Nos. 07-72803 & 07-73230

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BRENT NELSON, *et al.*,

Petitioners/Cross-Respondents

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ON BEHALF OF MONTANA FAIR HOUSING, INC.,

Respondent/Cross-Petitioner

_____

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

_____

BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (cont.): **PAGE**

TABLE OF CONTENTS (cont.): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (cont.): **PAGE**

CASES (cont.): **PAGE**

STATUTES:

STATUTES (cont.): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

RULE:

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STATEMENT OF JURISDICTION

The Administrative Law Judge (ALJ) and the Secretary of the United States Department of Housing and Urban Development (HUD) had subject matter jurisdiction under 42 U.S.C. 3612(b)-(h). The ALJ's June 1, 2007, Remedial Order that disposed of all claims became the final agency decision on July 1, 2007. See 42 U.S.C. 3612(h)(1). On July 16, 2007, Petitioners timely sought review in this Court (No. 07-72803). On August 7, 2007, the Secretary filed a cross-application for enforcement of the agency's order (No. 07-73230).

This Court has jurisdiction over the appeals pursuant to 42 U.S.C. 3612(i), 28 U.S.C. 2342(6), and 42 U.S.C. 3612(j)(1). Venue properly lies in this Court under 42 U.S.C. 3612(i)(2) because Petitioners' discriminatory housing practice took place in Billings, Montana, within the Ninth Circuit.[1]

STATEMENT OF ISSUES

1. Whether the ALJ's initial decision of August 24, 2006, is the final agency decision in this case.

2. Whether Montana Fair Housing (MFH) has standing under the Fair Housing Act, 42 U.S.C. 3601 *et seq*.

3. Whether HUD correctly ruled that Petitioners' apartment building was designed and constructed in violation of the Fair Housing Act.

4. Whether HUD correctly ruled that Petitioner Bernard Nelson is liable under the Fair Housing Act.

5. Whether this Court has jurisdiction to mandate Petitioners' compliance with HUD's remedial order.

6. Whether HUD correctly required Petitioners to retrofit the front entrances of their building.

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[1] This brief uses the following abbreviations: "E.R. __" for the page number of Petitioners' Excerpts of Record; "S.E.R. __" for the page number of the Respondent's Supplemental Excerpts of Record; "Add. __" for the page number of the Addendum to Respondent's brief; and "Br. __" for the page number of Petitioners' opening brief.

STATEMENT OF THE CASE

On January 12, 2004, Montana Fair Housing (MFH) filed a fair housing complaint with HUD against Petitioners Brent and Bernard Nelson. E.R. 10a-11a. On September 29, 2005, following an investigation and determination of reasonable cause, HUD filed a charge of discrimination on behalf of MFH against Petitioners. HUD alleged that Petitioners engaged in discrimination on the basis of disability in violation of the Fair Housing Act by failing to comply with the Act's design and construction accessibility requirements, 42 U.S.C. 3604(f)(3)(C). E.R. 11a. MFH intervened in the proceeding before an ALJ.

On August 24, 2006, the ALJ issued an initial decision dismissing the charge of discrimination. E.R. 10a-34a. On September 8, 2006, HUD filed a petition for secretarial review. E.R. 37a. On September 21, 2006, the Secretarial Designee issued an order granting the petition, concluding that "the Charging Party demonstrated by credible evidence that [the Nelsons] violated the [Fair Housing] Act's design and construction requirements," setting aside the initial decision, and remanding the proceeding to the ALJ to "enter a remedial order to include appropriate retrofits to the property; monetary damages to [MFH] * * * ; civil penalties; and injunctive relief." E.R. 47a.

On October 2, 2006, Petitioners filed in this Court an application to enforce the ALJ's initial decision of August 24, 2006. On December 26, 2006, this Court dismissed the application for lack of jurisdiction. S.E.R. 1.

On June 1, 2007, an ALJ assigned to the case on remand issued a remedial order requiring Petitioners to make numerous retrofits to their property, pay damages to MFH, pay civil penalties to HUD, and comply with various forms of injunctive relief. E.R. 54a-64a. On July 1, 2007, the ALJ's order became the final agency decision. See 24 C.F.R. 180.670(b)(2).

On July 16, 2007, Petitioners filed a petition for judicial review of the ALJ's remedial order, as well as the Secretary's order setting aside the ALJ's August 24, 2006, initial decision (No. 07-72803). E.R. 70a. On August 7, 2007, HUD filed a cross-application to enforce the final agency decision (No. 07-73230).

STATEMENT OF FACTS

1. This case involves a three-story, twelve-unit apartment building, with a split-level design that includes stairs leading down to the ground floor units, located at 640 Lake Elmo Drive, in Billings, Montana. E.R. 49a. The building does not have an elevator; thus, the four ground-floor apartments (one three-bedroom and three two-bedroom) are covered by the Fair Housing Act's design and construction requirements, and must be designed and constructed with specified accessibility features. E.R. 49a; 42 U.S.C. 3604(f)(7).

Design of the building began in 2001 and continued until at least June 2002. E.R. 13a. Petitioner Brent Nelson submitted building plans to the city and, in May 2002, received a list of corrections required by the city before it would approve the plans. E.R. 13a. The plans were corrected and the city issued a building permit in

July 2002. Thereafter, Brent Nelson constructed the apartment building. E.R. 13a. He did not, however, entirely follow the approved plans. E.R. 13a. Among other things, he "did not initially include designated disabled parking, and changed the layout of the parking lot and ingress/egress routes." E.R. 13a. Construction of the building was substantially completed and tenants moved in during the spring of 2003. E.R. 13a. Throughout this time Brent Nelson and his father Bernard Nelson co-owned the property. E.R. 40a.

In May 2003, Pam Bean, an employee of Montana Fair Housing, noticed the property and "requested from the city a copy of the building permit and temporary certificate of occupancy." E.R. 14a. Montana Fair Housing is a small, nonprofit corporation that exists "to promote fair housing, eliminate discriminatory housing practices, and increase the number and quality of housing opportunities available to people on a non-discriminatory basis." E.R. 12a. On June 3, 2003, Bean inspected the property and concluded that, as construction was progressing, the property would be inaccessible because "routes from parking into the units include stairs." E.R. 14a. MFH sent a letter to Brent Nelson on June 12, 2003, which the ALJ found was not received, to make him aware of the FHA's accessibility requirements. E.R. 14a. Bean conducted additional inspections of the property on September 23 and November 11, 2003. E.R. 14a. "In roughly September 2003, Brent Nelson transferred ownership of the property to BWN, a holding company he established for that purpose." E.R. 12a.

