enforcement position regarding accommodations under the Act for emotional support animals.

plaintiffs in coping with their disability. Professional credentials may be part of that sum; they are not its *sine qua non*." *Id*. at 431. In other words, a landlord may not shortcut the reasonable accommodation analysis by relying on training: an animal is not a required accommodation under the Act simply because it is trained; nor is an animal exempt from coverage because it is not. Formal training may bear on whether an animal is "necessary" in a given case, *Bronk*, 54 F.3d at 431, but it is the reasonable accommodation analysis – not an animal's level of training – that determines whether an animal is required under the Act.

Defendant quotes from *Bronk* in support of its position that training is required. Br. 15. However, defendant misconstrues *Bronk*'s discussion of the parties' dispute surrounding the dog's training. The issue of training was relevant in *Bronk* only insofar as it provided evidence as to whether the dog was "necessary" to assist plaintiffs with their hearing impairments. Plaintiffs had claimed that the dog was "necessary" because it performed specialized tasks to assist them with their hearing impairments and that it had been trained at a "certified training center" for that purpose. 54 F.3d at 427,429. Whether the dog was actually trained for and capable of performing such tasks was therefore relevant.

However, nothing in *Bronk* suggests that training was a necessary condition for animals aiding with hearing impairments in particular, much less for assistance animals in general. Indeed, in *Green v. Hous. Auth. of Clackmas Cnty*., 994 F. Supp. 1253, 1256 (D. Ore. 1998), the district court rejected a landlord's argument that deaf plaintiffs' hearing dog be formally trained. In granting summary judgment for plaintiffs, the court relied on *Bronk* and ruled that "[the

housing authority's] requirement that an assistance animal be trained by a certified trainer * * * has no basis in law or fact." [17]

5. Following *Bronk*, several district courts have ruled that emotional support animals may be required accommodations under the FHA, even though they do not have specialized training. For example, this district court in *North Dakota Fair Hous. Council v. Allen*, 319 F. Supp. 2d 972, 980 (D.N.D. 2004), denied summary judgment for the landlord on plaintiff's claim that she needed an emotional support dog as an accommodation for her mental disabilities. Even though plaintiff introduced no evidence that the dog had been trained, the court ruled that there were "conflicting statements as to whether [plaintiff's] dog had an ameliorative effect" on plaintiff's disabilities because she had submitted evidence from her doctor and had provided testimony that the dog was needed to lessen the effects of her depression and panic disorder. *Id.*

Similarly, in *Overlook Mut. Homes, Inc., v. Spencer*, 666 F. Supp. 2d 850, 861 (S.D. Ohio 2009), the district court denied summary judgment for the landlord and ruled that an emotional support dog may be a required accommodation because "the types of animals that can qualify as reasonable accommodations under the FHA include emotional support animals, which need not be individually trained." *See also Janush v. Charities Hous. Dev. Corp*., 169 F. Supp. 2d 1133, 1134-1136 (N.D. Cal. 2000) (denying motion to dismiss because plaintiff's doctor

[17] Defendant also relies on *In re Kenna Homes Coop. Corp*., 557 S.E.2d 787, 798 (W.Va. 2001), a state court decision construing West Virginia's state fair housing statute and the FHA. Br. 14-15. Following the decision, the United States sued Kenna Homes and entered into a consent order, which required it to reverse its policy and permit plaintiff to keep her emotional support dog even though it did not have special training. *See United States v. Kenna Homes Coop., Corp*., No. 04-00783 (S.D. W. Va. 2004) (consent decree entered Aug. 10, 2004), *available at* www.justice.gov/crt/housing/fairhousing/caseslist.htm.

testified that her animals "lessen the effects of" her mental disabilities and "defendants have not established that there is no duty to reasonably accommodate non-service animals"); *Majors v. Hous. Auth. of Cnty. of DeKalb Georgia*, 652 F.2d 454, 457-458 (5th Cir. 1981) (reversing grant of summary judgment for housing authority because companion dog may qualify as reasonable accommodation to no pets policy under the Rehabilitation Act).[18]

6. DOJ and HUD, the two federal agencies responsible for enforcing the FHA, have taken the position that emotional support or companion animals may be necessary accommodations under the FHA. DOJ has filed ten federal court complaints maintaining that the failure to offer reasonable accommodations to tenants with emotional support animals violates the FHA and resolved each one with a consent decree, settlement, or favorable jury verdict. *See infra* at n.20. In all of them, the United States required accommodations to no-pets policies for emotional support animals, notwithstanding lack of special training.[19]

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[18] *See also United States v. Royalwood Coop. Apts. Inc*., No. 03-73034 (E.D. Mich. filed Aug. 8, 2003) (verdict for plaintiffs entered Mar. 15, 2005 in case challenging failure to provide reasonable accommodation for emotional support animal), *available at* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm.

[19] *See e.g., United States v. Lund*, No. 09-1992 (D. Minn. filed July 30, 2009) (consent decree entered Sept. 29, 2010); *United States v. Bushee*, No. 09-00383 (D. Minn. filed Feb. 18, 2009) (consent decree filed June 3, 2010); *United States v. 75 Main Avenue Owners Corp*., No. 08-3834 (E.D.N.Y., filed Sept. 19, 2008) (settlement agreement and order filed Jan. 26, 2010); *United States v. Lucas*, No. 08-1106 (D. Ore., filed Sept. 22, 2008) (consent decree entered Oct. 14, 2009); *United States v. Townsend House*, No. 08-9753 (S.D.N.Y. filed Nov. 12, 2008) (Stipulation and Order entered May 6, 2009); *United States v. Bouquet Builders, Inc*., No. 07-3927 (D. Minn. filed Sept. 10, 2007) (consent decree entered June 23, 2008); *United States v. Hussein*, No. 07-1175 (D. Conn. filed Aug. 1, 2007) (consent decree entered May 30, 2008); *United States v. Royalwood Coop. Apts. Inc*., No. 03-73034 (E.D. Mich. filed Aug. 8, 2003) (verdict for plaintiffs entered Mar. 15, 2005); *United States v. Kenna Homes Coop. Corp*., No. 04-0783 (S.D. W.Va. filed July 29, 2004) (consent decree entered Aug. 10, 2004); *United States*

HUD's administrative law decisions also have established that emotional support animals may be necessary accommodations. *See, e.g., HUD v. Dutra*, 09-93-1753-8, 1996 WL 657690 (HUD ALJ Nov. 12, 1996) (landlord violated the Act by refusing to provide a reasonable accommodation to a no-pet policy for a therapeutic cat for disabled person with fibromyalgia and anxiety); *HUD v. Riverbay Corp*., 02-93-0320-1, 1994 WL 497536 (HUD ALJ Sept. 8, 1994) (landlord violated the Act by refusing to provide a reasonable accommodation to a no-pet policy for a companion dog for disabled person with schizoid personality disorder).

Indeed, the therapeutic effects of emotional support animals for the mentally disabled are well-established and widely reported in the medical and health literature. Emotional support animals have been used in a variety of settings for individuals with mental or psychiatric disorders, including in hospitals, nursing and retirement homes, mental institutions, and therapy programs for autistic children or veterans coping with post-traumatic stress disorder.[20]

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v. ADI Mgmt., Inc. No. 00-3273 (E.D.N.Y. filed June 5, 2002) (consent decree entered July 2, 2003). All of DOJ's orders and agreements are *available at* http://www.justice.gov/crt/housing/fairhousing/caseslist.htm.

[20] Jane Miller, HEALING COMPANIONS 69 (2010) (discussing use of therapy dogs for veterans returning from combat); Zoltán Kovács et al., *Animal Assisted Therapy for Middle-Aged Schizophrenic Patients Living in a Social Institution, A Pilot Study*, 18(5) CLINICAL REHABILITATION, 483, 485 (2004) (animal assisted therapy helpful in rehabilitation of schizophrenic patients living in social institution); Melinda Stanley-Hermams & Julie Miller, *Animal Assisted Therapy*, 102(10) AM. J. NURSING 69, 71 (2002) (describing Mt. Sinai Hospital's pet assisted therapy program in New York City); Margo A. Halm, *The Healing Power of the Human Animal Connection*, 17(4) AM. J. CRITICAL CARE, 373, 375 (2008) (discussing physiological, psychological and social benefits of animals on hospitalized patients); Mary Kaminski, Teresa Pellino & Joel Wish, *Play and Pets: The Physical and Emotional Impact of Child-Life and Pet Therapy on Hospitalized Children*, 31(4) CHILD. HEALTH CARE, 321, 327-28 (2002) (concluding that pet therapy provides an additional supportive activity for hospitalized children).

Emotional support animals have assisted individuals with a range of mental disabilities, including seizure disorders, panic disorder, biopolar disorder, depression, schizophrenia, autism, and other mental disabilities.[21] Through specific behaviors or through their mere presence, emotional support animals can alleviate the symptoms of these disorders. *See infra* n. 22. For example, emotional support animals can lead a person to a safe place during a hallucination, orient a person to the present time and place during a flashback or delusion, circle a person or bark loudly to interrupt self-harm or mutilation, and lay its head in a person's lap or make other physical contact to alleviate anxiety or excessive fear.[22] And none of these tasks requires special training.