In order to investigate accessibility issues at the Nelsons' property, MFH "diverted resources from training and educational outreach" activities. E.R. 22a. Also, because of Petitioners' FHA violation, MFH organized and implemented "informative and educational activities in the Billings area." E.R. 22a. MFH "alleged concrete times and costs, as well as other activities it would have conducted instead." E.R. 22a, 45a. Specifically, due to its work on this case MFH was unable to conduct a training on race and national origin issues; unable to conduct a workshop on Native American issues; and prevented from giving out posters and brochures and talking to other fair housing organizations throughout the state at its targeted rate of twice a year. S.E.R. 4-7, 10-13, 16-18.

In November 2003, the city "sent Brent Nelson a letter stating, '[y]ou have not provided handicapped accessibility to the rear of the building via wheelchair ramp as approved in your submitted site plans." E.R. 14a.

On January 12, 2004, MFH filed a complaint with HUD "alleging that the property did not meet accessibility requirements." E.R. 10a, 14a. On September 29, 2005, after investigation and determination of reasonable cause, HUD issued a charge of discrimination alleging the property did not comply with the design and construction requirements of Section 3604(f)(3)(C). E.R. 11a.

2. The ALJ held a hearing on April 11 and 12, 2006. At the hearing, the evidence established that the building's front entrance faces the parking lot and the entrance to Lake Elmo Drive. E.R. 16a; S.E.R. 20, 22-23. Each of the four ground

floor apartments has a front door, where the apartment numbers are posted, on the east side of the building, facing the parking lot. E.R. 16a; S.E.R. 22-23. A person can enter the apartment through the front door only by ascending a flight of four steps to a concrete landing, and then descending five steps to an entranceway that serves two apartments. E.R. 16a; S.E.R. 20, 26-27. The Nelsons stipulated that these front entrances "are not accessible to persons in wheelchairs." E.R. 40a; S.E.R. 24-25. The evidence established that there is a sidewalk leading from the parking lot around the side of the building to the rear (west) end. E.R. 39a; S.E.R. 19. At this rear end, each of the four ground floor units has a concrete patio in front of a sliding glass door that leads into the apartment. E.R. 39a; S.E.R. 19, 21.

The ALJ heard unrebutted expert testimony that various features of the property including "parking, the patio door widths, the doorway from the kitchen to the front hallway, and the master bedroom dimensions" "did not meet any recognized accessibility standard," and were not accessible to, and usable by, persons with disabilities. E.R. 39a. For example, the expert testimony established that many doors within the unit were significantly narrower than the 32-inch width for wheelchair access specified by the Fair Housing Accessibility Guidelines and other accessibility standards, including 28-inch wide doors into all of the master bathrooms. E.R. 17a. The expert further testified about numerous other accessibility barriers, including the mailbox locations, the height of the threshold at the patio doors, the knob hardware at the front entrances, the doorways and clear

floor space in all four master bathrooms, and the distance from the wall to the centerline of the toilet seat in unit numbers 1, 6, and 12. E.R. 39a.

Petitioners did not present any expert testimony or any evidence that any person with a disability had ever lived at the property. Nor did they present any evidence that the property met any recognized accessibility standard. E.R. 42a. Instead, Brent Nelson testified he had observed two persons in wheelchairs access limited portions of the property. Specifically, he testified that the mother of a tenant used a wheelchair and that she used the sidewalk around the side of the building to the sliding glass patio doors to visit her daughter. E.R. 16a, 43a, Tr. 412-413, S.E.R. 30-31. He also testified that on one occasion he had seen a prospective tenant in a wheelchair use the sidewalk around the side of the building, enter one of the units through the sliding glass door, enter the kitchen and use the sink, and enter the hall bathroom and lift himself onto the toilet and the tub. E.R. 43a, 418-419. Neither of these individuals testified. E.R. 43a.

3. On August 24, 2006, the ALJ issued an initial decision dismissing HUD's suit against the Nelsons. E.R. 33a. The ALJ concluded that MFH had standing and Brent Nelson was not shielded from liability by the holding company, BWN. E.R. 23a-24a. He decided that "Bernard Nelson was not involved in the property's design and construction," and therefore could not be held liable. E.R. 24a. The ALJ dismissed the complaint because he concluded that Brent Nelson's testimony about disabled individuals accessing the property was "credible evidence that the

property is accessible," and because he determined that HUD failed to meet its burden to show "that the property was inaccessible." E.R. 32a.

4. On September 21, 2006, the Secretary set aside the ALJ's initial decision and remanded "to the ALJ to enter a remedial order to include appropriate retrofits to the property; monetary damages to [MFH] * * * ; civil penalties; and injunctive relief." E.R. 47a. The Secretary did not overturn the ALJ's rulings on the issues of MFH's standing and piercing the corporate veil of BWN. E.R. 45a-46a, 46a n.11.

The Secretary concluded that "not only was the property designed and constructed in violation of the [HUD] Guidelines, the property as designed and constructed does not comply with *any* recognized accessibility standard." E.R. 44a. Specifically, the Secretary found violations of the FHA's accessibility requirements with respect to parking, stairs, the knob hardware at the front entrances, the width of patio doors, the height of the threshold and lack of beveling at the patio doors, the mailbox locations, the doorways from the kitchen to the front hall, the width of the doors and clear floor space in all four master bedrooms, the lavatories in the hall bathrooms of units 6, 7, and 12, the distance from the wall to the centerline of the toilet in units 1, 6, and 12, and the front entrances. E.R. 42a-43a, 53a.

On October 2, 2006, Petitioners filed in this Court an application to enforce the ALJ's initial decision of August 24, 2006 (No. 06-74735). In an order issued

on December 26, 2006, this Court construed Petitioners' application as a petition for review, and dismissed the petition for lack of jurisdiction. S.E.R. 1.

On October 31, 2006, HUD submitted its proposed retrofit plan. E.R. 50a. Petitioners subsequently filed several incomplete plans. E.R. 50a-51a. None of Petitioners' plans proposed to make the front entrances accessible. E.R. 50a-51a. On June 1, 2007, the ALJ issued a remedial order requiring the Nelsons, *inter alia*, to retrofit the property to bring it into compliance in each of the specified areas, E.R. 49a-59a; pay damages to MFH of $5,730.45, E.R. 62a; and pay civil penalties to HUD, E.R. 62a-63a.

SUMMARY OF ARGUMENT

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

1. Petitioners' claim that the ALJ's initial decision of August 24, 2006, is HUD's final order in the case was previously raised in and rejected by this Court in appeal number 06-74735. The Court's earlier resolution of this issue is law of the case. In any event, HUD's regulations reasonably interpret the FHA to allow the Secretary to "set aside" an ALJ's initial decision within 30 days.