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[21] Mona J. Sams, Elizabeth V. Fortney & Stan Willenbring, *Occupational Therapy Incorporating Animals for Children with Autism: A Pilot Investigation*, 60(3) AM. J. OCCUPATIONAL THERAPY, 268 (2006) (animal assisted therapy improved social interaction and language for children with autism); Anke Prothmann, Christine Ettrich & Sascha Prothman, *Preference for, and Responsiveness to, People, Dogs and Objects in Children with Autism*, 22(2) ANTHROZOOS, 161 (2009) (study suggesting that children with autism preferred interaction with therapy dogs over human interaction); Cheng-I Chu et al., *The Effect of Animal-Assisted Activity on Inpatients with Schizophrenia*, 47(12) JOURNAL OF PSYCHOSOCIAL NURSING (2009) (concluding that animal assisted therapy promotes significant improvements in many clinical aspects among inpatients with schizophrenia); K. Nattrass et al., *In Puppy Love: How An Assistance Dog Can Enhance the Life of a Child with a Disability*, 21(1) CONTEMPORARY PEDIATRICS, 57 (2004) (discussing benefits of assistance dogs for children with emotional disabilities).

[22] Jennifer Wisdom, Goal A. Saedi & Carla A. Green, *Another Breed of "Service" Animals STARS Study Findings about Pet Ownership and Recovery from Serious Mental Illness*, 79(3) AM. J. ORTHOPSYCHIATRY, 430 (2009) (confirming health benefits of animals on individuals with serious mental illness); Janet Eggiman, *Cognitive Behavioral Therapy: A Case Report - Animal Assisted Therapy*, 6(3) TOPICS ADVANCED PRAC. NURSING, (Oct. 12, 2006), http://www.medscape.com/viewarticle/545439 (case study of sexually abused child and animal assistance therapy); Sandra B. Barker & Kathryn S. Dawson, *The Effects of Animal-Assisted Therapy on Anxiety Ratings of Hospitalized Psychiatric Patients*, 49 (6)

7. Finally, contrary to Goldmark's contention (Br.12-13), the ADA regulation defining "service animals" (28 C.F.R. 36.104) does not apply to the FHA. [23] By its terms, the service animal regulation governs use of animals by persons with disabilities in commercial facilities and in places of public accommodations, such as in restaurants and movie theatres. [24] DOJ has stated explicitly that it does not apply to the FHA:

> [T]itle II and title III regulations [of the ADA] govern a wider range of public settings than the housing and transportation settings for which * * * HUD and the DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities. Accordingly, other Federal agency regulations [and] case law, * * * governing those situations may provide appropriately for increased access for animals other than service animals as defined under the ADA.
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> * * *

PSYCHIATRIC SERVICES (1998) (animal assisted therapy was associated with reduced anxiety for hospitalized patients with psychiatric diagnoses); Joan Esnayra, *Help From Man's Best Friend: Psychiatric Service Dogs are Helping Consumers Deal with the Symptoms of Mental Illness*, 27(7) BEHAV. HEALTH CARE, 30 (2007) (discussing examples of how dogs ameliorate symptoms of psychiatric disorders); Claire Smyth and Eamonn Slevin, *Experiences of Family Life with an Autism Assistance Dog*, 13(4) LEARNING DISABILITY PRACTICE, 12 (2010) (examines seven families with autistic children and assistance dog and highlights therapeutic benefits).

[23] "Service Animal" is defined as a "guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." 28 C.F.R. 36.104.

[24] A "public accommodation" is defined as "a facility, operated by a private entity, whose operations affect commerce," such as a hotel, restaurant, movie theater, store, private school, museum, day-care, depot, place of recreation, or other similar facility. 28 C.F.R. 36.104.

> [T[he Department's definition of "service animal" in the final rule does not affect the rights of individuals with disabilities who use assistance animals in their homes under the FHAct [sic].

75 Fed.Reg. 56236, 56269 (Sept. 15, 2010) (Final Rule on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities).

HUD, which shares enforcement authority under the FHA with DOJ, has also made clear that the service animal regulation under the ADA does not apply to the FHA:

> The Department does not agree that the definition of the term "service animal" * * * should be applied to the Fair Housing Act * * *. * * * There is a valid distinction between the functions animals provide to persons with disabilities in the public arena i.e. performing tasks enabling individuals to use public services and public accommodations, as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities. Specifically, emotional support animals by their very nature, and without training, may relieve depression and anxiety, and help reduce stress-induced pain in persons with certain medical conditions affected by stress. Conversely persons with disabilities who use emotional support animals may not need to take them into public spaces covered by the ADA.

73 Fed.Reg. 63834, 63836 (Oct. 27, 2008) (Final Rule on Pet Ownership for the Elderly and Persons with Disabilities). *See also Overlook Homes*, 666 F. Supp. 2d at 859 ("[s]imply stated, there is a difference between not requiring the owner of a movie theater to allow a customer to bring her emotional support dog, * * * into the theater * * * and permitting the provider of housing to refuse to allow a renter to keep such an animal in her apartment in order to assist her to cope with her depression, * * *.").[25]

[25] Thus, defendant's reliance on *Prindable v. Assoc. of Apt. Owners of 2987 Kalakaua*, 304 F. Supp. 2d 1245 (D. Haw. 2003), is misplaced. There, the court erroneously applied the definition of "service animal" found in ADA regulations in dismissing plaintiffs' reasonable accommodation claim for a landlord's failure to permit an emotional support dog. *Id.* at 1256.

Similarly, the Department of Transportation ("DOT"), through its regulations barring disability discrimination in airline travel,[26] has determined that required accommodations for disabled passengers are not limited to "service animals" and may include emotional support animals. 14 C.F.R. 382.117(e). In the preamble to its final rule, DOT explained: "[t]he Department believes that there can be some circumstances in which a passenger may legitimately travel with an emotional support animal." 73 Fed. Reg. 27614, 27636 (May 13, 2008) (Final Rule on Nondiscrimination on the Basis of Disability in Air Travel).

Thus, the FHA's text, legislative history, and relevant regulations, as well as applicable case law and agency enforcement proceedings, all make clear that the FHA does not contain a training requirement and that emotional support animals, which do not require specialized training, may be necessary accommodations under the Act.

B. Waiver of Generally Applicable Fees May Be Required Under the FHA If Necessary To Afford Persons with Disabilities an Equal Opportunity To Use and Enjoy a Dwelling

Contrary to Goldmark's argument (Br. 17-29), the FHA may require waiver of generally applicable pet fees, even if such fees are intended to recoup a portion of the costs associated with non-trained assistance animals.

1. Nowhere in the text or legislative history of the FHA are generally applicable fees or other financial policies exempted from scrutiny under the reasonable accommodation analysis of the FHA. Rather, as explained above (pp. 8-11), the Act requires reasonable accommodations in all "rules, policies, practices, or services" when necessary to afford an equal opportunity to use

[26] DOT issues rules under the Air Carrier Access Act ("ACAA"). 49 U.S.C. 41705. The statute prohibits discrimination in airline service on the basis of disability.

and enjoy a residence. 42 U.S.C. 3604(f)(3)(B). As the legislative history makes clear, this provision prohibits the "application or enforcement of otherwise neutral rules and regulations * * * in a manner which discriminates against people with disabilities." H.R. Rep. No. 100-711, at 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. at * 2185. It contemplates that reasonable accommodations be made to neutral policies of all types, including those with a financial component. *See, e.g., Giebeler v. M&B Assoc.*, 343 F.3d 1143, 1153 (9th Cir. 2003) ("disability-neutral administrative policies * * * do not escape all scrutiny under the FHAA's reasonable accommodation mandate simply because they are based on financial considerations * * *."). Were it not so, landlords could "circumvent the Act's requirements simply by imposing fees for certain matters" rather than banning them outright. *California Mobile Home I*, 29 F.3d at 1417.

2. DOJ and HUD, which share enforcement authority under the FHA, consistently have required waiver of generally applicable pet fees for assistance animals, including emotional support animals. The Joint Statement of HUD and DOJ on Reasonable Accommodations Under the Fair Housing Act ("HUD and DOJ Joint Statement") [27] makes clear that housing providers may not impose additional fees as a condition of granting an accommodation, including the accommodation of an assistance animal (Question 11):

> 11. May a housing provider charge an extra fee or require an additional deposit from applicants or residents with disabilities as a condition of granting a reasonable accommodation?
> No. Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.
> ***
> Example 2: Because of his disability, an applicant with a hearing impairment needs to keep an assistance animal in his unit as a reasonable accommodation.

[27] The HUD and DOJ Joint Statement is set forth in plaintiffs' Legal Appendix, Tab 1 and is available at http://www.justice.gov/crt/housing/jointstatement_ra.php.

> The housing provider may not require the applicant to pay a fee or a security deposit as a condition of allowing the applicant to keep the assistance animal.