2. HUD correctly determined that MFH has standing under the Act. The Act makes plain that "failure to design and construct" is a form of discrimination that violates the Act. Substantial evidence supports HUD's determination that MFH has shown Petitioners' FHA violation frustrated its mission and diverted its

resources. In addition, MFH has standing to pursue equitable relief because its mission will continue to be frustrated and it will continue to divert resources as long as Petitioners' FHA violation persists. Moreover, denying MFH standing to pursue equitable relief would impede the express statutory purpose of the Fair Housing Initiative Program. In any event, pursuant to 42 U.S.C. 3612(g)(3), HUD can order any appropriate equitable relief to vindicate the public interest in preventing future FHA violations.

3. The Secretary of HUD correctly interpreted the Act and its own Fair Housing Accessibility Guidelines in holding Petitioners liable for noncompliance with the FHA's design and construction requirements, 42 U.S.C. 3604(f)(3)(C). The Guidelines "describe minimum standards of compliance" and make clear that noncompliance with the Guidelines triggers a requirement to "demonstrate" compliance with the FHA by an alternative means. The Guidelines' definitions of "accessible" and "accessible route" show that the alternatives to compliance with the Guidelines are compliance with the American National Standards Institute (ANSI) standard, or compliance with a comparable – and thus objective – standard. Moreover, the Act itself requires compliance with an objective and broadly applicable accessibility standard. Petitioners' contention that they need not make any showing of compliance with the Act's design and construction requirements merely because the Guidelines are "not mandatory" is thus plainly inconsistent with the Act and the Guidelines. Moreover, uncontradicted evidence of record

amply supports the Secretary's determination that Petitioners' property is inaccessible in violation of the Act.

4. Petitioners' argument that Bernard Nelson is not liable for FHA violations on his property relies on their incorrect belief that this Court may review and sustain the ALJ's August 24, 2006, initial decision – which was overturned by the Secretary. In any event, Bernard Nelson's ownership of the property provides a basis for liability under controlling Fair Housing Act precedent.

5. This Court is not deprived of jurisdiction to mandate Petitioners' compliance with the remedial order's retrofitting requirements by HUD's having pierced the corporate veil of Petitioners' holding company, BWN, and dismissed it from the case. Petitioners admit that the corporate veil was correctly pierced in this case. This Court therefore has jurisdiction to require Petitioners – who are the owners of the property and admitted "alter-ego" of BWN – to complete the ordered retrofits.

6. The Secretary correctly ruled the building's front entrances, shared by multiple apartments, must be made accessible under the Act because they are "public use and common use" areas. HUD's regulations and the only court of appeals decision to address the issue further support the Secretary's ruling. Petitioners' arguments to the contrary fail to address the reasoning of the Secretary's decision.

ARGUMENT

I

THE ALJ'S INITIAL DECISION OF AUGUST 24, 2006, IS NOT A FINAL AGENCY ORDER

A. Standard Of Review

This Court reviews its "own subject matter jurisdiction de novo." *National Ass'n of Agric. Employees* v. *Federal Labor Relations Auth.*, 473 F.3d 983, 986 (9th Cir. 2007).

B. This Court's Prior Resolution Of This Issue Is Law Of The Case

Petitioners claim the ALJ's initial decision of August 24, 2006, is HUD's final order in this case. Br. 27-30. Their argument misinterprets Section 3612(h)(1). Moreover, it was previously raised in this case and was rejected by this Court.

In appeal number 06-74735, this Court rejected Petitioners' Section 3612(h)(1) argument – raised in an October 2, 2006, application to enforce the ALJ's initial decision – stating:

> The Secretarial Designee's September 21, 2006 order timely set aside the Administrative Law Judge's (ALJ) initial August 24, 2006 decision and remanded the proceedings to the ALJ to enter a remedial order consistent with the Secretarial Designee's instructions. See 42 U.S.C. § 3612(h)(1). Because this matter has been remanded, there is no final appealable order.

S.E.R. 1. Accordingly, the Court dismissed the petition for lack of jurisdiction. S.E.R. 1.

The Court should not re-decide the issue. See *Jenkins* v. *County of Riverside*, 398 F.3d 1093, 1094 (9th Cir. 2005) (applying a "prior panel's holding" as "the law of [the] case"). Under *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1393 (9th Cir.), cert. denied, 516 U.S. 955 (1995), "the court may reconsider previously decided questions in cases in which there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice." None of these factors apply here, so the Court's prior resolution of this issue is determinative.

C. HUD's Regulation Reasonably Interprets The Act

If this Court were nevertheless to reexamine this issue, it should again conclude that the ALJ's August 24, 2006, decision did not become final because it was timely set aside by the Secretary. "HUD regulations interpret [Section 3612(h)(1)] to permit the Secretary to 'affirm, modify or set aside, in whole or in part, the initial decision, or remand the initial decision for further proceedings.' 24 C.F.R. 180.675(a)." See *HUD* v. *Nelson*, No. 06-74735 (October 25, 2006) Respondent's Answer In Opposition To Petitioners' Application To Enforce Agency Order at 3. This regulation plainly does not conflict with the statute's requirement that the *Secretary's* "review shall be completed not later than 30 days" after issuance of an initial decision. 42 U.S.C. 3612(h)(1). In *Mountain Side Mobile Estates Partnership* v. *Secretary of Housing and Urban Development*, 56

F.3d 1243 (10th Cir. 1995), the court rejected an argument identical to the one made by Petitioners here. Specifically, *Mountain Side* held "that the agency's interpretation of its review power under § 3612(h)(1) in 24 C.F.R. § 104.930(a) is reasonable, not 'arbitrary, capricious,' nor 'manifestly contrary to the statute.'" 56 F.3d at 1248. *Mountain Side* further concluded "there is no indication that the Secretary's interpretation of his review powers is inconsistent with the legislative intent nor are there any other compelling indications that it is wrong." *Ibid.* Accordingly, Petitioners are plainly incorrect in asserting that the ALJ's decision of August 24, 2006, is the final agency order in this case.

II

MONTANA FAIR HOUSING HAS STANDING UNDER THE FAIR HOUSING ACT

A. Standard Of Review

The Supreme Court has concluded that Congress intended for fair housing organizations to be afforded the broadest possible standing, consistent with the constitutional limitations of Article III. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982) (holding that "Congress intended standing * * * to extend to the full limits of Art. III and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the Fair Housing Act]") (internal quotation marks and citation omitted). That is, "the only requirement for standing to sue * * * is the Art. III requirement of injury in fact." *Id.* at 376. This

Court reviews HUD's determination of standing *de novo*. See *Ramirez-Alejandre* v. *Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003).

B. Petitioners' Arguments That MFH Lacks Standing Are Unavailing

Petitioners advance several arguments against complainant MFH's standing to bring claims under the Fair Housing Act. These arguments have no merit.