Accordingly, DOJ's consent decrees and settlements consistently have required housing providers to waive monthly pet fees and deposits for assistance animals.[28] Similarly, HUD's regulations prohibit housing providers from imposing deposits and fees in HUD assisted housing for animals that "assist, support, or provide service to persons with disabilities." 24 C.F.R. 960.705(a) (prohibiting the application of pet policies, including pet deposits permitted under 24 C.F.R. 960.707(d), and other policies established under Subpart G for persons with disabilities); *see* 24 C.F.R. 5.303(a) (excluding application of pet rules under Subpart C, including pet deposits permitted under 24 C.F.R. 5.318, for persons with disabilities).

3. The case law establishes that the FHA may require waiver of generally applicable fees where such fees deny or interfere with an equal opportunity to use and enjoy a dwelling. For example, in *California Mobile Home I*, the Ninth Circuit reversed dismissal of plaintiff's claim

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[28] *See, e.g., United States v. Lund*, No. 09-1992 (D. Minn. Sept. 29, 2010) (reasonable accommodation to no pet policy may not require "pay[ment] [of] any fee, deposit, or other charge for keeping" an emotional support animal), at 5; *United States v. Bushee*, No. 09-00383 (D. Minn. June 3, 2010) (same), at 5; *United States v. Lucas*, No. 08-1106 (D. Ore. Oct. 14, 2009) (same), at 6; *United States v. Bouquet Builders, Inc.*, No. 07-3927 (D. Minn. June 23, 2008) (same), at 5; *United States v. Hussein*, No. 3:07-1175 (D. Conn. May 30, 2008) (same), at 5; *United States v. Kenna Homes Coop. Corp.*, No. 04-0783 (S.D. W.Va. Aug. 10, 2004) (same), at 4; *Settlement Agreement Between the United States and Reading (Pennsylvania)Housing Authority* (Feb. 6, 2009) ("a resident requesting or keeping an assistance animal will not be charged any fee, deposit or other charge") at 10; *Settlement Agreement Among the United States, Intermountain Fair Housing Council, and Syringa Property Management, Inc*. (Aug. 15, 2001) (defendant agrees "not to charge deposits or fees to disabled tenants in connection with their maintenance of service or support animals necessary to afford those persons full enjoyment of the premises") at 2; (all orders and settlement agreements available at www.justice.gov/crt/housing).

based on a landlord's refusal to waive generally applicable guest and parking fees for her daughter's home health care aid. 29 F.3d at 1418. In rejecting the argument that waiver of generally applicable fees is never required under the FHA, the court distinguished between "residential fees that affect handicapped and non-handicapped residents equally," and those that are "imposed in return for permission to engage in conduct that, under the FHAA, a landlord is required to permit." *Id.* at 1417. The court reasoned that where a generally applicable fee has an "unequal impact" on disabled persons because of their disability, such fees "merit closer scrutiny." *Id.* The court ruled that the landlord's refusal to waive the latter type of fee may constitute disability discrimination, and that plaintiff was entitled to "demonstrate that the [generally applicable guest and parking] fees involved had the effect of denying her an equal opportunity to use and enjoy her dwelling." *Id.* at 1418. [29]

Similarly, in *Samuelson v. Mid-Atlantic Realty Co*., 947 F. Supp. 756 (D. Del. 1996), a disabled tenant who had to terminate a lease early due to his "deteriorating mental condition" requested waiver of various generally applicable lease termination charges as a reasonable accommodation. The court denied the landlord's motion to dismiss and ruled that "[i]t is clear that generally applicable fees--as in California Mobile Home Park and here--can interfere with the use and enjoyment of housing by the handicapped." *Id*. at 761-762. And in *Bentley v. Peace and Quiet Realty*, 367 F. Supp. 2d 341 (E.D.N.Y. 2005), where a mobility-impaired tenant requested to move to a first-floor apartment, the court rejected defendant's argument that waiver

[29] On appeal from remand, in *United States v. California Mobile Home II*, the court of appeals held that plaintiff, who had requested the parking space for a caregiver and not for herself, had failed to establish that the parking fees "caused an interference with her use and enjoyment" of her residence because, among other things, plaintiff "failed to show why [the provider's] convenience is necessary for her own use and enjoyment." 107 F.3d at 1381.

of the rent increase applicable under New York's rent stabilization law was not required "because rent stabilization laws affect handicapped and non-handicapped residents equally." *Id.* at 348. The court ruled that plaintiff's request to move "without being forced to assume additional rental expenses * * * [is] exactly the type of accommodation that falls with the purview of the FHAA." *Id.* at 347. *See also Hubbard v. Samson Mgmt. Corp*., 994 F. Supp. 187, 191-192 (S.D.N.Y. 1998) (denying summary judgment for landlord who had argued that "[mobility impaired plaintiff] would be unfairly benefitted relative to the other tenants by reserving a space near her apartment for her sole use, without charge" and ruling that waiving fee for a reserved space "may be necessary * * * [to] provide [plaintiff] the same opportunity to use and enjoy her dwelling that other residents enjoy"); *Lanier v. Ass'n of Apartment Owners*, Case No. 06-cv-00558, 2007 U.S. Dist. LEXIS 2791, at *13, 17-19 (D. Haw. Jan. 12, 2007) (granting preliminary injunction requesting immediate waiver of a generally applicable architectural fee for air conditioning unit for disabled tenant partly because "failure to waive financial burdens, including generally applicable fees, could constitute discrimination under the FHAA in some circumstances"); *cf. Giebeler*, 343 F.3d at 1155 ("imposition of burdensome policies, including financial policies, can interfere with disabled persons' right to use and enjoyment of their dwellings").

4. Defendant's authority is not to the contrary. Defendant relies on several cases in which courts have denied a requested accommodation for waiver of an "essential requirement" of tenancy, *Giebeler*, 343 F.3d at 1156, n.9, such as monthly rent, credit history, or income guidelines. *Geter v. Horning Bro. Mgmt.*, 537 F.Supp. 2d 206 (D.D.C. 2008) (request for rent reduction)*; Bell v. Tower Mgmt. Service, L.P*., No. 07-cv-5305, 2008 U.S. Dist. LEXIS 53514

(D.N.J. July 15, 2008) (waiver of minimum income eligibility rules); *Schanz v. Village Apts.*, 998 F. Supp. 784, (E.D. Mich. 1998) (waiver of income eligibility and credit requirements); *Salute v. Stratford Greens Garden Apts.*, 136 F.3d 293 (2d Cir. 1998) (request for waiver of Section 8 restriction). With the exception of *Salute*, each of these decisions was based on the court's determination that the plaintiffs had failed to plead or otherwise show that the waiver of the tenancy requirement "directly relate[d]" to their disability or was otherwise "necessary" to ensure an equal opportunity to enjoy a dwelling. *Bell*, 28 U.S. Dist. LEXIS 53514, at *27; *Geter*, 537 F.Supp. 2d at 209 ("[plaintiff] cannot 'show that, but for the accommodation, [he] likely will be denied an equal opportunity to enjoy the housing of [his] choice'"); *Schanz.*, 998 F. Supp. at 792 ("direct correlation between plaintiffs' handicap and [waiver of income and credit requirements] is missing.").

Here, by contrast, the proposed accommodation is not for waiver of monthly rent or other "essential requirement" of tenancy. Plaintiffs' proposed accommodation is for an emotional support animal. Unlike the plaintiffs in the above cases, plaintiffs here have submitted evidence that the support animals "directly relate" and ameliorate the effects of their disability (and defendant does not dispute this for purposes of its motion). Exs. 1 ¶ 3; 2 ¶ 8; 4 ¶ 3; 5 ¶ 6.

5. In addition, the plaintiffs here have submitted evidence that waiver may be "necessary" because Goldmark's fees may "cause[] an interference" with their use and enjoyment of a dwelling. *California Mobile Home II*, 107 F.3d at 1381. Goldmark's fees are "imposed in return for permission" to have emotional support animals in its buildings. *California Mobile Home I*, 29 F.3d at 1417. These fees may have an "unequal impact," 29 F.3d at 1417, because they are not imposed on other similarly situated tenants, including on disabled

tenants with service animals (who pay no fees) or on non-disabled tenants with pets, who do not pay the $30.00 fee charged by Advantage Credit and do not always pay the one-time pet fees. Williams Supp. Aff., ¶ 14 ("to attract pet owners, based upon vacancy levels, property manager may try and fill a few apartments by waiving the one-time pet fee"). Nor are Goldmark's fees "too small to have any exclusionary effect" or otherwise diminimus. 29 F.3d at 1418. The fees total several hundred dollars.[30] Plaintiffs have limited incomes, receive food stamps or other government assistance, and contend the assistance animal fees have led them to look elsewhere for housing or forego pursing reasonable accommodations. Ex. 1, ¶ 5; Ex. 2, ¶ 8; Ex. 4, ¶¶ 5-7; Ex. 5 ¶¶ 6-8.