1. Petitioners' Claim That "There Was No Violation" Of The Fair Housing Act Is Incorrect

Petitioners incorrectly contend, Br. 20-23, that MFH lacks standing because no "buyer or renter" or "person" was ever "denied housing," so there was "no organic violation of the Act."

In fact, Section 3604(f)(3)(C) provides that "discrimination includes * * * a failure to design and construct" a covered dwelling as specified therein. The text does not mention any required effect of "a failure to design and construct," and thereby makes clear that a "failure" to properly design and construct a covered dwelling constitutes "discrimination" on the basis of disability, in violation of the Act. The language of the statute thus dispels any notion that in order to prove such discrimination, the Secretary also had to show that a disabled person actually tried to rent a unit at the property and was not able to do so because of the inaccessible features. As the House Judiciary Committee explained, the Act's accessibility requirements are "essential for equal access and to avoid future de facto exclusion of persons with handicaps." H.R. Rep. No. 711, 100th Cong. 2d Sess. 2188

(1988). Thus, because of their inaccessible design and construction, the apartments deny persons with disabilities who may seek to live there now or in the future their right to equal and nondiscriminatory access.

Here, substantial evidence in the record supports the Secretary's determination that Petitioners "violated the Act's design and construction requirements." E.R. 47a. See Argument III, *infra*. Petitioners' bare assertion that "a violation never occurred," Br. 23, is thus plainly without substance.

2. MFH Has Standing Under Fair Housing of Marin v. Combs

Petitioners next assert, Br. 23-25, that MFH does not have standing because it did not suffer injury. Petitioners are incorrect.

In *Fair Housing of Marin* v. *Combs*, 285 F.3d 899, 902, 905 (9th Cir.), cert. denied, 537 U.S. 1018 (2002), this Court held that a "community fair housing organization" "has direct standing to sue [where] it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission." MFH's "mission is to promote fair housing, eliminate discriminatory housing practices, and increase the number and quality of housing opportunities available to people on a non-discriminatory basis." E.R. 12a. A violation of the FHA within its jurisdiction "would therefore constitute a 'frustration of [its] mission.'" See *Smith*

v. *Pacific Prop. and Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir.) (citing *Fair Housing of Marin*), cert. denied, 543 U.S. 869 (2004).[2]

Substantial evidence supports the Secretary's finding that MFH showed "diversion of its resources to combat the particular housing discrimination in question." See *Smith*, 358 F.3d at 1105. The diversion of resources requirement of the organizational standing test is met where "resources were diverted to investigating and other efforts to counteract [Petitioners'] discrimination." *Fair Housing of Marin*, 285 F.3d at 905. The Secretary found, in agreement with the ALJ's initial decision, that MFH "(1) 'diverted resources from training and educational outreach to investigate the property and to determine that it believed there were FHA violations at the property;' (2) 'also diverted resources to engage in informative and educational activities in the Billings area as a result of its investigation of the property and its concern about the possible FHA violations and impact;' and (3) 'alleged concrete times and costs, as well as the other activities it would have conducted instead.'" E.R. 45a. These findings are supported by the

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[2] In establishing organizational standing, MFH concomitantly establishes that it is an "aggrieved person" under the Act. The Act defines "person" to include "one or more individuals, corporations, * * * [or] associations," 42 U.S.C. 3602(d), and "aggrieved person" to include "any person who[] (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur," 42 U.S.C. 3602(i). The Act's definition of "aggrieved person" does not require any additional showing beyond that necessary to establish standing under Article III. See *Fair Housing Council of Suburban Philadelphia* v. *Montgomery Newspapers*, 141 F.3d 71, 75 n.1 (3d Cir. 1998); *Moseke* v. *Miller & Smith, Inc.*, 202 F. Supp. 2d. 492, 497 (E.D. Va. 2002).

record. See E.R. 22a; S.E.R. 4-7, 10-13, 16-18. Petitioners' contention, Br. 25, unsupported by citation to the record, that "[n]o resources were diverted," is plainly false. The agency findings therefore satisfy the "diversion of resources" prong of the organizational standing test under *Fair Housing of Marin*.[3]

3. MFH Has Standing To Pursue Equitable Relief

Petitioners next argue, Br. 25-26, that under *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-105 (1983), MFH does not have standing to pursue injunctive relief because MFH alleged only that it lost money, and did not assert that it was denied access to the property. This argument misunderstands *Lyons*.

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[3] Petitioners are also incorrect in asserting, Br. 23, that MFH does not have organizational standing because most of its funding comes from the federal government. Regardless of the source of MFH's funds, the diversion of resources to counteract Petitioners' discrimination leaves fewer resources available to fulfill its mission in other ways. See S.E.R. 4-7, 10-13, 16-18 (because of the diversion of its resources required to pursue its case against Petitioners, MFH was unable to conduct a training on race and national origin issues; unable to conduct a workshop on Native American issues; and prevented from giving out posters and brochures and talking to other fair housing organizations throughout the state at its targeted rate of twice a year). See *Fair Housing Council, Inc.* v. *Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 477 (6th Cir. 2006) (rejecting the argument that a fair housing organization lacked standing because it investigated the alleged violation with "a fixed grant from HUD for the purpose of investigating housing discrimination through the use of testers"), cert. denied, 2008 WL 59848 (U.S. Jan. 7, 2008); *ibid.* ("Moreover, almost anytime an organization * * * funds a particular project * * * the pool of resources that it has to combat other instances of discrimination grows smaller."). Indeed, the legislation authorizing federal grants to "private nonprofit fair housing enforcement organizations" like MFH describes, as a purpose of the grant, "enforcement activities * * * to remedy [FHA] violations." 42 U.S.C. 3616a(b)(1). This purpose would be frustrated if the very receipt of the funds deprived MFH, and similar organizations, of standing to enforce the FHA.

MFH need not claim it was denied access to the property in order to have standing to pursue injunctive relief. *Lyons* held that a person who alleged he was illegally choked by a police officer lacked standing to pursue an injunction against the city to restrain future use of chokeholds by its police officers. 461 U.S. at 105. Plaintiff's claim that he might, at some point in the future, be subjected by Los Angeles Police to another illegal chokehold was held to be too speculative to confer standing to pursue this type of relief. *Ibid.*

Unlike the injury in *Lyons*, MFH's injury is ongoing. Petitioners' FHA violations will continue to frustrate MFH's mission and require MFH to continue to divert resources to combat its effects until the violation is remedied. The equitable remedy, requiring Petitioners to retrofit the property to bring it into compliance with Section 3604(f)(3)(C), plainly redresses MFH's injury.

Moreover, the Secretary is statutorily authorized to "use funds made available under [the Fair Housing Initiative Program] to conduct, through contracts with private nonprofit fair housing enforcement organizations, investigations of violations of the rights granted under [the FHA], and such enforcement activities as appropriate to remedy such violations." 42 U.S.C. 3616a(b)(1); see also *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (recognizing that such "private attorneys general" suits play "an important role in this part of the Civil Rights Act of 1968"). Section 3616a(b)(1)'s purpose of allowing HUD to contract with organizations like MFH to investigate and seek to remedy FHA

violations would be significantly impeded if these organizations lacked standing to seek equitable relief and could only obtain damages.

In any event, the Act specifically authorizes the ALJ not only to assess damages to redress the injury to the aggrieved person but also to order "appropriate" relief, including "injunctive or other equitable relief" and to "vindicate the public interest," by imposing civil penalties. 42 U.S.C. 3612(g)(3). Nothing in the statute suggests that the equitable relief that the Secretary may order must benefit the complainant directly; indeed prospective relief by its nature vindicates the public interest in preventing future violations of the law. Thus, in this case, the injunctive relief was appropriately entered pursuant to Section 3612(g)(3), regardless of MFH's standing to pursue such relief.[4]

III

HUD'S RULING THAT PETITIONERS' APARTMENT BUILDING WAS DESIGNED AND CONSTRUCTED IN VIOLATION OF THE FAIR HOUSING ACT IS CORRECT

A. Standard Of Review

This Court has the authority to set aside a HUD enforcement action "when the agency has acted with arbitrariness or caprice." *Pfaff* v. *United States Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 747 (9th Cir. 1996) (citing 5 U.S.C. 706(2)(A)).

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[4] This Court should not reach the issue of whether MFH has standing based on the costs of pursuing an administrative complaint. See *Fair Housing of Marin*, 285 F.3d at 905 (determining that it was unnecessary to decide whether litigation costs alone confer standing where the fair housing organization "alleged injury beyond litigation expenses").

This Court "may reverse under the arbitrary and capricious standard only if the agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation [for its decision] that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Great Basin Mine Watch* v. *Hankins*, 456 F.3d 955, 962 (9th Cir. 2006). This Court must sustain the agency's factual findings unless they "are not supported by substantial evidence." See *Yetiv* v. *United States Dep't of Hous. & Urban Dev.*, 503 F.3d 1087, 1089 (9th Cir. 2007) (citing 5 U.S.C. 706(2)(E)). HUD's interpretation of the Fair Housing Act "commands considerable deference" because HUD is the federal agency assigned to implement the Act. See *Pfaff*, 88 F.3d at 747. This Court "will defer to [an] agency's interpretation of its own regulation, unless that interpretation is plainly erroneous or inconsistent with the regulation." *Sacks* v. *Office of Foreign Assets Control*, 466 F.3d 764, 778 (9th Cir. 2006), cert. denied, 127 S. Ct. 2033 (2007).

Petitioners claim, Br. 18-20, that this Court should give "great deference" to the initial ALJ decision that dismissed the charge of discrimination. That claim is incorrect. This Court may not review an ALJ's initial decision that was set aside by the Secretary and is therefore not the final order of the agency. See 28 U.S.C. 2342(6) (This Court has jurisdiction over "all final orders under section 812 of the Fair Housing Act."). Indeed, as indicated (*supra,* pp. 13-15), this Court has

already ruled that it lacked jurisdiction to review the ALJ's August 24, 2006, initial decision because that decision is not a final appealable order. S.E.R. 1. Therefore, the ALJ's initial decision of August 24, 2006, is not before this Court and not entitled to deference.

Petitioners further contend, Br. 18 (citing *Aylett* v. *Secretary of Hous. & Urban Dev.*, 54 F.3d 1560 (10th Cir. 1995)), that this Court should apply a "heightened scrutiny" standard of review to the Secretary's order setting aside the ALJ's initial decision. That contention similarly lacks merit.

In *Aylett*, the court recognized that HUD's administrative findings must be sustained if supported by substantial evidence, but concluded that the standard was less deferential – requiring "heightened scrutiny" – where the Secretary overturns the ALJ's decision because of a different assessment of witness *credibility*. 54 F.3d at 1561. Even if adopted by this Court, the *Aylett* "heightened scrutiny" standard would not apply to the Secretary's decision in this case. The Secretary set aside the ALJ's August 24, 2006, decision because the ALJ incorrectly applied the law, ignored record evidence, and relied upon evidence that, even if credible, was legally insufficient to justify the ALJ's ruling. E.R. 41a-45a. Because the Secretary correctly applied the law, and his findings are supported by substantial evidence, it cannot be said that the final agency order is arbitrary or capricious.

B. The Secretary Correctly Determined That Petitioners Failed To Comply With The FHA's Design And Construction Requirements

1. Legal Standard

The Fair Housing Act provides:

For purposes of this subsection, discrimination includes –

* * * * *

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that –

> (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and
>
> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> > (I) an accessible route into and through the dwelling;
> >
> > (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
> >
> > (III) reinforcements in bathroom walls to allow later installation of grab bars; and
> >
> > (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. 3604(f)(3)(C).

Section 3608 of Title 42 delegates to the Secretary of HUD "[t]he authority and responsibility for administering" the Fair Housing Act; Section 3614a and Section 3604(f)(5)(C) grant the Secretary rulemaking authority. Pursuant to this authority, HUD developed Fair Housing Accessibility Guidelines through the traditional rulemaking process after receiving public comment from numerous parties. See 56 Fed. Reg. 9475 (1991) (see Add. 4). HUD explained that "[t]he purpose of the Guidelines is to describe minimum standards of compliance with the specific accessibility requirements of the Act." 56 Fed. Reg. at 9476 (see Add. 5). The Guidelines provide that they are "not mandatory" and "[b]uilders and developers may choose to depart from these guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act." 56 Fed. Reg. at 9499 (see Add. 6).

"[A] plain reading of section 3604(f)(3)(C) demonstrates that it requires compliance with an objective accessibility standard broadly applicable to handicapped people." See *United States* v. *Tanski*, No. 1:04-cv-714, 2007 WL 1017020, at *14 (N.D.N.Y. March 30, 2007). A party is liable for violation of the FHA's design and construction requirements where "a covered dwelling does not comply with the ANSI standards or the HUD Guidelines, and defendants fail to submit evidence that the property complies with any other accessibility standard." *Id.* at *11.

2. This Court Should Reject Petitioners' Burden Shifting Argument

Petitioners conclude, Br. 15-16, that because the Guidelines are "not mandatory," "[t]he law imposes no burden upon [them] to come forward with evidence." Br. 16. Contrary to Petitioners' contention, the Secretary's opinion properly sets out a framework by which "[t]he Charging Party may establish a *prima facie* case by proving a violation of the Guidelines." E.R. 42a. Next, the presumption established by a proved violation of the Guidelines can be rebutted by a party's "demonstrating compliance with a recognized, comparable, objective measure of accessibility." E.R. 42a.

Petitioners wrongly believe that under this framework the burden of proof is impermissibly shifted to them. Br. 16 (citing Federal Rule of Evidence 301). The Secretary did not say that the burden of proof shifts to them; rather, the Secretary stated only that violation of the Guidelines creates a "rebuttable presumption." E.R. 42a. This framework is consistent with Rule 301, which states "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption." Fed. R. Evid. 301. Indeed, Petitioners' brief appears to recognize that they may not simply do nothing in the face of the presumption established by their violation of the Guidelines. See Br. 16 (asserting that "[a] presumption fails to exist and has no evidentiary weight whatsoever as soon as there *has been some evidence contrary to the presumption put in the record*") (emphasis added). By failing even to assert "compliance with a

recognized, comparable, objective measure of accessibility," E.R. 42a – *i.e.,* evidence contrary to the presumption – Petitioners failed to carry their "burden of going forward with evidence to rebut or meet the presumption."

The framework applied by the Secretary is supported by the language of the Act. The Act makes clear that compliance with the design and construction requirements of Section 3604(f)(3)(C) must be measured by reference to an objective standard of accessibility. The Act refers to "handicapped persons" and the concept of accessibility. See, *e.g.*, 42 U.S.C. 3604(f)(3)(C)(i) (requiring that "common use" areas be "readily accessible to and usable by handicapped persons"); 42 U.S.C. 3604(f)(3)(C)(ii) (requiring that doors be "sufficiently wide to allow passage by handicapped persons in wheelchairs"). The Act's requirement of "compliance with a broadly applicable objective accessibility standard is reinforced by the provision in section 3604(f)(4) that the requirements of section 3604(f)(3)(C)(iii) may be satisfied by compliance with the appropriate ANSI requirements." *Tanski*, 2007 WL 1017020, at *14. The requirements of Section 3604(f)(3)(C) are therefore general and tied to an objective national standard.

The Guidelines provide further support for the Secretary's framework. "The purpose of the Guidelines is to describe *minimum standards of compliance* with the specific accessibility requirements of the Act." 56 Fed. Reg. at 9476 (emphasis added) (see Add. 5). To be sure, as Petitioners point out, the introduction to the Guidelines states that they are "not mandatory." 56 Fed. Reg. at 9499 (see Add. 6).

However, that same introduction states, in the very next sentence, that "[b]uilders and developers may choose to depart from these guidelines, *and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act.*" 56 Fed. Reg. at 9499 (emphasis added) (see Add. 6); see also *United States* v. *Taigen & Sons, Inc.*, 303 F. Supp. 2d 1129, 1154 (D. Idaho 2003) (relying on this language to grant summary judgment for the United States where defendants' property did not comply with the Guidelines or ANSI requirements and defendants "failed to submit evidence in the record that [their property] complie[d] with any other accessibility standard"). Under the plain language of the Guidelines, therefore, noncompliance with the Guidelines triggers a burden to "demonstrate" compliance with the FHA by an alternative method.

The Guidelines show that, as is apparent in the Act itself, this demonstration of compliance by an alternative means must be accomplished by showing compliance with some objective standard. In defining the term "accessible," the Guidelines state that "[a] public or common use area that complies with appropriate requirements of ANSI A117.1-1986, a comparable standard or these guidelines is 'accessible.'" 56 Fed. Reg. at 9499 (see Add. 6). Similarly, in defining the term "accessible route," the Guidelines state "[a] route that complies with the appropriate requirements of ANSI A117.1-1986, a comparable standard, or Section 5, Requirement 1 of these guidelines is an 'accessible route.'" 56 Fed. Reg. at 9499 (see Add. 6). These statements, contained in the Guidelines'

definitions of "accessible" and "accessible route," limit the meaning of those terms. Thus, by providing that a route that complies with ANSI, "a comparable standard," or the Guidelines "is an 'accessible route,'" the Guidelines also express the inverse. That is, a route that fails to comply with *any* appropriate objective standard is *not* "an 'accessible route.'"

Moreover, this Court must defer to HUD's reasonable interpretation of its own Guidelines and the FHA. See *Sacks*, 466 F.3d at 778; *Pfaff*, 88 F.3d at 747. Petitioners argue because the Guidelines are "not mandatory," they are not required to make any showing that they complied with Section 3604(f)(3)(C) – even in the face of unrebutted expert testimony that the property in numerous respects does not meet any recognized accessibility standard and is not accessible to or usable by persons with disabilities. Even if this were a minimally plausible interpretation of the Guidelines – and it is not – Petitioners must show that HUD's interpretation of its own guidelines is "plainly erroneous." *Sacks*, 466 F.3d at 778. Petitioners have failed even to attempt to make this showing.

Finally, HUD's application of the FHA and Guidelines is supported by decisions of federal district courts.[5] "Courts have held that summary judgment on the issue of design-and-construction discrimination is appropriate where plaintiff demonstrates that a covered dwelling does not comply with the ANSI standards or

[5] Neither this Court nor any other federal court of appeals has considered this issue.

the HUD Guidelines, and defendants fail to submit evidence that the property complies with any other accessibility standard." *Tanski*, 2007 WL 1017020, at *11 (citing *Taigen*, 303 F. Supp. 2d at 1154 (granting summary judgement where plaintiff established noncompliance with the Guidelines and ANSI and defendants "failed to submit evidence in the record that [their property] complies with any other accessibility standard"), and *United States* v. *Quality Built Const., Inc.*, 309 F. Supp. 2d 756, 763 (E.D.N.C. 2003) (granting summary judgment where plaintiff proved noncompliance with the Guidelines and defendants "have not come forward with alternative measurements or any other evidence to show that a triable issue of fact exists.")). Petitioners' brief fails to cite any case that supports their preferred rule – that because the Guidelines are not mandatory they need not make any showing of compliance with Section 3604(f)(3)(C). Moreover, the Secretary is unaware of any case that supports this rule.[6]

3. Uncontradicted Record Evidence Amply Supports HUD's Determination

In any event, the uncontradicted evidence that Petitioners' property is inaccessible in violation of the Act is overwhelming. The Secretary found, based on uncontradicted expert testimony, that the property failed in many ways to

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[6] Petitioners' brief contains a long summary of this Court's decision in *Pfaff,* immediately following its statement that the Guidelines are not mandatory. Br. 14-15. Petitioners do not make clear why they think *Pfaff* supports their argument that because the Guidelines are "not mandatory," they have no burden to show compliance with Section 3604(f)(3)(C). In fact, nothing in *Pfaff* – a familial status case – supports their argument.

"comply with *any* recognized accessibility standard." E.R. 42a. "[M]any features of the property are not accessible to and usable by persons with disabilities such as parking; the stairs and knob hardware at the front entrances; the width of the patio doors; the height of the threshold and lack of beveling at the patio doors; the mailbox location; the doorways from the kitchen to the front hall; the width of the doors and the clear floor space in all four master bedrooms; the lavatories in the hall bathrooms of units 6, 7, and 12; the distance from the wall to the centerline of the toilet in units 1, 6, and 12." E.R. 42a-43a. Finally, the front entrances are indisputably – as stipulated – inaccessible. E.R. 43a.

Against this mountain of evidence, Petitioners offered only the "unsubstantiated, vague, and anecdotal testimony of * * * Brent Nelson about two [disabled] people allegedly navigating the property." E.R. 43a. Petitioners failed to dispute the accessibility expert's findings and "could not name any specific accessibility standard that the property was build to meet." E.R. 42a.

Indeed, Petitioners' brief fails to argue that their anecdotal evidence established compliance with the Act. See E.R. 43a. This argument is therefore waived. See *Rattlesnake Coal.* v. *United States Envtl. Prot. Agency*, 509 F.3d 1095, 1100 (9th Cir. 2007) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in the appellant's opening brief."). Even if the Court were to reach this argument, it should conclude that the Secretary correctly interpreted the Act in determining that "the issue is not whether

a specific person with a disability could access the property, but rather, whether *most persons* with wheelchairs or other disabilities can utilize the property." E.R. 43a. This Court should therefore defer to the Secretary's conclusion that such evidence, even if credible, does not rebut the presumption created by proof of a Guidelines violation. See E.R. 43a, 45a.

IV

HUD CORRECTLY RULED THAT BERNARD NELSON IS LIABLE UNDER THE ACT

A. Standard Of Review

This Court will set aside a HUD enforcement action only when the agency has acted with arbitrariness or caprice; sustain factual findings unless they are not supported by substantial evidence; and defer to HUD's reasonable interpretation of the FHA. See pp. 21-22, *supra.*

B. Bernard Nelson Was Correctly Held Liable

Petitioners contend, Br. 32-33, that Bernard Nelson is not liable for violating the FHA because he was insufficiently involved with the property. This Court, however, should sustain HUD's determination that he is liable as an owner of the property during its design and construction.

Petitioners fail to raise, Br. 32-33, and thus waive, any argument that the Secretary's imposition of FHA liability on Bernard Nelson is arbitrary and capricious. See *Rattlesnake Coal.* v. *United States Envtl. Prot. Agency*, 509 F.3d

1095, 1100 (9th Cir. 2007). Instead, they ask this Court to "uphold" and deem "conclusive" the ALJ's finding in its initial decision of August 24, 2006, that Bernard Nelson was not liable. As previously explained, pp. 13-15, *supra*, this Court has no reason to review or defer to the ALJ's initial decision.

In any event, Petitioners do not dispute, Br. 32-33, the Secretary's finding that "Bernard Nelson owned the property during its design and construction." E.R. 11a-12a. This fact establishes liability for the FHA violations. In *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003), the Court stated "it is well established that the [Fair Housing] Act provides for vicarious liability" and "traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." Under these traditional rules, joint owners of property are vicariously liable for FHA violations by a co-owner. See *Alexander* v. *Riga*, 208 F.3d 419, 433 (3d Cir. 2000) ("Mr. Riga could not insulate himself from liability for discrimination in regard to an apartment building owned jointly by him and his wife and managed for their joint benefit, merely by relinquishing the responsibility for preventing discrimination to [his wife]."), cert denied, 531 U.S. 1069 (2001).

Furthermore, in determining who may be liable for a violation of the design and construction provisions of the Act, courts have held that "[w]hen a group of entities enters into the design and construction of a covered dwelling, all participants *in the process as a whole* are bound to follow" the Act. *Baltimore*

Neighborhoods, Inc. v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 665 (D. Md. 1998); see also *Montana Fair Hous.* v. *American Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1068-1069 (D. Mont. 1999) (holding a landlord liable for a violation of the FHA's design and construction requirements because of the actions of his contractor). Agency decisions similarly support liability for co-owners. See, *e.g.*, *HUD* v. *Gruzdaitis*, No. 02-96-0377-8, 1998 WL 482759 at *4 (HUDALJ Aug. 14, 1998) ("Mrs. Gruzdaitis' liability rests solely on her status as co-owner of the building."); *HUD* v. *Dutra*, No. 09-93-1753-8, 1996 WL 657690 at *11 (HUDALJ Nov. 12, 1996) (all co-owners liable though one may have discriminated without the other co-owners' knowledge or consent). As the owner of the property during its design and construction, Bernard Nelson shares responsibility for the inaccessible design and construction of the property. HUD's determination that Bernard Nelson is liable for the FHA violations on his property is thus correct, and certainly not arbitrary and capricious.

V

THIS COURT HAS JURISDICTION TO MANDATE PETITIONERS' COMPLIANCE WITH HUD'S REMEDIAL ORDER

A. Standard Of Review

This Court reviews its "own subject matter jurisdiction de novo." *National Ass'n of Agric. Employees* v. *Federal Labor Relations Auth.*, 473 F.3d 983, 986 (9th Cir. 2007).

B. This Court Has Jurisdiction To Uphold HUD's Remedial Order

Petitioners argue, Br. 33-35, that this Court cannot sustain the remedial order's requirement that they retrofit their property because the property is actually owned by a limited liability holding company called BWN. The initial decision of the ALJ dismissed BWN as a party because "it [was] appropriate to 'pierce the corporate veil.'" E.R. 23a. The Secretary affirmed that portion of the decision. See E.R. 46a n.11. Asserting that BWN is not a party, and therefore not subject to this Court's jurisdiction, Petitioners claim this Court cannot require the design and construction violations to be remedied. This claim is incorrect.

Petitioners admit, Br. 34, that they are subject to liability for damages, and accept HUD's finding that they are "the alter-ego" of BWN. This admission that the ALJ correctly pierced the corporate veil of BWN fatally undermines their claim. Petitioners appear to assume – without argument or citation to legal authority – that, when the corporate veil is pierced, the owners of the company may be held liable for damages caused by the company's discrimination, but may not be required to take action to remedy that discrimination. This assumption is incorrect.

This Court has explained that when corporate veil piercing is supported by the relevant factors, the Court will "disregard * * * the corporate fiction on the grounds of equity and fairness," "cast aside the corporate shield," and "fasten liability on the individual shareholder." *Holley* v. *Crank*, 400 F.3d 667, 674-675

(9th Cir. 2005) (remanding to the district court for consideration of liability based on corporate veil piercing and suggesting that piercing is appropriate in a FHA case where, *inter alia*, the corporation was "thinly capitalized"); cf. E.R. 23a (finding BWN "had no money or tax returns of its own"). Petitioners do not dispute that, as the alter egos and owners of BWN, they plainly have the authority to retrofit the property as required by the Secretary's Order. Accordingly, this Court has jurisdiction to compel Petitioners to complete the retrofits required by the remedial order.

VI

HUD CORRECTLY REQUIRED PETITIONERS TO RETROFIT THE FRONT ENTRANCES OF THEIR BUILDING

A. Standard Of Review

This Court will set aside a HUD enforcement action only when the agency has acted with arbitrariness or caprice; sustain factual findings unless they are not supported by substantial evidence; and defer to HUD's reasonable interpretation of the FHA. See pp. 21-22, *supra*.

B. The Required Retrofit Is Reasonable

Petitioners argue, Br. 30-32, that they should not be required to retrofit the front entrances of their building. This argument is without merit.

The Secretary found that "[t]he stair landings at the front of the building are common areas because they each provide access not only to ground floor units

below but also to the units on the upper floors." E.R. 43a. This finding is supported by substantial evidence, including Petitioners' stipulation that the front entrances are not accessible to persons in wheelchairs. See E.R. 40a, 43a. The Secretary concluded, "[a]s a result" of this finding, that "the front (east) entrances of the property are required to be accessible as a matter of law." E.R. 43a. In entering the remedial order on remand, the ALJ correctly concluded that she was "bound by [the Secretary's] determination" of that issue, and "that the Secretary's Order requires that the front entrances be retrofitted." E.R. 57a.

The Secretary's conclusion is compelled by the plain language of the statute. The Act defines discrimination to include the "failure to design and construct" covered dwellings "in such manner that the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons." 42 U.S.C. 3604(f)(3)(C)(i). The Secretary's decision is also consistent with *United States* v. *Edward Rose & Sons*, 384 F.3d 258 (6th Cir. 2004), in which the apartments at issue were designed similarly to the ones involved in this case. The front doors that faced the parking lot could be reached only by going down stairs to a common landing shared by two apartments. *Id.* at 261. There was a path without steps, however, that led around the building to patio doors in the rear of the building. *Ibid.* Upholding a preliminary injunction prohibiting the defendants from proceeding with construction on this design, the court held that "because the

two apartments share the stair landing, the stair landing qualifies as a 'common area' that must be accessible" pursuant to Section 3604(f)(3)(C)(i). *Id.* at 263.

The Secretary's conclusion is also supported by HUD's regulations. HUD's regulations state that "*[p]ublic use areas* means interior or exterior rooms or spaces of a building that are made available to the general public." 54 Fed. Reg. 3288 (1989) (emphasis added) (see Add. 2). The regulations provide that "*[c]ommon use areas* means rooms, spaces or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and passageways among and between buildings." 54 Fed. Reg. at 3288 (emphasis added) (see Add. 2). Petitioners' stair landings therefore must be accessible under the regulations as they are "exterior * * * spaces" "outside of a building" that are "made available to the general public" and "made available for the use of residents of a building or the guests thereof." 54 Fed. Reg. at 3288 (see Add. 2).

Furthermore, courts have recognized such retrofitting as the appropriate remedy for noncompliance with design and construction requirements under the Fair Housing Act. See *Balachowski* v. *Boidy*, No. 95 C 6340, 2000 WL 1365391, at *15 (N.D. Ill. Sept. 20, 2000) (retrofitting is an appropriate way to remove the physical barriers created by the failure to design and construct a property in compliance with the Fair Housing Act); *Baltimore Neighborhoods* v. *LOB, Inc.*, 92

F. Supp. 2d 456, 467 (D. Md. 2000) (finding that relief in the form of retrofitting or a retrofitting fund is an appropriate remedy under the Fair Housing Act because without such relief, the vestiges of defendant's discrimination will linger).

Petitioners' arguments to the contrary, Br. 30-32, reflect a clear misunderstanding of the law. Petitioners first contend – again without any supporting evidence or citation to the record – that the required retrofit is moot because "subsequent events have made the patio doors far more accessible because phase two of this residential development now has a parking lot far closer to the back patio doors." Br. 31. Even if this is true (and there is no evidence in the record that it is), it does not address the reason the Secretary held that front entrances must be accessible – *i.e.,* that they are "common use areas" because they provide access to more than one apartment.

Petitioners' second argument, Br. 31, similarly misapprehends the meaning of Section 3604(f)(3)(C)(i). Petitioners miscite this Section as requiring that "there must be *an* accessible entrance on an accessible route" – words that do not appear in the statute. Based on this misreading of the statute, Petitioners go on to argue that the Secretary incorrectly held that "the primary entrance must be accessible." Br. 31. But that is not what the Secretary held. Rather, as previously explained, the Secretary held that the front entrances must be accessible because they provide access to multiple apartments and are therefore public and common use areas. Petitioners' argument thus fails to come to grips with the Secretary's reasoning,

and is directly contrary to the Sixth Circuit's decision in *Edward Rose & Sons,* 384 F.3d at 263.

Finally, Petitioners argue the ALJ who issued the remedial order was not impartial because she found the cost of retrofitting the front entrances "not so unreasonable that [requiring it] would constitute an abuse of judicial discretion." E.R. 58a. While the ALJ's use of this language is awkward, it is also inconsequential. As the ALJ recognized, she was bound by the Secretary's holding that the front entrances "are required to be accessible as a matter of law." E.R. 43a, 57a. That determination was, as explained, not only free from arbitrariness and caprice, but also correct.

The ALJ was required to order a remedy for the violations. In *Long* v. *Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001), for example, a case alleging violations of the Americans with Disabilities Act, this Court held that the district court had erred in refusing to order the defendants to widen non-compliant bathroom doors in their hotel rooms, where the district court had determined that the estimated cost, $800,000, outweighed the potential benefit to persons with disabilities. The Court held that retrofitting was required because the "violation resulted in the very discrimination the statute seeks to prevent: it denied individuals with disabilities access to public accommodations." *Ibid.* Similarly, retrofitting here was essential to remedy the violation.

CONCLUSION

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

Respectfully submitted.

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_____
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am not aware of any related cases pending in this Court.

_____
NATHANIEL S. POLLOCK
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 9755 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
NATHANIEL S. POLLOCK
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Dated: February 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2008, two copies of the foregoing BRIEF FOR THE RESPONDENT/CROSS-PETITIONER were served by first-class mail, postage prepaid, on the following counsel of record:

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