6. Finally, that Goldmark's alleged "sole purpose" of imposing fees on non-specially trained animals is to "recoup a portion of the costs" associated with accommodating these animals (Br. 25-26), does not entitle it to judgment as a matter of law under the FHA. Goldmark is correct that a landlord may recoup costs for damage. The Joint Statement states this explicitly (Question 11, Ex. 2):

> [] if a tenant's assistance animal causes damage to the applicant's unit or the common areas of the dwelling, the housing provider may charge the tenant for the cost of repairing the damage (or deduct it from the standard security deposit imposed on all tenants), if it is the provider's practice to assess tenants for any damage they cause to the premises.

However, Goldmark has not established that its fees have any direct correlation to its need to recoup costs. For years, Goldmark permitted assistance animals in its buildings without

[30] A tenant seeking an emotional support dog pays $470 in the first year of tenancy, which includes the $200.00 non-refundable fee, the $20.00 monthly rent fee and the $30.00 accommodation request fee. A tenant seeking an emotional support cat pays $240 in the first year of tenancy, which includes the $100.00 non-refundable fee, the $10.00 monthly fee and the $30.00 accommodation request fee. Br. 5-6.

imposing fees. Williams Aff., ¶ 10. Goldmark's one-time fee and its extra monthly rental charge for non-trained assistance animals are non-refundable, even if an assistance animal causes no damage to a unit. Id. ¶ 17; Ex. 6, p. 71. And Goldmark's standard Lease Agreement already provides mechanisms for Goldmark to recoup costs associated with animal damage, including through a general security deposit of up to one month's rent, requiring all tenants to "professionally steam clean" their carpets at the end of the lease term at their expense, and requiring reimbursement for other "property damage, or cost of repairs or service" incurred during the tenancy. Williams Aff., Ex. G, p. 2 ("Deposit" "Carpet" "Occupancy"). The Assistance Animal Agreement provides additional protection to Goldmark in that tenants with companion animals must reimburse "all damage caused by the animal, including, but not limited to, the cost of cleaning of carpets and draperies and/or fumigation of the unit" within "thirty (30) days of invoice from Landlord." Williams Aff., Ex. B ¶12.

Moreover, Goldmark has not established beyond dispute that its fees in fact recoup the cost of damage associated with non-trained assistance animals.[31] For example, Goldmark did not conduct a financial or other analysis to determine the amount of fees needed to recoup its costs associated with non-specially trained animals. Ex. 6, pp. 60-61, 72, 92. Goldmark did not determine whether the cost difference between pet and non-pet buildings that is offered as the basis for the fees (Br. 27) is due to damage caused by animals or to other factors. Ex. 8, pp. 11,

[31] The fact that the fees are slightly less than those charged to non-disabled tenants with pets does not, as Goldmark suggests (Br. 24-26), make them *per se* lawful under the Act or exempt them from waiver. It is well-settled that a professed benign intent for a policy, such as a lower fee for assistance animals, does not exempt it from scrutiny under the FHA. *Cf. UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (absence of malevolent motive does not convert facially discriminatory policy into neutral policy with discriminatory effect).

12, 16. Goldmark also did not determine whether the costs identified in its sample of 47 residents over a six year period were due to animals. In fact, most of these costs were determined not to be related to animals. *See supra*, pp. 6-7; Ex. 8, pp. 24-27, 91. And Goldmark has no accounting system or other practice for determining whether a particular expenditure is animal-related. Ex. 8, pp. 11, 16.

C. Goldmark's Fee Policy Is Not Generally Applicable Because it Discriminates Against Tenants Who Need Emotional Support Animals for Mental Disabilities

It is not necessary, however, to determine the circumstances under which a waiver of a generally applicable pet fee may be appropriate because Goldmark's fees are not generally applicable. Goldmark's fee policy discriminates based on the nature of the plaintiffs' disabilities. Goldmark has one set of rules for "non-specially trained" animals, meaning emotional support animals for persons with mental disabilities. Br. 12-13; Ex. 15, 16. It has another, more favorable set of rules, for "specially trained" animals, meaning animals that assist with physical disabilities. Br. 13; Ex. 16, p. 2; Ex. 7, p. 90. Goldmark imposes an extra monthly rent, a non-refundable animal deposit, an accommodation request fee, and other requirements on the former. It waives these requirements for the latter. Br. 6; Williams Aff., Ex. C.

It is axiomatic that disability discrimination in violation of the Act includes treating persons with disabilities differently than persons without disabilities in the rental of an apartment or in the "terms, conditions, or privileges" of rental. 42 U.S.C. 3604(f)(1),(2). Discrimination in violation of these provisions, however, also includes treating one group of disabled persons differently, or less favorably, than another group of disabled persons based on the nature of their disability, as is the case here with assistance animals for tenants with mental and physical disabilities.

For example, in *Hargrave v. Vermont*, 340 F.3d 27 (2d Cir. 2003), the court of appeals held that a state procedure violated the ADA and Section 504 of the Rehabilitation Act because it treated the mentally and physically ill differently. Specifically, the procedure "discriminated on the basis of mental illness" because "only mentally ill patients who have been found incompetent may have their treatment preferences as expressed in [their power of attorney for health care] overridden in family court [.]" *Id*. at 37. By contrast, "equally incompetent patients who are physically ill or injured enjoy the security of knowing" their preferences have greater protection. *Id.*

It is immaterial to the discrimination analysis if a policy distinguishes among the disabled based on seemingly neutral criteria, such as whether an animal has "special training." Intentional discrimination under the FHA may still occur where a neutral criterion serves as a proxy for, or correlates closely with, disability status.[32] As the court of appeals explained in *Cmty Servs, Inc. v. Windgap Mun. Auth.*, 421 F.3d 170 (3d Cir. 2005), a "regulation or policy cannot use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination, such as classifications based on gray hair (as a proxy for age) or service dogs or wheelchairs (as proxies for handicapped status)." *Id.* at 177-178 (citing *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992)) (quotations omitted). *See also Larkin v. Mich. Dep't of Soc. Servs*., 89 F.3d 285, 289-290 (6th Cir. 1996) (ordinance that singled out adult foster care facility facially discriminated against disabled); *Nevada Fair Hous. Ctr. Inc. v. Clark Cnty.*, 565 F. Supp. 2d

[32] Plaintiffs' papers point to substantial evidence in the record that defendant's policy of imposing fees and other requirements on "non-specially trained animals" may be discriminatory and directed at persons with mental disabilities seeking emotional support animals. *See* Pls. Resp., pp. 25-39.

1178, 1183 (D. Nev. 2008) ("Nevada's group home statute facially discriminates against the handicapped" by "singl[ing] out the handicapped through the definition of 'residential establishment'"); *Comm. Hous. Trust v. Dep.'t of Consumer and Reg. Affairs*, 257 F. Supp. 2d, 208, 222 (D.D.C. 2003) ("the court finds that the language * * *, which classifies persons based upon their 'common need for treatment * * *' does, in fact, apply different standards to persons on the basis of their disability. The fact that the ordinance's language does not make the distinction outright is irrelevant").

Goldmark has not offered any tenable justification for charging fees for companion animals but waiving the same for service animals.[33] Goldmark admits that there is no factual basis for contending that service animals cause less damage than companion animals. Ex. 6, p. 156; Ex. 7, p. 222. Goldmark did not conduct a financial analysis or study to conclude that service animals cause less damage than either companion animals or pets. Ex. 6, p. 156. Thus, Goldmark's stated fee policy is not generally applicable but instead treats persons with mental disabilities who need emotional support animals less favorably than persons with physical disabilities who need service animals.

CONCLUSION

For the foregoing reasons, the Court should deny Goldmark's Motion for Summary Judgment.

[33] Goldmark's principal justification is that the FHA requires that "only [] trained assistance animals [i.e., service animals] be accepted as accommodations." Br. 16. As explained *supra* text pp. 7-20, the FHA does not contain a training requirement for assistance animals necessary as a reasonable accommodation.

Respectfully submitted this 2nd day of November, 2010,

TIMOTHY Q. PURDON
United States Attorney

s/Shon Hastings
SHON HASTINGS
Assistant United States Attorney
Quentin N. Burdick United States Courthouse
655 First Avenue North, Ste. 250
Fargo, ND 58102-4932
(701) 297-7400
ND Bar Board ID No. 05084
Attorney for the United States

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

s/ Sameena S. Majeed
STEVEN H. ROSENBAUM
Section Chief
TIMOTHY J. MORAN
Deputy Chief
SAMEENA SHINA MAJEED
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.-G. St.
Washington, D.C. 20530
(202) 305-1311
(202) 514-1116 (fax)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for the United States as Amicus Curiae in Support of Plaintiffs' Response to Defendant's Motion for Summary Judgment was served by electronic mail and the court's electronic case filing ("ECF") system on this day, November 2, 2010 on the following counsel:

Christopher Brancart
Elizabeth Brancart
BRANCART & BRANCART
PO BOX 686
PESCADERO, CA 94060
650-879-0141
Email: cbrancart@brancart.com

Michael T. Andrews
Krista L. Andrews
Anderson, Bottrell, Sanden & Thompson
4132 30th Avenue, SW, Ste. 100
PO Box 10247
Fargo, ND 58106
701-235-3300
Email: mandrews@andersonbottrell.com

s/Sameena Shina Majeed
Sameena Shina Majeed
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice