UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 3:09-cv-0412-B
JPI CONSTRUCTION L.P., et al.,	§	
Defendants.	§	

DEFENDANTS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 9.1, Defendants JPI Construction, L.P.; Multifamily Construction, L.L.C.; JPI Apartment Development, L.P. d/b/a JPI Campus Quarters; Lifestyle Apartment Development Service, L.L.C.; Jefferson Bend, L.P. d/b/a Jefferson at Mission Gate Apartments; Jefferson Lake Creek, L.P. d/b/a Jefferson Center Apartments; and Apartment Community Realty, L.L.C. hereby move this Court to enter summary judgment or, alternatively, partial summary judgment against Plaintiff the United States of America.

Pursuant to this Court's Order dated March 11, 2011 (Dkt. #230), Defendants also herein respond to Plaintiff's Motion for Summary Judgment filed on April 15, 2011 (Dkt. #236) on the grounds that there are genuine issues of material fact in dispute on the issues presented by Plaintiff such that summary judgment cannot be granted in Plaintiff's favor.

The bases for this Cross-Motion and Response are set forth in the accompanying Memorandum of Points and Authorities along with each of the required matters for compliance with Local Rules 56.3 and 56.4.

Defendants respectfully request a hearing as it is anticipated that the Court will benefit from oral argument on these competing motions.

Respectfully submitted,

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May 16, 2011

UNITED STATES DISTRICT COURT
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DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 3:09-cv-0412-B
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' COMBINED CROSS-MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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SUMMARY -- LOCAL RULE 56.3

For purposes of Defendants' cross-motion, Defendants summarize the elements of the claims and defenses on which summary judgment is sought as follows.

Plaintiff alleges a pattern and practice of willful discrimination with the design and construction of 52 properties under two laws.[1] To prevail, Plaintiff has the burden to prove that each Defendant has discriminated in the terms, conditions, or privileges of sale or rental of each dwelling at issue, or the provision of services or facilities in connection with such dwellings, because of a handicap. The legal definition of "discrimination" is whether Defendants failed to design and construct the covered buildings and facilities at issue to include:

- at least one building entrance on an accessible route, unless it is impractical to do so because of the terrain or unusual characteristics of the site;
- public use and common use portions that are readily accessible and usable;
- doors designed to allow passage that are sufficiently wide to allow passage; and
- premises containing 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 located in accessible locations; (iii) reinforcements in bathroom walls to allow later installation of grab bars; and (iv) usable kitchens and bathrooms such that a wheelchair can maneuver about the space.

42 U.S.C.§ 3604(f)(3)(C). Plaintiff is unable to prove its claims as a matter of law.

Plaintiff seeks to impose its own definition of discrimination based upon certain optional guidance approved by a federal agency. Congress did not mandate any prescriptive "standard" or absolute measurements for compliance with the FHA. In fact, the guidance applied by Plaintiff is not mandatory and exceeds the modest requirements of the FHA. Accordingly, divergence from those recommendations is not *prima facie* evidence of discrimination. The "safe harbors" are not entitled to legal deference to trump Congressional intent.

Plaintiff ignores the impact of its delay of many years before bringing this action.

[1]The suit was bought pursuant to the Fair Housing Act, as amended, 42 U.S.C. §§ 3601–3619 ("FHA"), and the Americans with Disabilities Act, 42 U.S.C. §§ 12181–12189 ("ADA").

Instead, Plaintiff focuses exclusively on existing property conditions as of the date of inspection -- undaunted by evidence showing that the properties were designed and constructed in accordance with federal law and disregarding the effects of environmental and other maintenance issues (e.g., movement of the ground from soil expansion and contraction, wear and tear and renovations) occurring over the life of the properties since construction.

Even if Plaintiff's inspection methodology were given credence, at best, Plaintiff's claims must be limited to the small portion of the units Plaintiff's experts inspected as Plaintiff has no scientific basis for extrapolating its conclusions to any other units at the properties.

Plaintiff is unable to demonstrate any justification for pursuing this case in the first instance. Plainly, there is no pattern or practice of discrimination. Plaintiff has already waived its claims as to 20 properties and at the remaining 32 fail as a matter of law to demonstrate that discrimination was Defendants' usual practice. Plaintiff's own failure to proceed with this case in a timely manner demonstrates the lack of a need to pursue these Defendants.

Even if it were to prevail on the merits, Plaintiff should not obtain the relief requested as to certain properties. In addition to seeking to impose a bifurcation not contemplated by the Court, the relief claimed by Plaintiff, which includes civil penalties and compensatory damages, should be denied as time-barred for many properties. The injunctive relief Plaintiff seeks would be inequitable. Further, Defendants do not own any of the 32 properties, and many of the current property owners may be outside the jurisdiction of the Court.

SUMMARY -- LOCAL RULE 56.4

In response to Plaintiff's motion, there are multiple genuine issues of material fact in dispute.

Accessibility and usability as contemplated by Congress are inherently fact driven concepts for which summary judgment is inappropriate. In a ploy to circumvent the jury,

Plaintiff asserts that there are undisputed conditions at certain properties. There are not. Plaintiff's claims have been refuted entirely by one or more of Defendants' experts who rendered equally governing general opinions and property specific opinions, concluding that each of the properties are accessible to and usable by persons with disabilities. Although Plaintiff seeks judgment based on perceived pinholes in Defendants' reports, whenever an inspector did not provide a direct response to an item flagged by Plaintiff for a particular property, that item had already been refuted in a general report or by another one of Defendants' experts. (Defendants' Response to Conditions at 32 Properties (Ex. 1, App. 1-85.1)).[2]

In addition to Defendants' retained experts, hybrid and fact witnesses have made clear that the theories presented by Plaintiff's experts are not only nonsensical in light of the realities of construction and accessible design, but are specifically refuted by the facts and circumstances of how these properties were designed and constructed.

Plaintiff's motion should be denied. If judgment is not entered in favor of Defendants, this matter should be expeditiously set for a trial by jury.

INTRODUCTION

This case is the culmination of a governmental investigation eclipsing a decade. Despite its best efforts -- combing through public documents, conducting multiple phases of property inspections, requiring production of hundreds of boxes of plans and construction documents, taking multiple depositions, and attempting to hunt down past and current disabled residents -- Plaintiff has come up woefully short in meeting its affirmative burden. This case was not supported by evidence of discrimination when filed, and Plaintiff has failed to cobble together any evidence since. Indeed, Plaintiff was forced to concede that it has no evidence on 20 of 52

[2] To avoid deluging the Court with paper, Defendants' Appendix does not include the property-specific reports for all properties. These are available on the electronic docket and Chambers has been provided courtesy copies of all reports during discovery. Nonetheless, if requested, Defendants will supplement the Appendix with all such reports.

properties at issue *sua sponte*. Defendants should not be required to expend further time and expense in defending baseless accusations concerning the remaining properties.

Blinded by its own crusade, Plaintiff advances an extreme and unsupported interpretation of the requirements of the accessibility laws and willfully ignores obvious facts. Contrary to Plaintiff's bald accusations, the factual record demonstrates a careful and deliberate effort by Defendants to design and construct the properties to be accessible, usable, and adaptable for persons with disabilities and a commitment to meet the specific needs of disabled residents. Defendants' experts demonstrate that the properties are a model of compliance, and Plaintiff's claim to the contrary misapply federal law and ignore all practical realities of construction. Plaintiff's theory that there are undisputed accessibility issues is absurd. (Ex. 1, App. 1-85.1).

Plaintiff's conduct has been outrageous -- making allegations concerning construction and design decisions that took place decades ago while deliberately ignoring the implications of the passage of time. Plaintiff's sudden interest in these properties cannot reasonably be divorced from the reality that the design and construction of these properties was undertaken over a span of twenty years by hundreds of individuals working for a multitude of entities scattered across the country. While Plaintiff refuses to acknowledge it, the fact is that buildings, parking lots, sidewalks and other improvements age and respond to the natural environment in ways that require maintenance. This causes impacts to accessibility that are unrelated to the original design and construction. The sidewalks and parking areas have shifted due to soil and environmental conditions (e.g., soil with high clay content swells and shrinks); features of the properties have outlived their natural life or have fallen into disrepair; and new owners have undertaken routine renovations -- such as replacing door knobs and carpet, or adding new amenities. Although Plaintiff clings to the notion that these properties are static, it is simply

absurd to ignore the simple fact that a property constructed 15 years ago is not the same today as it was then. Even though many of the changes are visually apparent (e.g., sidewalks have shifted and cracked) Plaintiff ordered their experts to ignore these obvious changes. Plaintiff cannot reasonably expect this Court to pretend compliance for a property built decades ago should be measured without accommodating for changes outside the control of Defendants.

Plaintiff misstates the law and ignores Congressional intent. The FHA does not include a standard of total accessibility; Congress made clear that the FHA does not require that every entrance, doorway, bathroom, parking space, and portion of buildings and grounds be accessible. Rather, the FHA requires that common areas and apartment units be designed to reasonably accommodate the needs of persons with disabilities -- not the need of every disabled person without regard to how extreme their disability might be. The latter is taken care of on an as-needed basis through adaptation of the particular feature.[3] Plaintiff's theory of total accessibility for all possible disabilities at the moment of design is legally erroneous and fundamentally misunderstands how a property is managed and needs are met in the real world.

Similarly, the FHA does not require that the ground underneath all apartment communities built since 1991 be leveled flat before construction could proceed. Such a prospect is financially prohibitive and often contrary to the laws of the local jurisdictions. Instead, the FHA allows multifamily properties to be legally designed and constructed with steps on walkways, with sidewalks that slope along with the terrain (no matter how steep), and with units and common space amenities that are not accessible to wheelchairs.

[3]In its zealotry to build a case, Plaintiff went so far as to have attorneys and experts copy license plates of cars with handicapped tags. (Ex. 2, App. 86-89). This blatant intrusion into the privacy of persons with disabilities is ironic given Plaintiff's stated goals. In contrast, Defendants have always welcomed and accommodated persons with disabilities as it is widely understood in the apartment industry that such persons are reliable and responsible long-term residents, who are desired by providers of conventional apartment housing.

Plaintiff distorts the legal significance of technical assistance materials issued by the Department of Housing and Urban Development ("HUD"). Congress intentionally did not enact a national building code for multi-family housing, and HUD was never empowered to promulgate a prescriptive standard that could be held against developers to demonstrate non-compliance. Consistent with its limited authority, HUD has issued various technical assistance materials among which are "safe harbors" that *may* be relied on by those that seek explicit guidance for compliance. Such "safe harbors" were not meant to become binding standards or the minimum requirements for compliance; they plainly state so on their face. The law and legislative history demonstrates that Congress intended that there would be various methods for providing accessibility at multifamily apartment complexes and that no one "standard" must be met for demonstrating compliance. Further, the notion that the federal government can hold out a document as non-binding on publication and come back twenty years later and use that same document as a mandatory, minimum standard is a disturbing abuse of governmental authority.

Yet, Plaintiff's entire case is built on a "standard" that is a combination of all the suggested technical specifications of multiple safe harbors and other guidance documents. Use of this super safe harbor to catalogue "violations" deliberately twists the safe harbors in order to run up the score -- ultimately painting a deliberately misleading picture of compliance. As demonstrated by Defendants' reports, Plaintiff's inspection teams did anything possible to reach the conclusion that an element was not in compliance, ignoring more lenient criteria, accepted variances, and/or empirical research demonstrating that the condition is accessible.

Plaintiff lacks factual foundation for the allegation that there was a pattern and practice of "willful" and "intentional" discrimination. The communities were designed and constructed over a 20 year period, across 19 states, with over 600 individuals working at more than 100 different

professional design firms. Plaintiff ignores the thousands of documents relating to the design and construction of the properties as well as the deposition testimony of multiple fact witnesses. Such evidence demonstrates a careful and deliberate effort by Defendants to meet the requirements of the accessibility laws running from the concept stage of a project to final construction -- with multiple responsible individuals, reliable professionals, and layers of review. In fact, the evidence shows that in designing these properties, Defendants' architects and design professionals mostly relied on the FHA Guidelines safe harbor that Plaintiff holds so dear. In direct contrast to Plaintiff's accusations of inaccessibility, the properties have provided housing for thousands of residents, many of whom have disabilities.

After putting Defendants through vigorous discovery for all 52 properties, following the close of discovery, Plaintiff has indicated it will not pursue claims against 20 properties, including those gone over with a fine tooth comb by their inspection teams. Given the stage of this case, Plaintiff cannot cavalierly pullback its claims as to these properties without prejudice.

Finally, although well aware of the fact, Plaintiff's request for relief asks this Court to ignore the fact that Defendants has not owned or managed any of the 32 properties for many years and in some instances, for more than a decade. In many cases, ownership of such properties has turned over more than once. Despite this substantial deficiency, Plaintiff continues to prosecute this action without naming the current owners of those properties as parties to this action.

With the factual record here, Plaintiff's continued assertions of discrimination against persons with disabilities are unbelievable. Defendants cannot be found liable, and judgment should be summarily entered in their favor.

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment shall be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Summary judgment is mandated "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Piazza's Seafood World, LLC v. Odom, 448 F.3d 744, 752 (5th Cir. 2006).

Summary judgment is appropriate unless the nonmoving party can show affirmative evidence of disputed material facts. F.R.C.P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). While all of the evidence is viewed in a light most favorable to the motion's opponent, reliance on conclusory allegations to refute a motion is insufficient to allow the claim to continue to trial. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994) (*en banc*); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992).

However, especially where a motion for summary judgment raises mixed question of fact and law, the court's role is not to act as fact finder and resolve factual issues. Whitmire v. Terex Telelect Inc., 390 F.Supp. 2d 540 (E.D. Tex. 2005). Likewise, summary judgment is inappropriate, even if there are no disputed facts, where reasonable minds could differ on the inferences arising from any undisputed facts. Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982); See also Venturelink Holdings, Inc. v. Kirkpatrick & Lockhart, L.L.P., Civ. Action No. 3:05-CV-2103-L, 2006 WL 2844121 (N.D.Tex. Oct. 2, 2006). Rather, the evidence of the non-moving party is to be believed; all justifiable inferences are to be drawn in its favor; and any and all doubts as to the

existence of a factual dispute are to be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. THE FEDERAL ACCESSIBILITY LAWS DO NOT MANDATE BUILDING CODE-LIKE REQUIREMENTS.

Plaintiff's Complaint includes two separate counts -- one for alleged violations of the FHA and another for alleged violations of the ADA. Because this action involves the design and construction of multi-family housing complexes (i.e., apartment buildings), almost all issues contested by Plaintiff relate to questions of compliance with the FHA. The claims under the ADA relate exclusively to the few issues in public areas (e.g., the leasing center and its parking).

A. Congress Did Not Mandate Any Particular "Standard" Or Code Of Measurements That Must Be Met In Order To Comply With The FHA.

On its face, the FHA has only six broad requirements of accessibility, usability, and adaptability, requiring "covered units"[4] and the public and common areas to have the following:

> (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)(i)-(iii).[5]

Congress did not mandate any specific technical design criteria in order to satisfy the requirements of the Act and did not authorize any federal entity with the authority to promulgate binding standards or to enact proscriptive technical criteria that builders must follow. Instead,

[4]Not every apartment unit is subject to the FHA. Congress defined "covered multifamily dwellings" as "(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and (B) ground floor units in other (non-elevatored) buildings consisting of 4 or more units." 42 U.S.C. § 3604(f)(7).

[5]In addition to those six features, the entrance to the building itself must be accessible, 24 C.F.R. § 100.205(a).

Congress empowered HUD with the limited authority to "provide technical assistance to States and units of local government and other persons to implement the requirements of" the Act. See 42 U.S.C. § 3604(f)(5)(C).

Congress specifically rejected "a standard of total accessibility [that] would require that every entrance, doorway, bathroom, parking space, and portion of buildings and grounds be accessible" choosing instead "to use a standard of 'adaptable' design" that would "provide usable housing for handicapped persons without necessarily being significantly different from conventional housing." (H. R. Rep. No. 100-711, at 18, reprinted in 1988 U.S.C.C.A.N. 2173, 2179, 2187 (Ex. 3, App. 88-91)). The requirements of the FHA are "modest". (Id. at 2179).

Congress did, however, provide some explicit guidance for those seeking clear measures of compliance. First, compliance with the requirements of the American National Standards Institute Inc. ("ANSI") accessibility standards (commonly known as ANSI A117.1) "suffices to satisfy" the FHA. 42 U.S.C. § 3604(f)(4). Yet, while Congress assured designers that if they follow ANSI 117.1 they will meet the Act's requirements, Congress made clear that this section of the Act "is not intended to require that designers follow this standard exclusively, for there may be *other local or state standards with which compliance is required* or there may be *other creative methods* of meeting these standards." (H.R. Rep. No. 100-711, at 27 n.71 (Ex. 3, App. 90) (emphasis added)). Second, Congress established that if a municipality has incorporated "into its laws the requirements set forth in paragraph (3)(C)," then compliance with the municipal law satisfies the requirements of the FHA. 42 U.S.C. § 3604(f)(5)(A).[6]

Hence, the sole dispositive question at issue in an FHA design and construction case is whether the dwelling units and common areas as designed and constructed are reasonably

[6]See also 24 C.F.R. § 100.205(f). Numerous states, including Texas, Massachusetts and California have accessibility laws and codes that mirror and/or exceed the federal requirements.

accessible to most persons with disabilities. See Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 Fed. Appx. 469, 482 (6th Cir. 2006).

B. The ADA Has Prescriptive Standards, But Plaintiff's ADA Claims Are No Stronger.

Plaintiff makes a half-hearted effort to assert that 15 of the properties also violate the ADA. (Dkt. #236 at 8-9, 35-36.) HUD's limited authority under the FHA is illustrated by a comparison with the authority Congress delegated to the Department of Justice to promulgate regulations under the ADA. Cf. 42 U.S.C. § 12186 (b) ("Not later than 1 year after the date of the enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this title…") with 42 U.S.C. § 3604(f)(5)(C) (issuance of "technical assistance"). Regardless, Defendants' experts have contested all allegations of ADA violations in both the main reports and property-specific appendixes which illustrate serious questions concerning the methodology of Plaintiff's experts (e.g. measurement of slope), and their interpretation of the underlying standard (e.g. failure to recognize construction tolerances) . Hence, there are clearly material facts at issue with regard to the ADA.

III. THE PROPERTIES WERE DESIGNED AND CONSTRUCTED TO BE ACCESSIBLE, USABLE, AND ADAPTABLE.

Plaintiff moves for a finding of discrimination while ignoring the many facts that make clear that Defendants designed and constructed the properties in compliance with the federal accessibility laws. This is proven by the thousands of documents produced from the development and construction files, the expert reports, and the fact witness testimony. The following summarizes such facts presented during discovery.

It is empty rhetoric to assert that "Defendants (collectively "JPI") have discriminated against persons with disabilities by engaging in a longstanding pattern or practice—dating back nearly two decades—of building multi-family housing complexes with extensive and significant

accessibility barriers, in violation" of the FHA. (Dkt. #236 at 1).

First, while Defendants will not expend significant resources herein contesting Plaintiff's new found theory that the Defendants are all acting as single, integrated business enterprise known as JPI, there is no legal or factual basis for Plaintiff's assertion. (Dkt. #236 at 2-3, 38-40). This theory of liability was not presented in the Complaint. (Dkt. #1). The theory of liability is expressly not recognized by the law of either Texas or Delaware which governs the Defendants. See SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 456 (Tex. 2009); Hart Holding Co. v. Drexel Burnham Lambert Inc., 1992 WL 127567 (Del. Ch. May 28, 1992). Defendants' 30(b)(6) designee made clear that the entities were not integrated as one. (Motsenbocker Dep. (Vol. II), 51:18-52:19 (Ex. 4, App. 93-95)).[7] And, nothing in the principle case relied on by Plaintiff, Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761 (5th Cir. 1997), changes the inapplicability of this theory here; the Schweitzer decision was limited to the context of employment discrimination cases, not cases brought under the FHA.[8]

Second, during the 30(b)(6) deposition for the named Defendants, David Motsenbocker explained to Plaintiff that Defendants undertook many efforts to meet the requirements of the accessibility laws. Foremost, Mr. Motsenbocker testified that Defendants "always. . . designed and built properties in accordance with Fair Housing and ADA." (Motsenbocker Dep. (Vol. I), 52:24-53:1 (Ex. 5, App. 99-100). He made clear that it is a requirement of the contracts of the

[7]Instead, at best, one entity provided employees, accounting, and tax services to various Defendant entities, a fact which falls far short of showing that the entities were integrated as one.

[8] The Trevino test, on which Schweitzer is based, relates to whether two entities can be treated as one employer under Congress's definition of "employer" in Title VII. Unlike the term "employer" used in Title VII, there is no term of art that is essential to determine the actor potentially liable for discrimination under the FHA or ADA. Rather, as established by Congress, the question of whether an entity is liable is whether that entity designed and constructed the multifamily housing developments at issue. 42 U.S.C. § 3604(f)(2) & (3)(C). When Congress has not explicitly spoken on an issue, a court must not look beyond the state law that governs. Gregory v. Ashcroft, 501 U.S. 452, 456-470 (1991); White Buffalo Ventures, LLC v. University of Texas at Austin, 420 F.3d 366, 370 (5th Cir. 2005); Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006). In the FHA, Congress addressed preemption of state laws and was clear that, with the exception of laws permitting housing discrimination, it was not Congress's intent to preempt the rights of the states. 42 U.S.C. § 3615; 42 U.S.C. § 3604(f)(5). As Congress did not clearly indicate an intent to preempt (and indeed sent the opposite message), state law on business organizations applies.

professionals that they design properties "in accordance with all federal, state and local laws including Fair Housing" (it was "expected" of them) and that "there was lots of different people involved in the process, but the local developer had responsibility for overseeing compliance with Fair Housing, ADA, state and local laws including Fair Housing." (Id. at 52:24-53:22 (Ex. 5, App. 99-100)).[9] Responsibility for accessibility was not slotted to one person but rather, "overseeing accessibility at the properties was a lot of people's responsibility." (Id. at 50:9-11 (Ex. 5, App. 99); (see generally id., 50:9-59:13 (Ex. 5 App. 99-101)).

Mr. Motsenbocker relayed Defendants' compliance efforts and the multiple layers of accessibility review from the inception of the project to final construction. (Motsenbocker Dep. (Vol I.), 53:23-59:13 (Ex. 5, App. 100-101)). Compliance reviews were done "early on" and Defendants "had the architects that were charged with designing it in accordance with state and local laws", "the local developer and his team responsible for overseeing that process," and "the construction team that was responsible for overseeing the construction of the property in accordance with the plans, which would have been designed in accordance with federal, state and local laws." (Id. at 54:16-54:23 (Ex. 5, App. 100). Defendants "created checklists for use during the design and construction phase to assist our construction and development personnel in overseeing the designers" and had "a closing review . . . at the end of the design stage." There was considerable "back and forth as the plans are getting refined" before start of construction. (Id. at 55:8-59:13 (Ex. 5, App. 100-101)).[10]

Mr. Skarzenski, an architect at an architectural firm that designed a large number of the

[9]See also Motsenbocker Dep. (Vol. I),162:11-164:20 (Ex. 5, App. 105) (discussing the evolution of the process); excerpts of contracts and correspondence with design professionals. (Ex. 6, App. 113-149; Ex. 7, App.150-152; Ex. 8, App. 153-212; Ex. 9, App. 107:14-112:5; App. 231-232; Ex. 10, App. 66:2-68:2, App. 259).

[10]An example of the checklist is attached as are other documents showing the "back and forth" that took place through this process are attached as Ex. 11, App. 263-272. (Meacham Dep. (Vol. I), 124:19-138:9 (Ex. 9, App 235-239)). This is but a small percentage of the documents produced.

properties at issue, confirmed the effectiveness of this back-and-forth process. (Skarzenski Dep., 41:3-45:16; 46:8-48:9 (Ex. 12, App. 277-78). He stressed that in his role reviewing the plans for accessibility compliance, he would review the plans "to the building code in its entirety, and then also to the ANSI '86 and the Fair Housing Guidelines in its entirety." (Id. at 46:11-47:11 (Ex. 12, App. 278)). Another architecture firm, Niles Bolton, described a similar process, explaining that "every project that we have designed has been designed to an accessibility standard…" (Meacham Dep. (Vol. I) 37:18-21, 38:2-49:10, 53:1-54:22, 61:5-63:22, 97:9-169:18 (Ex. 9, App. 22-26, 228-47); Meacham Dep. (Vol. II) at 19:15-23, (Ex. 13, App. 288)).

Professionals designed the properties to a design standard since day one. See, e.g. Decl. of J. O'Connor, III, Ex. 14, App. 320-21 (noting the use of Guidelines for Jefferson at Preston, which was completed in 1991). In doing so, at most properties, the Guidelines and ANSI 86 were the primary standards utilized by the design professionals as guidance.[11] (Motsenbocker Dep. (Vol. I), 177:14-18, 184:6-191:7 (Ex. 5, App. 106-09)). Likewise, architects must also take into consideration all local regulations which often establish specific accessibility standards. (Meacham Dep. (Vol. I), 10:25-41:5, 112:17-113:17 (Ex. 9, App. 214-223, 232-233); Skarzenski Dep., 35:2-36:12, 41:24-43:9 (Ex. 12, App. 276-277)).

Defendants worked closely with the architect in ensuring accessibility at the properties:

> It would be the soup-to-nuts discussion, what code are we using, how are we approaching compliance, have you got the guidelines, in terms of JPI guidelines, you know, are there any exceptions; what is the county, the local jurisdiction going to require in addition to, you know, what is required under the federal standards.

(Meacham Dep. (Vol. I) 104:18-105:3 (Ex. 9, App. 230-31)). Mr. Knight, a civil engineer, described the role of the civil engineer and the efforts to ensure that accessibility was addressed

[11]Use of such "objective" standards is reflected in the architectural plans, other documents, and fact testimony as shown in the attached summery chart. (Ex. 15, App. 322-330). Another architect, not deposed but disclosed to Plaintiff, confirmed that it too looked to safe harbors in designing the properties. See Looney Ricks Kiss Dec. (Ex. 57, App. 1204-1206).

in relation to issues such as slope and grade, soil, sidewalk placement, and parking. (Knight Dep. (Vol. I), 12:23-16:9; 20:23-25:15; 26:17-28:22; 30:21-36:16) (Ex. 10, App. 252-58)).

As a precautionary measure, while allowing the consultants to exercise professional judgment, Defendants requested their architects and other design professionals to utilize the safe harbors in an effort to ensure compliance with the Act. (Motsenbocker Dep. (Vol. I), 177:1-13 (Ex. 5, App. 106)). Defendants did not allow construction to commence until there was a letter from a consultant certifying that, based on their company's review of the plans and designs, the plans met the federal accessibility requirements. (Id. at 55:25-56:25 (Ex. 5, App. 100)).

These diligent efforts did not cease with the design phase. Throughout construction, either the architecture firm, an expert, or Defendants themselves would conduct inspections for quality control and conformance with the plans and the accessibility laws. (Meacham Dep. (Vol. I), 111:4-112:5 (Ex. 9, App. 232); Skarzenski Dep. 81:9-83:18; 249:5-249:17; 249-249:17 (Ex. 12, App. 283)).

As the processes evolved, Defendants took another proactive step when, in 2001, Mr. Skarzenski designed a checklist based on ANSI 86, the ADAAG, the Guidelines, and the "pet issues" frequently identified by plaintiff's experts in other litigation. (Skarzenski Dep. 247:13-248:3 (Ex. 12, App. 282-283); Motsenbocker Dep. (Vol. I), 118:1-120:6 (Ex. 5, App. 104)). The checklist was used throughout the design and construction process along with the normal process of internal review and "back and forth" with the architects. (Id., at 57:2-59:12 (Ex. 5, App. 101)).[12] In 2002, the checklist became the standard that was used by Defendants and their third-party design professionals to ensure that the properties were accessible. (Id., at 178:4-25, 184:3-200:10 (Ex. 5, App.111)). In turn, at the end of construction after multiple inspections, the third-

[12]The checklists expanded over time to address more issues that commonly arose. (Id. at 184:16-185:6 (Ex.5, App. 107); Skarzenski Dep., 250:17-252:18 (Ex. 12, App. 283)). This was a "belts and suspenders" approach designed to cover all bases due to the constant threat of litigation. (Id., 284:24-285:23 (Ex. 12, App. 284)).

party reviewer issued another certification letter stating that "the construction of this project meets Fair Housing and ADA." (Id., at 58:11-59:13 (Ex. 5, App.100)).

IV. PLAINTIFF IS UNABLE TO MEET ITS AFFIRMATIVE PROOF BURDEN.

Hoping to dodge the factual evidence proving the contrary, Plaintiff seeks to change the metric. Plaintiff attempts to satisfy its burden by merely showing that certain features were found to have dimensions that vary from measurements set forth in a combination of three "safe harbors" -- documents that state on their face that they are not meant for this purpose. Other than comparing the properties to such safe harbors, no effort was made to determine whether the dwelling units or common areas at the properties meet the actual seven requirements of the FHA.

A. As A Matter of Law, Divergence From The "Safe Harbors" Is Not *Prima Facie* Evidence Of Discrimination.

Consistent with its authority to issue "technical assistance," since 1991, HUD has recognized ten different "safe harbors". 72 Fed. Reg. 39540, 39541-42 (July 18, 2007).[13] Among those ten, in March 1991, HUD issued the Guidelines.[14] In the preamble, HUD clearly stated that "the Guidelines are not mandatory, nor do they prescribe specific requirements which must be met, and which, if not met, would constitute unlawful discrimination under the Fair Housing Act." 56 Fed. Reg. at 9473 (emphasis added); see also 53 Fed. Reg. 44992, 45004 (Nov. 7, 1988). Merely a safe harbor, the Guidelines "simplify compliance with the [FHA] by providing guidance concerning what constitutes acceptable compliance with the Act." 56 Fed. Reg. at 9472. [15] Hence, the "safe harbors" are just that -- protection for those seeking clear

[13]HUD has not "issued regulations recognizing the safe harbors," (Dkt. #236 at 15). Safe harbors are not codified in the Code of Federal Regulations, can be changed at HUD's whim, and have no force of law.
[14]HUD, Notice of Final Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472-9515 (Mar. 6, 1991)[not even published in the current CFR].
[15]Compliance with the Guidelines "shall be a basis for a determination that there is no reasonable cause to believe that a discriminatory housing practice. . . has occurred or is about to occur in connection with the investigation of complaints filed with [HUD] . . . ." 56 Fed. Reg. 9478. Builders can comply with the FHA without meeting the Guidelines as "the statute itself is the safest guide". 55 Fed. Reg. 24370 (June 15, 1990).

measures of compliance -- not an inflexible directive forming the basis for liability. Rodriguez v. Investco, L.L.C., 305 F.Supp.2d. 1278, 1282, fn. 15 (M.D. Fla. 2004); Ass'n for Disabled Americans, Inc. v. Concorde Gaming Corp., 158 F.Supp.2d 1353, 1362 (S.D. Fla. 2001).

Plaintiff's core theory is the Guidelines form the "minimum" baseline of compliance and provide "precise instructions for what is necessary to make a feature accessible under the FHA." (See Dkt. # 236 at 20). Yet, in adopting the Guidelines, HUD made clear that the agency "has not categorized the final Guidelines as either performance standards or minimum requirements. The minimum accessibility requirements are contained in the Act." 56 Fed. Reg. at 9478 (emphasis added). Similarly, "a dwelling unit that complies fully with the ANSI Standard goes beyond what is required by the [FHA]," and is "more stringent." 56 Fed. Reg. at 9476 (emphasis added). Thus, it has always been clear that "builders and developers may choose to depart from the Guidelines and seek alternate ways to demonstrate that they have met the requirements of the Fair Housing Act." Id. at 9473; 59 Fed. Reg. 33362 (1994); United States v. Pacific Northwest Electric Inc., No. 01-019, 2003 WL 24573548, *12 (N.D. Idaho Mar. 21, 2003). Given HUD's prior statements (and limited authority), it is abhorrent that the federal government seeks, as much as twenty years after design, to argue that the specifications of the Guidelines are the "minimum" standard of compliance or "strict standards" that must be met. (Dkt. #236 at 17).

Courts assessing claims brought under the FHA confirm that Plaintiff has ignored HUD's prior stated view of the Guidelines. The fact a property does not strictly conform to the Guidelines "does not constitute unlawful discrimination." Memphis Ctr. for Independent Living v. Grant, No. 01-2069, at 7 (W.D. Tenn. Oct. 2, 2003) (slip op.); Pacific Northwest Electric Inc., 2003 WL 24573548 at *12 (explaining that because Congress did not delegate HUD the authority to promulgate specific regulations for design and construction compliance and in light

of HUD's own characterization of the Guidelines "the fact that a covered complex does not comply with the HUD 'guidelines' does not establish a violation of the FHA").

Given that the safe harbors do not establish a minimum requirement for compliance, failure to meet them alone cannot logically create a rebuttable presumption, a *prima facie* case, or a *per se* violation of the FHA. See, e.g. Fair Hous. Council, Inc. v. Village of Olde St. Andrews, Inc., 250 F. Supp. 2d 706, 720 (W.D. Ky. 2003), aff'd. 210 Fed. Appx. 469 (6th Cir. 2006); United States v. Taigen & Sons, Inc., 303 F. Supp. 2d 1129, 1151 (D. Idaho 2003).[16] Accessibility itself is the ultimate touchstone by which conformity with the FHA is determined. Taigen & Sons, Inc., 303 F. Supp. at 1151.

B. HUD Has No Authority To Establish The Burden Of Proof.

Plaintiff's request that the Court defer to HUD's interpretation of what establishes a *prima facie* case, (Dkt. #236 at 16), improperly asks this Court to relinquish its own role. It is well established that the allocation of the burden of proof is decided by Congress or reserved for the courts. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005). The basis for Plaintiff's extreme position is an excerpt of a federal register notice taken out of context. (Dkt. #236 at 16) (citing 73 Fed. Reg. 63614). That notice pertains not to the standard for summary judgment, but acceptance of the 2003 version of ANSI as a safe harbor. 73 Fed. Reg. 63610. Moreover, as Congress established [the FHA] enforcement scheme independent of HUD, "it would be inappropriate to consult executive [or agency] interpretations" of how such enforcement should be carried out, including to the appropriate burden of proof. Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990). 494 U.S. at 650; see also Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior, 252 F.3d 473, 478-79 (D.C. Cir. 2001). HUD's delegated authority to provide "technical

[16]Cf. United States v. Hallmark Homes, Inc., No. 01-432, 2003 WL 23219807, at *8 (D. Idaho Sept. 29, 2003) (expert noted not only variations from the Guidelines but also failure to "comply with any recognized accessibility standard" and, a professional opinion that the property was not accessible or usable by persons with disabilities).

assistance" "does not empower [HUD] to regulate the scope of the judicial power vested by the [FHA]." Adams Fruit Co., 494 U.S. at 650. Plaintiff's expert opinions concerning accessibility are limited to whether the features meet the safe harbors.[17] Thus, as a matter of law, Plaintiff is unable to meet its burden of proof.

C. Plaintiff's Attempts To Heighten The Importance Of The Safe Harbors Through Legal Deference Is Without Merit.

Plaintiff attempts to justify its theory of the case by arguing that HUD's interpretation of the FHA as "contained in its regulations and in the Guidelines is entitled to great deference. . . ." (Dkt. #236. at 19-21). This position fundamentally mischaracterizes the authority Congress delegated to HUD and ignores the most basic principles of administrative law.

In determining whether the Court should defer to HUD's interpretation of the FHA, the first question is whether "Congress has directly spoken to precise claims at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). By contrast, a court will defer to an agency's construction of a statute only if (1) Congress "has not directly addressed the precise question," (2) the agency has acted pursuant to an express or implicit delegation of authority, and the agency's interpretation of the statute is "reasonable," rather than "arbitrary, capricious, or manifestly contrary to the statute," and (3) it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of that authority." See Chevron, 467 U.S. at 843-45; see also Monigold v. Berkebile, No. 07-0750, 2008 WL 623350 (N.D. Tex. March 5, 2008);

[17]Mr. Catlin made clear that LCM was looking for compliance with the safe harbors, not accessibility. (Catlin Dep., at 215:5-216:24 (Ex. 18, App. 365) (disagreeing with the characterization that the safe harbors were used to determine accessibility and clarifying that they were solely used to demonstrate compliance)).

Garza Garcia v. Moore, 539 F. Supp. 2d 899 (S.D.Tex. 2007).

Thereafter, the Supreme Court clarified Chevron, holding that a court should defer to an agency's interpretation of a statute only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-227 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations ... contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant Chevron-style deference.").

Furthermore, where an agency's actions are "inconsistent with a statutory mandate," they cannot be given Chevron deference. Nationwide Mutual Insurance Co. v. Cisneros, 52 F.3d 1351, 1359 (6th Cir. 1995). Administrative agencies are "bound, not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed for the pursuit of those purposes." MCI Telecomm. Corp. v. AT&T Co., 512 U.S 218, 231 n.4 (1994); see also Texas v. United States, 497 F.3d 491, 501(5th Cir. 2007) (agency regulations exceeding the scope of remedial authority delegated to the agency are not entitled to deference); Platte River Wooping Crane Critical Habitat Maint. Trust v. FERC, 962 F.2d 27, 33 (D.C. Cir. 1992) (appeals to a statute's broad purposes not proper).

Contrary to Plaintiff's statement, HUD was not delegated authority to issue proscriptive enforcement standards and the Guidelines do not set forth requirements that have the force of law. (Dkt. #236 at 20). The limitations on Congress's delegation of authority to HUD are clear -- HUD is only authorized to provide "technical assistance," 42 U.S.C. § 3604(f)(5)(C). In HUD's own words, "[t]here is no statutory authority to establish one nationally uniform set of accessibility standards." 56 Fed. Reg. at 9478.

The Guidelines lack the import Plaintiff seeks to grant them. They constitute mere "recommended specifications,"56 Fed. Reg. at 9499, and do not provide mandatory, or even presumptive, design specifications "which must be met." Id. at 9473. The court need not defer to an agency's interpretation when "the regulation itself indicates that its command is permissive and not mandatory." Christensen, 529 U.S. at 588. In issuing the Guidelines, HUD did not "set out with a lawmaking pretense in mind. . . ." Mead, 533 U.S. at 233. They are, therefore, "beyond the Chevron pale," and neither command nor allow presumptive deference. Id. at 234.

Likewise, the Design Manual is not entitled to deference as an authoritative interpretation of the FHA's requirements under Skidmore v. Swift Co., 323 U.S. 134 (1944). Informal agency interpretations such as this are entitled to respect under Skidmore only when they are persuasive, and then only in an amount proportional to the agency's "power to persuade."[18] 323 U.S. at 140.

The Design Manual is not "persuasive" under Skidmore. It was written by a third-party contractor, it states on its face that it is a non-mandatory "alternative", and like the other safe harbors, contains mere "recommendations" or "suggestions" that explicitly exceed the FHA's "modest requirements". Design Manual at 2 (Ex. 19, App. 372). Therefore, to use it to conclusively establish what is minimally necessary for determining accessibility under the FHA or to establish a *prima face* case of compliance is patently unreasonable.

In sum, the attempt to characterize HUD's technical assistance authority as authorizing the agency to establish mandatory minimum requirements and to shift burdens is contrary to Congressional intent, and thus cannot be given deference.

D. Plaintiff's Experts Rely Exclusively On A Standard That Is A DOJ-Created Super Safe Harbor Which Far Exceeds The "Modest" Requirements Of The FHA.

[18]The persuasive value of informal agency interpretations is assessed based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking control." Skidmore, 323 U.S. at 140.

Plaintiff banks its entire theory of the case on the convenient but misguided approach that an "uncontested" violation may be inferred where measurement of an existing conditions does not meet a dimension set forth in a combination of multiple safe harbors. In doing so, Plaintiff effectively created a new super "safe harbor" far above the FHA. Hence, even if the Court were inclined to find that the "safe harbors" have some persuasive value, the newly concocted metric dictated by Plaintiff's counsel does not.

Plaintiff hired Ken Schoonover, Frank Colby, Gina Hilberry, and four individuals from LCM Architects (John Caltin, Doug Mohnke, Douglas Anderson, and John Ritzu).[19] Although each of the experts acknowledged that they take different approaches in other matters,[20] the inspectors defined "violations" by piecing together multiple documents:

- LCM cited "violations" when they found variations from the Guidelines, ANSI A117.1 1986 (ANSI 1986) as interpreted through the Guidelines, the Design Manual; the 1994 Guidelines Q&A,[21] and the ADA Standards. (Dkt. #45-2 at 2-3, 11).
- Mr. Schoonover indicated that he flagged violations where he found inconsistencies with the Guidelines, the 1994 Guidelines Q&A, ANSI 1986, "as referenced by the Guidelines", the Design Manual, and the ADA Standards. (Dkt. #47-2 at 13-16).
- Ms. Hilberry found violations based on the Fair Housing Act, the Guidelines, the FHA regulations, "HUD's technical assistance materials"; ANSI A-l 17.1 1986 "as referenced by the [Guidelines]"; and the ADA Standards. (Dkt. #50-2 at 2, 8). [22]
- Mr. Colby used the Guidelines, "along with the Act, the FHA regulations, HUD's technical assistance and ANSI A117.1-1986"; and "the ADA Standards. . . ." (Dkt. #55-2 at 5).

Hence, while the Guidelines and ANSI 86 exceed the FHA, Plaintiff went even further by creating a standard consisting of a combination of all possible technical criteria from ANSI 86,

[19]LCM, Plaintiff's primary expert firm, has the least amount of experience of any witness in this case, having worked on FHA issues for only the past "four or five" years. (Catlin Dep., 25:18-22 (Ex. 18, App.344)). Mr. Anderson was the "primary author" of their main report but did not sign it, (Anderson Dep., 88:16-89:7 (Ex. 20, App. 382)). Mr. Anderson has no formal training in accessible design or degree in architecture. (Id. at 27:15-28:17 (Ex. 20, App. 378), (explaining his "business background")).

[20]See e.g., Catlin Dep., 46:19-58:3 (Ex. 18, App.348); Schoonover Dep., 13:19-15:15 (Ex. 23, App.412).

[21]HUD, Supplement to Notice of Fair Housing Accessibility Guidelines: Questions and Answers About the Guidelines, 59 Fed. Reg. 33362 (June 28, 1994) (Ex. 22, App. 393-409).

[22]As explained by Hilberry, she used a "group of documents" together under the theory that none of the safe harbors is a "solitary" document. (Hilberry Dep., 42:8-43:13 (Ex. 24, App.430)).

the Guidelines, the Design Manual and other HUD assistance materials.[23] To prove a "violation" Plaintiff cherry picks from these materials the most restrictive requirement possible even if under a less burdensome provision the condition would be considered accessible.[24] In particular, Plaintiff relies on the Design Manual and the 1994 Q&A to justify their interpretation where the "requirement" is not set forth in the Guidelines. (Schoonover Dep., 244:16-245:19 (Ex. 23, App. 426-427); Dkt. #236 at 24, 28- 34, 46, 47)).[25] This ignores the fact that more half of the properties at issue here (18) were designed prior to the 1998 publication of the Design Manual. (See Ex. 15, App. 322-330). Thus, even if Plaintiff correctly characterizes case law where the plaintiff compared existing conditions to the Guidelines, (Dkt. #236 at 10-11, 16-17), Plaintiff's experts went far beyond simple comparison with the Guidelines or ANSI 86, and desperately applied a standard not in existence at the time of design. Having presented a theory of liability that goes so far beyond the Guidelines, much less the FHA, Plaintiff is not entitled to summary judgment under any of the cases they rely upon.

E. Plaintiff Conveniently Ignores That The FHA Allows For The Properties To Incorporate Four Features Of Adaptive Design.

Plaintiff's methodology for demonstrating non-compliance ignores a fundamental aspect

[23]Ritzu Dep., 37:6-55:21 (Ex. 25, App. 440-444); Anderson Dep., 89:16-101:14 (Ex. 20, App. 383-86); Catlin Dep., 14:1-18:4, 27:15-33:20, 42:20-44:4, 55:7-57:15, 65:4-89:1, 91:16-96:4, 214:15-216:24, 228:7-229:2 (Ex. 18, App. 342-43;344-46; 347; 350-51; 352-59;365; 366-67). (Schoonover Dep., 15:2-23; 57:22-58:13; 178:14-22 (Ex. 23, App.412; 413; 425); (Hilberry Dep., 41:25-42:15; 43:3-13; 200:2-16 (Ex. 24, App.430, 436)). Hence, Plaintiff's statement that its experts compared their observations to "the HUD regulations," the Guidelines, and "the 1991 ADA Standards," (Dkt. #236 at 4), is a misstatement that ignores the increased scope of "requirements" turned to by their experts to maximize "violations".

[24]There are numerous examples of where Plaintiff took the most restrictive interpretation possible in the quest to catalogue "violations." (See, e.g., Catlin Dep., 123:22-124:6 (Ex. 18, App. 362, 363) (agreeing that while ANSI 86 allows for T-turns in a kitchen flagging a violation for lack of clear floor space); Id., 126:12-25 (Ex. 18, App. 363) (using 48" inch requirement for thermostat heights despite the fact that it is 54" under ANSI 86); (Schoonover Dep., 169:10-170:12 (Ex. 23, App. 424) (using the Manual to create a requirement for a 12-inch minimum from the refrigerator to the centerline of outlets)).

[25]For example, "centering" of clear floor space is "violation" that Plaintiff cites repeatedly yet concedes was not in the text of the Guidelines, (Dkt. #236 at 32 n. 28, 33). As explained by multiple experts, the concept of centering was first suggested in the Design Manual. (Skarzenski Dep., 173:9-174:22 (Ex. 12, App. 280); Wales Dep., 75:23-76:9 (Exh., 26, App. 458); Sheriff Dep., 178:18-24 (Ex. 27, App. 471)).

of the Act by failing to account for the presence of features of adaptive design. On its face, the FHA states that there are four "features of adaptive design": (1) an accessible route into and through the dwelling; (2) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (3) reinforcements in bathroom walls to allow later installation of grab bars[26]; and (4) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space. 42 U.S.C. § 3604(f)(3)(C)(iii).[27]

Despite the clear language of the FHA, Plaintiff's experts either took the position that there is only one feature of adaptive design (reinforced bathroom walls), (Dkt. #141 at 10),[28] or ignored the concept completely. (Dkt. #144-1 at 2-3, 16-17, 26-27, 33-35 ("[t]he presence of adaptable features in a space does not mean that that space complies with the minimal levels of accessibility required by the FHAA."). The argument that "use of the terms 'adaptive' or 'adaptable' in both the statute and the legislative history in no way modifies the requirement that all the features required by the FHA must be in place at the time of first occupancy," (Dkt. #236 at 13 n.13), is both legally incorrect and logically absurd.

It is well recognized in the building industry that the four features of adaptive design are key to complying with the goals of the FHA as they allow units to be changed to meet the specific needs of the disabled resident. See Wales Main Rpt. at 10-12 (Ex. 28, App. 483-485; Ex. 29, App.552-555); Vredenburgh Main Rpt. at 15 (Ex. 30, App. 571; Ex. 31, App. 592-594); Sheriff Main Rpt., p. 7-8 (Ex. 32, App. 602-603; Ex. 33, App. 619-623). The whole purpose of adaptability is recognition that because not all needs can be anticipated, the unit should be built

[26]Plaintiff' does not contest the presence of reinforcements. (See Dkt. #236 at 22 n. 23).
[27]See H.R. Rep.at 26-27, describing the "four specified features of adaptive design" consistent with Defendants' experts. (Ex. 3, App. 90). Such features of "adaptive design," are elements that allow persons with disabilities to "easily make additional accommodations if needed." (See id. at 18.)
[28]Catlin and Anderson eventually retreated from LCM's prior statement. (Anderson Dep., 60:13-61:24 (Ex. 20, App. 379-380); Catlin Dep., 216:3-6 (Ex. 18, App. 365) (conceding that the Act speaks of 4 features)). Mr. Ritzu continued to maintain this misinterpretation of the Act and expressed puzzlement over Congress' intentions. (Ritzu Dep., 138:16-141:25 (Ex. 25, App. 448-49)). Thus, Plaintiff's own experts undermine their counsel's interpretation.

so that it can be easily changed to meet the specific needs of the tenants, once known. Further, compliance with a safe harbor does not obviate the need for adaptation prior to occupancy, as Plaintiff's own expert admits:

> Q. Does one -- is there one safe harbor that would allow for design and construction to meet all the disabilities that are out there?
> A. Yeah. I think as you are probably aware, I have rendered the opinion that the ANSI standard, ANSI A117.1 as an example does not purport to provide requirements that will satisfy 100 percent of all ranges of all people with disabilities.
> Q. It's an unrealistic goal to expect that a safe harbor would provide for 100 percent, correct?
> A. Well, yeah, I think it's unrealistic to expect design and construction -- to design and construct buildings in a way that meets 100 percent of everybody's needs that has a disability.

(Schoonover Dep., 73:20-74:8 (Ex. 23, App. 414)).[29]

"Adaptive design" or "adaptability" refers to dwelling units that "can be adjusted or adapted without renovation or structural change." Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc., 40 F. Supp.2d 700, 708 (D. Md. 1999)(quoting HUD); Phillips v. Downtown Affordables, LLC, No. 06-00402, 2007 WL 2668637, at *8 (D. Haw. Sept. 5, 2007). Provided that there is sufficient space and an adequate layout, there are a wide range of adaptable features that can be built into properties to allow for later alteration by maintenance staff such as changing base cabinets, thermostats, thresholds, door swing, floor coverings or appliances. (See Sheriff Dep., 106:15-109:23, 126:21-127:6, 139:4-140:14, 175:10-177:2 (Ex. 27, App. 466-67; 468; 469; 470); Wales Dep., 171:16-172:9 (Ex. 26, App. 461); Vredenburgh Dep., 171:12-172:4 (Ex. 34, App. 627); Meacham Dep. (Vol. I), 26:11-33:6 (Ex. 9, App. 219-21)).[30]

[29] See also Id., 74:9-18 (Ex. 23, App. 414) (further noting "we accept that there are features of a building design and construction, you know, which will not meet everybody's needs. That's just generally accepted in the standards development process")). Indeed, the safe harbors Plaintiff professes to apply give examples of adaptable features. (Anderson Dep., 58:2-60:12 (Ex. 20, App. 379)).

[30] Examples of "non-structural adaptations that, if present, would not constitute FHA[] violations," include "changing counter and sink heights; removing a cabinet to reveal a knee space under the work surface, kitchen sink, and

Courts have recognized that the use of adaptive design is well within the purview of what Congress intended. Baltimore Neighborhoods, 40 F. Supp.2d at 708 (adaptive design refers to modifications that can be made "without delaying occupancy by the new tenant"); Phillips, 2007 WL 2668637 at *8. Whether or not a unit incorporates features of adaptive design is a necessary question of fact for determining FHA compliance. Id. at *1.

Plaintiff has chosen to read the words "features of adaptive design" right out of the FHA. Because Plaintiff utterly failed to acknowledge this fundamental aspect of statutory construction, Defendants are entitled to summary judgment. See Kaltenbach v. Richards, 464 F.3d 524, 528 (5th Cir. 2006) ("a statute ought, upon the whole, to be so construed that. . . no clause, sentence, or word shall be superfluous, void, or insignificant"). Therefore, Defendants are entitled to summary judgment on all allegations concerning features of adaptive design, 42 U.S.C. § 3604(f)(3)(C)(iii) -- the accessible route into and through the unit, (Conditions 468-472), heights of light switches and thermostats (Conditions 473-482), and usable kitchens and bathrooms (Conditions 483-530). (See Dkt. #236-2, Exhibit 1 at App. 110-125).

F. Plaintiff's Conclusions Must Be Limited To The Specific Units Inspected.

Plaintiff's experts acknowledge that they did not inspect every unit at the properties for which they seek to offer opinions. Instead, small percentages of units were inspected with only one of any unit type inspected and the other two checked for comparison. From that small percentage of units inspected, Plaintiff asserts that entire buildings are not compliant and seeks a remediation plan for the entirety. Such assertions are contingent on the assumption that all units of the same "type" would have the same allegedly non-compliant features. This assumption,

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bathroom lavatory" as well as changing out "appliance controls . . . ." Phillips, 2007 WL 2668637 at *7. In sum, "an adaptable unit is an accessible unit with features that can be tailored to the specific needs of the tenant." Id.

however, is the exact issue on which the experts seek to opine and thus cannot be assumed. Fed. R. Evid. 702; United States v. Day, 524 F.3d 1361, 1368-69 (D.C. Cir. 2008).

In rebuttal to such extrapolation, Defendants proffer the opinions of Joseph Kadane, Ph.D., a professor of statistics at Carnegie Mellon University since 1971. (Kadane Decl., Ex. A, ¶ 1 (Ex. 35, App. 631)). Dr. Kadane has written numerous articles regarding statistics as reflected on pages 7 through 35 of his curriculum vitae, including a recent book entitled "Statistics in the Law". (Id., at Ex. A, Tab A (Ex. 35, App.635-70)).

Dr. Kadane explained the importance of implementing random sampling prior to extrapolating in order to "ensure[] that there is no bias, whether intentional or inadvertent, in the choice of units." (Kadane Decl., Ex. A, ¶ 7 (Ex. 35, App. 632-33)). In considering if Plaintiff's selection of units was conducted properly, Dr. Kadane concluded "no." Dr. Kadane reviewed the deposition transcripts of each of Plaintiff's experts and confirmed that Plaintiff's experts failed to use random sampling: "As it is clear that appropriate random sampling was not used in Plaintiff's studies, the inferences drawn by Plaintiff's experts about units not inspected are not scientifically valid. Instead, the results of their inspections are limited to the specific units inspected." (Kadane Decl. at Ex. B, ¶ 10 (Ex. 35, App. 677); Hilberry Dep, 62:18-66:10 (Ex. 24, App.433-34); Schoonover Dep., 143:21-145:2 (Ex. 23, App. 418-19); Colby Dep., 81:14-82:22 (Ex. 21, App. 392); Catlin Dep., 187:13-23 (Ex. 18, App.364); Mohnke Dep., 139:1-15 (Ex. 36, App. 683); Anderson Dep., 74:8-75:17 (Ex. 20, App.381); see generally Kadane Dep. 16:9-16:18, 26:3-29:11 (Ex. 37, App.690; 691-92)).

Consistent with Dr. Kadane's opinion, courts recognize that, when an expert fails to reliably represent the population through proper sampling, the opinion is not to be admitted. See Rink v. Cheminova, 400 F.3d 1286, 1290 (11th Cir. 2005) (excluding extrapolated opinions

based on conjecture); Meister v. Med. Eng'g Corp., 267 F.3d 1123 (D.C. Cir. 2001) (affirming exclusion of plaintiff's expert testimony because of too great an analytical gap between data and opinion). Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

Plaintiff attempts to refute the inadmissibility of Plaintiff's extrapolated expert opinions by asking this Court to ignore Dr. Kadane, disregard the controlling case law, and conclude that random sampling is not necessary here. (Dkt. #236 at 37, fn. 33.) The sole support for Plaintiff's request is one trial court decision that did not address the need for sampling or the admissibility of the opinions at issue there but rather concluded that the record in that case failed to create a genuine issue of material fact based on deposition testimony that was "littered with uncertainty and vagueness." Id. In contrast, here Dr. Kadane's opinions are crystal clear.

As Plaintiff's experts only have knowledge regarding the specific units they inspected, they have no scientific basis for rendering their broad opinions. (Kadane Decl. at Ex. B, ¶ 10 (Ex. 35, App. 677)). Such broad opinions without factual support are not helpful to the fact finder in determining the very issues that Plaintiff must prove. Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir. 1999); Muñoz v. Orr, 200 F.3d 291, 301 (5th Cir. 2000). Summary judgment can be entered against Plaintiff on any units Plaintiff's experts did not inspect.

V. EVEN IF PLAINTIFF HAS MET ITS AFFIRMATIVE PROOF BURDEN, DEFENDANTS HAVE PRESENTED SUBSTANTIAL EVIDENCE REFUTING PLAINTIFF'S ALLEGATIONS.

In light of the many facts contradicting Plaintiff's claims, Plaintiff cites to numerous cases where divergences from the FHA were undisputed and claims this is another such case.[31] It is not. Upon review of the main expert reports, the rebuttals to Plaintiff's experts and the

[31]The cases primarily relied on by Plaintiff, (Dkt. #236 at 11 n. 11), are easily distinguishable given that they all involve situations where the defendants failed to put on a case. The record in this case is plainly different - merely using the word "undisputed" does not make it so. Indeed, even the "violations" listed for Jefferson at Marymoor, for which Defendants' did not file an expert report, are disputed by numerous documents, which reflect that the property was designed and constructed in accordance with the Guidelines.(See Decl., J. O'Connor, III (Ex. 14, App. 293-319)).

detailed site-specific reports and accompanying videos and photos, it becomes readily apparent that Defendants have alleged sufficient facts to contest every allegation in this case if not to demonstrate compliance such that Defendants' motion should be granted.

A. Defendants' Experts Found That The Properties Are Accessible And Usable.

Defendants have provided four different experts who analyzed the properties with different (although complimentary) methodologies.[32]

1. Two Experts Focus On A Proper Application Of The Safe Harbors.

Contrary to the confused application applied by Plaintiff's experts, Defendants had two experts render opinions based on a conventional interpretation of the safe harbors--the very measures Plaintiff considers as objective and thus finds acceptable.[33] In doing so, those experts noted numerous problems with Plaintiff's conclusions and showed that the properties are indeed accessible and usable even if the safe harbors were the only proper metric.

Mark Wales is the owner and president of Wales Associates, LLC. Mr. Wales has over twenty-five years of experience related to interpretation, enforcement, and development of building codes and standards, including the federal accessibility standards.[34] Mr. Wales refutes the methodology and conclusions of Plaintiff's inspectors and also affirmatively analyzes the accessibility, usability and adaptability of the properties. His analysis is based on a wide spectrum of technical assistance materials (including the safe harbors) and empirical research. (See Wales Expert Report (Wales Main Rpt. at 75-78, Ex. 28, App. 548-51)).

Peter Skarzenski, AIA, of Pete Skarzenski Consulting has over thirty years of experience

[32]These experts expressed general opinions on the accessibility of the properties as well as property-specific opinions in publicly filed reports. If necessary, these experts will provide further affirmative evidence at trial that all the relevant properties are accessible, usable or adaptable for persons with disabilities.

[33] Defendants' experts explain that the safe harbors are actually the result of a consensus voting process. (Wales Dep., 76:12-78:9 (Ex. 26, App. 458-59); Vredenburgh Dep., 25:9-27:23 (Ex. 34, App. 626)).

[34]Mr. Wales was on many of the same committees as Plaintiff's witness Mr. Schoonover. Mr. Wales served for 13 years on the ANSI 117.1 standards committee. (See Ex. 38, App. 694-96).

as an architect and as a private consultant and has provided services such as in-house quality control, building code and handicap accessibility plan review, project specifications, construction observations, and post-construction reviews for multi-family housing, student housing, military housing, and multi-family housing renovation work. Mr. Skarzenski's main report, response to Plaintiff's rebuttals, and property-specific reports provide an analysis of accessibility based primarily on his deep understanding of the safe harbors and the design process.

2. Two Other Experts Look to Other Creative, Objective Methods to Assess The Accessibility and Usability of the Properties.

Consistent with Congress's intent that there may be "other creative methods" of meeting the Act, H.R. Rep. No. 100-711, at 27 n.71 (Ex. 3, App. 90), Defendants hired two other experts to address accessibility and usability based on empirical research and on a practical methodology that demonstrates the concepts visually as applied to the properties.

Dr. Alison Vredenburgh is a principal with Vredenburgh & Associates, Inc. and the author of studies that evaluate the accessibility and usability of walkways and ramps and of apartment bathrooms, kitchens, turning space and control placement. Among other issues discussed in Dr. Vredenburgh's main report, response to Plaintiff's rebuttals, and in the property-specific reports, Dr. Vredenburgh discusses her empirical research, studies and experience and her determination that the properties are accessible, usable and adaptable to the needs of persons with disabilities, and how compliance with the safe harbors does not necessarily mean that an element is accessible. (See Vredenburgh Main Rpt. at 1-17 (Ex. 30, App. 557-73)).

Paul Sheriff is the founder and President of Paul Sheriff Inc., which provides consulting services to large corporations, small companies, architects, attorneys, individual business owners, insurance companies, and the federal government on accessibility issues. Mr. Sheriff serves as a Special Master, Court Monitor and Arbitrator/Mediator to the US District Court for

the District of Hawaii on issues relating to accessibility and compliance with the accessibility laws. Mr. Sheriff is a paraplegic and has used a wheelchair for the past twenty-five years. Mr. Sheriff conducted "roll-thru" surveys by which he assesses the accessibility, usability and adaptability of properties as well as any barriers to accessibility. While he does not use a tape measure, he uses a specially made wheelchair to evaluate the various components of the living space looking primarily for the presence of 30 x 48 clear floor space (i.e. "ability to maneuver about the space") and reach ranges. Mr. Sheriff also discusses how adapting a space to meet the specific needs of disabled individuals on a case-by-case basis allows the property manager to meet the needs of each specific person with a disability, upon request. His analysis is presented in both written reports and videos.[35] (See Sheriff Main Rpt. at 1-23, (Ex. 32, App. 596-618)).

B. There Is No "Uncontested" Evidence Of Violations.

Plaintiff asserts entitlement to summary judgment for "those conditions that are either undisputed by JPI's inspectors or are so egregious when compared to the standard provided by the Guidelines that they cannot be legitimately explained by other purported defenses, such as wear and tear, construction 'tolerances,' or environmental conditions." (Dkt.# 236 at 22). While Plaintiff cobbled together an exhibit for the supposed purpose of demonstrating pinholes in Defendants' reports, it is readily apparent that Defendants contested every single allegation in this case either in main reports or on an item-by-item basis.[36] Simply because a measurement was not disputed does not mean that there is a "undisputed" violation of the accessibility laws.

The majority of the "conditions" (#1-445) identified by Plaintiff pertain to the requirement to make the public and common areas readily accessible to and usable by

[35] See, e.g. written property report of Paul Sheriff for Aspen Ridge, (Ex. 39, App. 732-804), and video report for Aspen Ridge (Ex. 40, App. 806).

[36] Plaintiff's theory is only substantiated by an improper, inadmissible summary exhibit which mischaracterizes opinion and testimony as opposed to summarizing information. In response, Defendants provide the Court with a proper counter exhibit reflecting that each issue raised is indeed refuted by Defendants' experts. (Cf. Dkt. #236-2 at Plaintiff's Ex. 1 with Defendants' Ex. 1, App. 1-85).

handicapped persons, with the primary focus on "accessible routes." (Dkt. #236 at 22-28). These allegations are addressed by Defendant's experts in terms of misapplication of the safe harbors, situations where the condition met other safe harbors or peer-reviewed research:

1) There is no requirement under the safe harbors to have a network of sidewalks connecting every dwelling unit to the common use areas and not every amenity has to be accessible. (Wales Main Rpt. at 30-34 (Ex. 28, App. 503-503); Wales Dep. 167:10-168:1; 236:2-238:6 (Ex. 26, App.460; 462-63); Skarzenski Main Rpt. at 2-3 (Ex. 41, App. 809-810), Ex. 56, App. 1200-03)).

2) Defendants' design professionals designed all "accessible routes" to have 2% cross slope and 5% running slope. (Knight Dep. (Vol. I), 28:6-29:3 (Ex. 10, App. 256-57) and Dep. Exh's 4, 5, 7, 9, 16 and 22 (Ex. 42, App. 812-863)). Plaintiff's examples of "undisputed" conditions focuses almost exclusively on sidewalks that were by definition not the "accessible" route (having exceeded 8.33%). (Dkt. #236-2 at 25-27, Conditions 63-212).

3) Sidewalks, landings and ramps with greater than 5% running slope and 2% cross slope are accessible. (Wales Main Rpt. at 8-9, 35-43 (Ex. 28, App. 480-81; 507-15); Jefferson on the River Rpt. at 10-12 (Ex. 44, App. 872-74); Vredenburgh Main Rpt. at 7-10 (Ex. 30, App. 563-66)).

4) The FHA did not require that all building sites have to be flattened or that all sidewalks have 5% running slope and 2% cross slope, nor did it ban the use of stairs at apartment complexes. (See Dkt. #236 at 23-27). HUD's regulations merely provide that there must be "[a]n accessible route into and through the covered dwelling unit," 24 C.F.R. § 100.205(c)(3)(i). Hence, as a matter of law not every sidewalk leading to a building nor every entrance must be accessible -- only one accessible route and entrance must be provided and even that requirement

may be waived due to terrain or unusual characteristics of the site.[37] Yet, Plaintiff measured every sidewalk for slope and catalogued every set of steps they could find even when it was not on the accessible route. (See Dkt. #236-2 at 48 -289). Clearly sidewalks with stairs were not intended to be the accessible route. (Knight Dep. (Vol. I), 30:1-32:8 (Ex. 9, App. 220); Knight Dep. (Vol II), 63:21-64:14 (Ex. 43, App. 866)).[38] Defendants' experts looked for alternative routes that met the necessary criteria. (Wales Main Rpt. at 32-33 (Ex. 28, App. 504-05); Sheriff Main Rpt. at 22, fn. 11 (Ex. 32, App. 617)).

5) Merely taking a measurement of a single point on a sidewalk is a faulty means of measuring the actual slopes of the sidewalk. (Wales Main Rpt. at 20-21 (Ex. 28, App. 492-93); Knight Dep. (Vol. II), 69:16-72:1; 74:7-76:1; 78:7-80:22 (Ex. 43, App. 867; 868 ;869).

6) Under the Guidelines, only 2% of the covered units require accessible parking and the properties far exceeded this minimum number. (Wales Dep., 167:10-168:1 (Ex. 26, App. 460); Knight Dep. (Vol. II), 109:19-112:13 (Ex. 43, App. 870)).

Many of the issues identified by Plaintiff's inspectors were clearly unrelated to design and construction. The built environment is not static -- all properties are subject to soil movement and natural changes due to soil expansion and shrinkage, settlement, frost heave and tree root growth.[39]

1) It is well known to all but Plaintiff's inspectors that soil expands and contracts, eventually causing obvious sidewalk movement (e.g. the high clay content of the soil in Dallas).

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[37] Similarly, not every door has to be accessible, rather only those that are designed for passage. (Wales Main Rpt. at 6 (Ex. 28, App. 479) (e.g. closet doors or secondary doors to a room)).

[38] Plaintiff ignores the fact that the Design Manual states that "inaccessible walks" are "allowed" where site amenities are linked by alternative accessible routes. Design Manual at 2.9 (Ex. 19, App. 373).

[39] Even though Plaintiff's experts attempt to ignore the fluctuation of sidewalks and slopes which regularly occurs due to weather, the Court can take judicial notice of this obvious fact. F.R.E. 201. If there were any doubt of this fact, evidence of the sever drought and frost conditions rampant throughout the states where many of these properties are located is reflected in multiple publications. (See, e.g. Ex. 45, App. 875-884 (articles regarding drought); (Ex. 46, App. 885-897) (articles discussing snow and ice).

(Skarzenski Dep., 178:17-179:3 (Ex. 12, App. 281); Knight Dep. (Vol. I), 16:24-20:22 (Ex. 10, App. 253-54); Vredenburgh Main Rpt. at 11-15 (Ex. 30, App. 567-71); Wales Main Rpt. at 27, 43-44 (Ex. 28, App. 499; 515-16)).[40]

2) Natural conditions particularly impact the sidewalks, ramps and landings. On countless occasions, the inspectors encountered changes to the accessible routes caused by environmental conditions causing slope deviations, vertical level changes at the interface of construction where buildings and/or sidewalks meet, cracks and gapping. [41] Sidewalks are designed to move and can be expected to move as much as 12 inches in a single year. (Knight Dep. (Vol. I), 16:24-20:22 (Ex. 9, App. 216-17)).

Plaintiff did not consider the impact of the terrain or unusual characteristics at the various sites. (Schoonover Dep., 101:17-103:11 (Ex. 23, App. 415); Mohnke Dep., 146:17-148:13, 75:24-77:1 (Ex.36, App. 684; 681-82); Anderson Dep., 18:18-19:5, 19:16-22, 175:12-25 (Ex. 20, App. 376; 387)). There are obvious practical reasons for the fact that not every sidewalk or entrance can meet Plaintiff's stringent standards. A development company cannot simply flatten an entire site or replace all of the soil, as Plaintiff's experts suggested. (Knight Dep. (Vol. I), 16:9-23 (Ex. 10, App. 253); Meacham Dep. (Vol. I) 47:2-49:10 (Ex. 9, App. 224-25)).[42]

1) Plaintiff gave no credence to the vehicular route exemption, which exempts the requirement for accessible pedestrian sidewalks between covered dwellings and public or common-use facilities elsewhere on the site due to site or legal constraints. 56 Fed. Reg. at 9505. (Dkt. #236 at 24). Defendants demonstrated that the use of vehicular routes and vehicles

[40] See, e.g. Jefferson on the River Rpt. at 11, 12 (Ex. 44, App. 873-74); see also Sullivan Place Rpt. at 10 (Dkt. #160-1) and Beaver Creek Rpt. at 3-4 (Dkt. #86-2).
[41] See Riverchase Rpt. (Dkt. #79-1 at 27, 43-44) (concluding that 100% of the gaps are resultant of deterioration and breakdown of the expansion joint material and/or due to the movement of soil causing vertical level changes).
[42] As shown in the attached photos, there is no possibility of designing a sidewalk with 5% grade at certain locations. (Wales Decl. (Ex. 29, App. 553-55)).

is an acceptable means of accessing common use areas where the slope of sidewalks exceeds 8.33%. (Wales Main Rpt. at 9, (Ex. 28, App. 482); (Alara Farms Rpt. at 6, Dkt. #199-1); Knight Dep. (Vol. I), 82:14-85:2 (Ex. 10, App. 260)).

2) HUD's regulations exempt from the requirement of having at least one building entrance on an accessible route situations where "it is impractical to do so because of the terrain or usual characteristics of the site." 24 C.F.R. § 100.205(a).[43] The civil engineer would perform a "slope analysis, using the topographic survey, to define the percentage of the site that was over 10 percent in grade."[44] (Knight Dep. (Vol. I), 24:14-26:22 (Ex. 10, App. 255-56)). A number of sites had 25 to 20 percent slope over 10%. (Id.) Hence, the existing terrain made it impractical to provide an accessible route to certain units at several properties including those where Plaintiff claims "undisputed" conditions.[45] Contrary to Plaintiff's assertion, this was accounted for during the design and construction process. (See e.g. Dec. J. O'Connor, III, (Ex. 14, App. 290-292)).[46] Defendants' experts confirmed that the terrain affected numerous properties and eliminated units from consideration.[47]

3) Defendants' expert reports have disputed the characterization of certain units as the second "ground floor", noting that they were not intended to be "covered units" due to site constraints. (See, e.g. Dkt. #199-1 at 79, 10; Dkt. # 151-1 at 5; Dkt. #192-1 at 6-7; Dkt. #115-1

[43]The regulations do not provide any particular test for this analysis. Id. (providing examples of such conditions).
[44]The 10% grade is used in the Guidelines, which requires analysis of the percentage of the total buildable area of the undisturbed site that is above 10% as the starting point. 56 Fed. Reg. at 9503-04.
[45]The properties are Hill, Lakes, Canyon, Founders, Den Rock, Morgan Falls, Aspen Ridge, Marymoor, Fair Oaks, Farms, Jefferson on the River, Pin Oak, Beaver Creek and Alara Farms. (Defendants' Responses to Requests for Admissions at 13-15, 76-78, 120-22, 131-133, 166-167, 200-202, 381-383, 547-548, 270-271, 291-293, 413-415, 392-394, 246-248 (Ex. 47, App. 899-938)).
[46]Plaintiff has faulted Defendants for not providing "any evidence showing that anyone performed the tests as required by the Guidelines." (Dkt. #236 at 48). In addition to the fact that the regulations do not require conformance with the Guidelines, it is important to note that the FHA has no document retention requirement. Plaintiff challenges decisions that took place decades ago and seeks to hold Defendants to a non-mandatory standard and a document retention policy that does not exist.
[47]See, e.g, Dkt. #86-2 at 3-4; Dkt. #166-1 at 1-4; Dkt. #191-1 at 3-4; Dkt. #151-1, at 3-4; Dkt. #199-1 at 2, 7-9; Dkt. #192-1 3-6; Dkt. #96-1 at 32; Dkt. #115-1 at 2; Dkt. #192-1 at 3.

at 4; Dkt. #191-1 at 8). It is Plaintiff's burden to prove that the unit in question is a "covered" unit, which they have not done.

Plaintiff cannot dodge the fact that the conditions of the properties are affected by age. While derisively paying lip service to the notion of "defenses, such as wear and tear, construction 'tolerances,' or environmental conditions," (Dkt. #236 at 22), the simple fact is that some of these properties are almost 20 years old and Defendants have not owned most of them for quite some time.[48] Elements of the properties outlived their natural life or have fallen into disrepair (thereby requiring maintenance), and current management has undertaken renovations. The property-specific reports demonstrate that this affected accessibility in numerous ways:

1) Resealing and restriping of asphalt parking lots is often times necessary to arrest cracking and deterioration.[49] With this, handicapped accessible spaces are moved.

2) Operating mechanisms such as door knobs, lavatory faucet handles/plumbing fixtures wear out due to age or become inoperable and thresholds loosen and rise. (Dkt. #152-1 at 3). They may be replaced with knobs or handles that are not designed specifically for people with hand manipulation disabilities.[50]

Having waited so long to file suit, Plaintiff tries in vain to pretend that a property constructed twenty years ago is the same today as it was then. This is not remotely credible. While the wear and tear on some of these properties was observable to even the untrained eye (e.g. crumbling concrete, sidewalk movement, stuck doors),[51] Plaintiff's inspectors refused to acknowledge issues of maintenance, taking the position that they were only to inspect for

[48]For example, Villas at Beaver Creek was sold to System Realty Inc. c/o Virginia Retirement System in April 1994. The current owner of Villas at Beaver Creek is Trammel Crow Residential. See Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories, No's. 1 and 3, Ex. A and C (Ex. 48, App. 940-45).
[49]See Jefferson on the River Rpt. (Dkt. #192-1 at 12-15).
[50]See Jefferson at Morgan Falls Rpt. at 87-88 (Dkt. #191-1).
[51]See, e.g. photos from expert reports (Dkt. #137-1 at 2-3; Dkt. #47-3 at 63). Mr. Meacham explained the various ways that a building can change after it is designed and constructed. (Meacham Dep. (Vol. I), 59:1-61:4, Ex. 9, App. 227-28); Mohnke Dep., 183:19-184:17, Ex. 36, App. 686-87).

"existing conditions" at the time of the site visit. (See, e.g. Ritzu Dep., 190:9-208:8 (Ex. 25, App. 450-454); Mohnke Dep., 184:7-185:16 (Ex. 36, App. 686-87); Hilberry Dep. 194:6-15 (Ex. 24, App. 435); Schoonover Dep., 154:7-165:1 (Ex. 23, App. 420-23); Knight Dep. (Vol. I) at 94:9-12 (Ex. 10, App. 262)).[52]

Many of the alleged divergences from the suggested measurements of the safe harbors were fractions of an inch, which is allowable.[53] The very safe harbors cited by Plaintiff allow for deviations from their recommendations, which are commonly known as construction tolerances.[54] (See ANSI 117.1 § 3.2 (Ex. 49, App. 949); Meacham Dep. (Vol. I), 21:15-22:17 (Ex. 9, App. 218)). Minor variations between the plans and final construction is an accepted aspect of these standards given the lack of precision in this type of construction. (See Wales Main Rpt. at 7 (Ex. 28, App. 480); Skarzenski Main Rpt. at 2 (Ex. 36, App. 680); Sheriff Main Rpt. at 22 (Ex. 32, App. 617); Skarzenski Rebuttal Rpts. at 166-3 at 4; 166-4 at 2, 4-6, 8 (Ex. 50, App. 962; 966; 968-970; 972).

Courts have taken into account construction tolerances when evaluating the accessibility of a facility in the safe harbor context and under the ADA. See, e.g. Access Now, Inc. v. Ambulatory Surgery Center Group, Ltd., No. 99-109, 2001 WL 617529, at *11 (S.D. Fla. May 2, 2001) (finding that "conventional building industry tolerances for field conditions," or "construction tolerances," exist in varying amounts for different construction elements); Parr v. Kapahulu Investments, Inc., No. 98-00329, 2000 WL 687646, *20 (D. Haw. May 16, 2000) (finding injunctive relief not appropriate for *de minimis* violations of ADAAG given that the

[52]At certain properties these minor maintenance issues were so minor that they were actually addressed before Defendants' inspection teams could get to the property. (Catlin Dep., 106:16-109:14 (Ex. 18, App. 360-61); Mohnke Dep., 179:6-183:18 (Ex. 36, App. 685-86)). LCM still considers these "violations".

[53]LCM explained that they "noted a violation of the Act any time there was a discrepancy from the guideline no matter how minor." (Ritzu Dep., 104:2-22 (Ex. 25, App. 445)).

[54]Section 3.2 of ANSI states: "All dimensions are subject to conventional building industry tolerances for field conditions." (Ex. 49 at §3.2, App. 949). AADAG has similar language.

discrepancies "do not materially impair the use of an area for its intended purpose, nor does it pose any apparent danger to persons with disabilities."). It is in fact Plaintiff's burden to demonstrate that any variance exceeds the tolerance. See Cherry v. City College of San Francisco, No. 04-04981, 2006 WL 6602454 at *6 (N.D. Cal. Jan. 12, 2006). However, Plaintiff's witnesses did not account for such tolerances or otherwise attempt to reach a conclusion about whether such minor divergences resulted in conditions that were not accessible. (Schoonover Dep., 127:21-129:11 (Ex. 23, App. 416-17); Ritzu Dep., 117:22-120:17 (Ex. 25, App. 447)).[55] Given that Plaintiff has failed to address evidence that the alleged barriers are within permitted dimensional tolerances, Defendants are entitled to summary judgment on that defense.

The FHA is triggered by the discrete acts of design and construction of the covered unit or common area. Fair Housing Council, Inc., 250 F. Supp. at 718-19; Garcia v. Brockway, 526 F.3d 456, 461-62 (9th Cir. 2008). Therefore, Defendants are entitled to summary judgment for all instances where the alleged violation was due to changes unrelated to actions of design and construction. Alternatively, at a bare minimum, all of these fact-driven impacts on accessibility will be subject to proof as such by Plaintiff at trial, and Defendants cannot be held in violation of the FHA without first examining both the cause and whether or not the deviation nontheless results in a condition that is "accessible" "usable" or a "feature[] of adaptive design." Defendants are entitled to demonstrate that issues of maintenance, "de minimis" deviations from the standards relied on by Plaintiff, and issues caused by changing site conditions, may co-exist with

[55]LCM was not even aware that ANSI 117.1 allowed for construction tolerances until confronted during the deposition. (Ritzu Dep., 116:1-118:25 (Ex. 20, App. 446-447)). While Ms. Hilberry acknowledged that the dimensions suggested under ANSI 117.1 are subject to construction tolerances and claimed to have considered them, she drew a "blank" when asked for a specific example of taking construction tolerances into account. (Hilberry Dep., 51:16-56:7 (Ex. 24, App. 431-432)). Her reports indicate the most minor of variances. (See, e.g. Dkt. #149-1 at 5-7).

an accessible, usable, and/or adaptable property. See Access Now, 2001 WL 617529, at *11; Parr, 2000 WL 687646, at *20; Independent Living v. Oregon Arena, 1 F.Supp.2d. 1124, 1135 (D. Ore. 1998) (recognizing a defense for "dimensional tolerances" where plaintiff claimed arena was inaccessible); D'Lil v. Stardust Vacation Club, No.00-1496, 2001 WL 1825832, at *5 (E.D. Cal. Dec. 21, 2001).

C. Plaintiff Fails To Show A Pattern Or Practice Of Discrimination.

Plaintiff claims there is a pattern and practice of discrimination under the theory that there are a variety of deviations at 32 of the 52 properties at issue in this litigation. (Dkt. #236 at 36). On this issue, Plaintiff offers only theories, not facts. Plaintiff's theory is fundamentally flawed and ignores the fact that Defendants' policy has always been one against discrimination. By its own case law, Plaintiff fails to show that discrimination is "the company's *standard operating procedure*, the regular rather than the unusual practice." Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (emphasis added); Dkt # 236 at 36.

1. Plaintiff Hopes To Dodge All Evidence Regarding 20 Undisputed Properties.

This phase of the litigation is about 52 properties. Unable to prove liability related to the conditions at 20 of the 52 properties based upon the documents and written discovery produced as well as the expert testimony regarding 8 of the 20 properties, Plaintiff has decided to forego its claims against those 20 properties. (Dkt # 236 at 7, n.9.) Those 20 properties constitute all of the student housing projects and all of the elevator projects (with the limited exception where elevator buildings are mixed with garden-style buildings and where multiple elevator buildings are spread across a property). At a minimum, Plaintiff's decision to drop student housing and elevator buildings is an express recognition by Plaintiff that with respect to those styles of properties, the pattern is one of full and complete accessibility. Further, the fact that, for over

one-third of the properties included in this phase, Plaintiff has no case, crushes Plaintiff's claim that there was any pattern or practice of discrimination employed by Defendants across the design and construction of all of its properties.

2. Defendants' Policies Are One of Inclusion and Anti-Discrimination.

The scattered divergences from non-mandatory standards hardly meets the high hurdle of demonstrating a pattern and practice. See Pacific Northwest Electric, Inc., 2003 WL 24573548 at *10 ("a showing of violation of the FHA is, in and of itself, insufficient, to succeed on a claim of "pattern and practice of discrimination").[56] The properties at issue were not designed and constructed by the same individuals or even the same entities. Instead, a diverse group of JPI employees and design professionals working out of various offices throughout the country developed the properties over a 20 year period. (See Initial Disclosures, Ex. A and B (identifying more than 100 professional design firms and over 600 JPI employees involved in design and construction) (Ex. 51, App. 976-1109)); Motsenbocker Dep. (Vol. I), 53:11-17 (Ex. 5, App. 100) (explaining that JPI operated in various locations with different people involved in the design and construction process)). And, as the design professionals testified, each property is designed to meet the various needs of the community in which it is located, the state and local building codes, and the site conditions. (See Meacham Dep. (Vol. I), 109:23-110:21 (Ex. 9, App. 232); Knight Dep. (Vol. I), 20:23-22:17 (Ex. 10, App. 254-55) (explaining that different site conditions and local regulations influence design)).

As reflected above, the overwhelming evidence shows a careful, deliberate and concerted effort at compliance throughout design and construction by hiring qualified professionals, mandating that certain standards are met, and overseeing the process to ensure that such goals

[56]Plaintiff must establish that the Defendants engaged in a "policy of discrimination," United States v. W. Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971), or that it was its "standard operating procedure," Hallmark Homes, Inc., 2003 WL 23219807, at *5 (D. Idaho Sept. 29, 2003) (citations omitted).

were achieved. Indeed, when one reverses Plaintiff's own chart (Dkt. # 236, at 8-9), it is clear that Plaintiff must concede the accessibility of the majority of the features investigated at these properties. (See Exs. 16,17). In addition, Defendants had firm practices in place to ensure its residents' needs were met. Development, construction, and property managers were all trained with regard to compliance, including distribution of the Guidelines, (Motsenbocker Dep. (Vol. I), 60:6-65:11 (Ex. 5, App. 101-03)), and an FHA compliance manual for property management (Ex. 52, App. 1110-1137).

Despite the passage of time and number of residents (some of these buildings have been occupied for almost 20 years and have been occupied by tens of thousands of residents), accessibility complaints have been few. (See Defs.' Response to Plaintiff's Second Set of Interrogatories No. 9. (Ex. 53, App. 1138,1182)). The specific needs of the residents were met via accommodations and modifications of the adaptable units just as the statute intended. (Id.; see also Motsenbocker Dep. (Vol. I), 298:2-299:4 (Ex. 5, App. 112) (describing process for accommodating resident requests to meet their specific needs)). Indeed, when an accessibility complaint was filed with HUD, the subsequent investigation determined that Congressional Village was accessible and the complaint was completely without merit-- they found "no violations" and it "was a bogus claim." (Meacham Dep. (Vol. I), 184:3-186:7 (Ex. 9, App. 248-49)).

VI. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT CONCERNING THE TWENTY PROPERTIES PLAINTIFF CHOSE NOT TO PURSUE.

In pursuing these claims, Plaintiff sought voluminous discovery on 52 properties. Following the close of discovery, Plaintiff supplemented its interrogatory responses and now indicates that it will not pursue claims regarding the design and construct of 20 properties. (Dkt. #236 at 15, fn. 9). Plaintiff cannot unilaterally pullback its claims as to these properties without

prejudice or any other preclusive consequences.[57]

In its Motion, Plaintiff has failed to put forth any facts challenging the accessibility of these 20 properties. Because Defendants filed an Answer, engaged in 15 months of fact and expert discovery regarding these properties, and filed its own Motion for Summary Judgment, Plaintiff cannot unilaterally withdraw its claims as to such properties without consequence. Plaintiff had an opportunity to make its case and failed to prove that these properties do not comply with the FHA. Where a defendant has presented undisputed facts in support of a motion for summary judgment, a plaintiff's efforts to dismiss claims should be denied so that the court may address the claims on the merits. See, e.g. Mosley v. JLG Industries, Inc., 189 Fed. Appx. 874 (11th Cir. 2006); Koerner v. Aetna Healthcare, Inc., 92 Fed. Appx. 394 (9th Cir. 2003); Tolle v. Carroll Touch, Inc., 23 F.3d 174 (7th Cir. 1994).

Plaintiff did not present opinion testimony regarding nine properties in this case: Jefferson at Berry Street (University of Minnesota), Clark Atlanta University, Gainesville (University of Florida), North Carolina State University (Wolfpack), Jefferson Commons--Lawrence (KU), Jefferson Commons--OSU (Stillwater II), Jefferson Commons at Star Ranch (Tucson II), Jefferson Commons at Fresno, and Jefferson at Simi Valley. Without any evidence to support the initial claim that these properties are inaccessible, Plaintiff cannot meet its burden and judgment should be entered summarily in Defendant's favor. Further, for a number of these properties, Defendants have put forth undisputed evidence and testimony that the property is

[57]Plaintiff should have filed a motion to dismiss its claims voluntarily. See Fed. R. Civ. P. 41(a). However, at this point, it should not be permitted to do so. "Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the district court may, in its discretion, refuse to grant a voluntary dismissal." Hartford Accident & Indemnity Co. v. Coasta Lines Cargo Servs., Inc., 903 F.2d 352, 360 (5th Cir. 1990); see also League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993); Oxford v. Williams Companies, Inc., 154 F. Supp. 2d 942, 951-4 (E.D. Tex. 2001).

accessible.[58] Based on this undisputed evidence, Defendants are entitled to summary judgment on these properties.

For the remaining 11 properties, Plaintiff conducted expert inspections but failed to meet its affirmative burden to show by a preponderance of the evidence that the dwelling units or common areas at these properties are not accessible. In choosing not to pursue claims against these properties, Plaintiff has made clear that it cannot dispute Defendants' assertion that the properties are accessible to and useable by persons with disabilities. On the other hand, Defendants have put forth substantial evidence in property-specific expert reports that these properties are accessible to and useable by persons with disabilities. Each of these properties was inspected by an accessibility expert, and in each case, based on the evidence observed during their inspection of the property, the expert concluded that the property was accessible and useable to persons with disabilities as required by the FHA and ADA.[59]

Based on this undisputed evidence, Defendants are entitled to summary judgment on these 20 properties.

VII. EVEN IF LIABILITY COULD BE PROVEN, PLAINTIFF IS NOT ENTITLED TO THE RELIEF IT SEEKS.

In a footnote, Plaintiff states that "[s]hould the Court grant the United States' motion for partial summary judgment as to liability, the United States intends to seek monetary damages for aggrieved persons, 42 U.S.C. § 3614(d)(1)(B); other appropriate injunctive relief, 42 U.S.C. § 3614(d)(1)(A)–(B); and civil penalties, 42 U.S.C. § 3614(d)(1)(C)." (Dkt. #236 at 50 n.44). This attempt to bifurcate the proceedings is inconsistent with the Court's scheduling order, but, even if that were not the case, Plaintiff faces significant problems securing relief in this matter.

[58] See, e.g. Dkt. #220-1; Dkt. #204-1; Dkt. #210-1; Dkt. #211-1.
[59] See Dkt. #99-1; Dkt. #126-1; Dkt. 130; Dkt. #135-1; Dtk. #133-1; Dkt. #145-1; Dkt. #205-1; Dkt. #160-1; Dkt. #147-1; Dkt. #124-1.

A. Plaintiff's Claims For Penalties And Damages Are Time Barred.

Under 28 U.S.C. § 2462, "any action suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued…" A cause of action seeking imposition of civil penalties under 42 U.S.C. § 3604(f)(3)(C) accrues from the date on which the design and/or construction is completed. Pacific Northwest Electric, Inc., 2003 WL 24573548, at *10; See also Garcia, 526 F.3d at 460-462 (9th Cir. 2008) (recognizing that a failure to design and construct "is not an indefinitely continuing practice, but a discrete instance of discrimination that terminates at the conclusion of the design-and construction phase.")

In this case, the five year statute of limitations bars Plaintiff's claim for civil penalties on the 21 properties[60] for which design and construction was completed before May 5, 2000.[61] Imposing any civil penalty outside of this five year period is inappropriate given "the problems of faded memories, lost witnesses, and discarded documents in penalty actions brought decades after alleged violations are finally discovered." Pacific Northwest Electric, 2003 WL 24573548, at *7 (citing 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994). See also Taigen, 303 F.Supp.2d at1133 (five year limit for civil penalties claim).

Likewise, the statute of limitations for Plaintiff to seek compensatory damages on alleged violations at 29 properties has run. The applicable statute of limitations provides, "Every action for money damages brought by Plaintiff or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first

[60]Design and construction of the following properties was completed before May 5, 2000: Jefferson at Rock Creek, Jefferson at Fox Hollow, Jefferson at Coral Square, Jefferson Summit(Maitland), Morgan Falls, Jefferson River, Jefferson at Pin Oak, Jefferson at King Farm, Jefferson on the Plaza, Jefferson Farms, Jefferson at Preston, Villas at Beaver Creek, Jefferson at Melrose, Jefferson on the Parkway, Jefferson at Riverchase, Jefferson at Prestonwood Hills, Jefferson at Frankford, Jefferson Hill, Jefferson at Mission Gate, Jefferson Pines, and Jefferson at Fair Oaks; Jefferson Commons-Lawrence (KU); Jefferson Commons-TTU. (See Ex. 15, App. 322-330).

[61]The parties entered into a tolling agreement on May 5, 2005. (Ex. 54, App.1183-1185). Plaintiff did not file its Complaint against Defendants until March 4, 2009. (Dkt. #1.)

accrues…" 28 U.S.C. § 2415. Plaintiff's allegations here are "in the nature of a tort claim," bringing the suit within the three year limitation period of 28 U.S.C. § 2415. Taigen, 303 F.Supp. 2d at 1144.

The FHA gives Plaintiff an advantage not generally afforded private plaintiffs, providing that the cause of action for compensatory damages brought by the United States does not accrue until the facts material to the right of action are known or reasonably could be known by an official of the United States charged with the responsibility to act in the circumstances. 28 U.S.C. § 2416(c). However, the legislative history expressly states that the principal application of this exclusion was intended for situations involving fraud. H. Rep. No. 1328, 89th Cong., 2d Sess., reprinted in S. Rep. 89-1328 at 5 (1966), as reprinted in 1966 U.S.C.C.A.N. 2502, 2507. And, courts have held that this provision should not be interpreted to render the statute of limitations meaningless. "Congress could not ... be completely forgiving of government delay and still be true to its motives in enacting a statute of limitations. Therefore, it is not necessary that relevant officials have all details of a claim before the statutory period begins to run; once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." United States v. Kass, 740 F.2d 1493, 1497 (11th Cir.1984).

In cases not involving fraud or concealment, courts have found that the government could have reasonably known facts when those facts were available to the general public. For example, in United States v. Hess, 194 F.3d 1164 (10th Cir. 1999), a case involving an improper excavation through trespass, the court concluded that the government could have reasonably known of the extraction by the defendants when the defendants publicly advertised a gravel sale.

Here, any alleged violation occurred when the properties were completed. See Garcia, 526 F.3d at 460-462. These multi-family housing properties were advertised to the public and

can be accessed by the public. Therefore, Plaintiff could have reasonably known of the alleged violations when they were offered for occupancy.[62] Accordingly, the three year statute of limitations bars Plaintiff's claim for compensatory damages on any property for which design and construction was completed before May 5, 2002.[63] Plaintiff's claim for compensatory damages regarding alleged violations at these 29 properties is barred.

B. Plaintiff's Claims For Injunctive Relief Are Inequitable.

As Plaintiff waited, at the very least, nearly eight years to bring its claims against Defendant, Plaintiff's claim for injunctive relief is inappropriate, unfair, and unnecessary, and Plaintiff should be barred from obtaining the equitable relief it seeks.

The propriety of imposing equitable relief depends on the particular facts of each case. Sanford v. Coleman Realty, 573 F.2d 173, 178-79 (4th Cir. 1978); Rogers v. 66-36 Yellowstone Blvd. Cooperative Owners, Inc., 599 F. Supp. 79, 83 (E.D.N.Y. 1984). And, in assessing what, if any, equitable relief should be granted, a district court should craft an equitable remedy that corresponds in degree to the wrong inflicted. Rogers, 599 F. Supp. at 83. That is, equitable relief should be "'a special blend of what is necessary, what is fair, and what is workable.'" Id.

Traditionally, the defense of laches cannot be asserted against the United States to its claims for equitable relief because "time does not run against the king." Doggett v. United States, 505 U.S. 647, 667 (1992). But the traditional rule is not "an absolute bar where

[62]Plaintiff had additional notice of at least some of the facts underlying its claim since it notified JPI of its investigation of Jefferson River Estate on June 21, 2001. See United States Responses to Defendants' First Set of Requests for Admissions, Request for Admission 1 (Ex. 55, App.1187). Likewise, between 2002 and 2008, Defendants produced to Plaintiff architectural and civil design drawings on 45 properties. (Id. at no. 6 (Ex. 55, App 1189)).

[63] Design and construction of the following properties was completed before May 5, 2002: Jefferson Commons-Lawrence (KU), Clarke-Atlanta (Heritage Commons), Jefferson Commons-TTU, Jefferson Commons at Star Ranch (Tucson II), Jefferson at Aviara, Jefferson at Emerald Park; Jefferson at Rock Creek, Jefferson at Fox Hollow, Jefferson at Coral Square, Jefferson Summit (Maitland), Morgan Falls, Jefferson River, Jefferson Park (Den Rock), Jefferson at Pin Oak, Jefferson at King Farm, Jefferson on the Plaza, Jefferson Farms, Jefferson at Preston, Villas at Beaver Creek, Jefferson at Melrose, Jefferson on the Parkway, Jefferson at Riverchase, Jefferson at Prestonwood Hills, Jefferson at Frankford, Jefferson Hill, Jefferson at Mission Gate, Jefferson Pines, Jefferson Lakes, Jefferson at Fair Oaks. (See Ex. 15, App. 322-330).

unreasonable agency delay has caused hardship." Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n, 620 F.2d 900, 909 (1st Cir. 1980). "Government agencies, like private corporations, have an obligation to conduct their affairs in a reasonably efficient manner." Texaco Puerto Rico Inc. v. Department of Consumer Affairs, 60 F.3d 867, 879 (1st Cir. 1995). Where the government has unreasonably delayed in bringing its case, the delay can be considered by the court in determine whether an equitable remedy is appropriate. Id. at 878-880 (unreasonable delay militates against equitable relief). As the Fifth Circuit has said, "When seeking an equitable remedy, Plaintiff is no more immune to the general principles of equity than any other litigant." United States v. Second Nat'l Bank of N. Miami, 502 F.2d 535, 548 (5th Cir. 1974).

In Equal Emp. Opportunity Comm'n v. Liberty Loan Corp., 584 F.2d 853, 857-58 (8th Cir. 1978), the Eighth Circuit affirmed the district court's decision to dismiss an employment discrimination case under its equitable powers, given that the agency had waited four years and four months to bring its suit and this unreasonable delay had impaired the defendant's ability to defend itself. In this case, design decisions and construction was undertaken decades ago and Plaintiff investigated Defendants for 8 years before filing a Complaint. This unreasonable delay has caused substantial prejudice to Defendant. Plaintiff seeks to have Defendants produce documents (e.g. site impracticality analysis or evidence of safe harbor use) that were created well beyond even the most conservative document retention policies and to have perfect recall on all decisions on every property long after most employees have left. Moreover, Plaintiff seeks broad equitable relief despite having presented no evidence to show that the condition of the properties reflects the condition of the properties when they were designed and constructed -- alleging that all it takes is the Guidelines to prove a *prima facie* case. This position is

problematic for assessing whether there has been a design and construction violation, and is particularly unfair under the circumstances of this case given the number of years and property ownership changes. Holding a developer liable for conditions at a property years after the property was sold unfairly subjects them to liability for conditions they had no control over.[64]

C. Retrofits Are Not An Appropriate Remedy For Sold Properties.

Plaintiff's request for retrofits cannot be granted without the joinder of the current owners of the properties as co-defendants. Defendants do not own any of the 32 properties at issue and advised Plaintiff of this problem in the Answer. (Dkt. #18 at 11-12.)

Current property owners are required parties under Rule 19 to effectuate any remedial relief sought by the plaintiff, including "retrofitting of the noncompliant properties." National Fair Housing Alliance v. A.G. Spanos Construction, Inc., 542 F. Supp. 2d 1054, 1066-67 (N.D. Cal. 2008); Roberts v. Royal Atlantic Corp., No. 03-2494, 2010 WL 749944, at *8 (E.D.N.Y. Mar. 3, 2010); Thompson v. Sand Cliffs Owners Ass'n, No. 96-270, 1998 WL 35177067, at *2-3 (N.D. Fla. Mar. 30, 1998). See also F.R.C.P. 19(a)(1) (parties are required if, "in [their] absence, the court cannot accord complete relief among existing parties.").

There also can be no question that any decision mandating modifications to the properties will impair the proprietary interests of the owners. See F.R.C.P. 19(a)(1); Frotton v. Barkan, 219 F.R.D. 31, 32 (D. Mass. 2003). Given Plaintiff's decision to not timely add them, the owners are not able to protect their interests. Roberts, 2010 WL 749944 at *8 (unit owners not joined in ADA action had "the right to be heard" and "that right is violated by litigating this matter in their

[64]Because of this, state law typically recognizes statute of repose which limits liability after a specified period of time following the substantial completion of a construction project. See, e.g. Tex. Civ. Prac. & Rem. Code Ann. § 16.008. LCM acknowledged that architects benefit from statutes of repose because they cannot control the conditions of buildings they designed after the building is constructed and occupied for years. (Anderson Dep., 184: 14-187:25 (Ex. 20, App. 388-89)).

absence"); Doty v. St. Mary Parish Land Co., 598 F.2d 885, 887 (5th Cir. 1979) (holding that "resulting judgment, although not legally binding on the [absentee]," would impair interests).

Further, injunctive relief may only bind (a) parties to a suit; (b) the parties' officers, agents, servants, employees, and attorneys; and (c) other persons who are in active concert or participation with the parties, their officers, agents, servants, employees, and attorneys. See F.R.C.P. 65(d). Here, Plaintiff chose not to join the owners. Zenith Radio, Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110-11 (1969) ("a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."); Additive Controls & Measurement Systems, Inc. v. Flowdata, Inc., 96 F.3d 1390, 1394 (Fed. Cir. 1996).[65]

Even if the Court were inclined to override Plaintiff's decision and consider adding the current owners at this late stage, numerous current owners may not be added. Under Rule 19, in federal question cases, it is feasible to join absent persons only if they are subject to service of process. See F.R.C.P. 19(a)(1); F.R.C.P. 4(k); Godwin Gruber, P.C. v. Lambert, No. 03-1095, 2004 WL 813229, *2 (N.D. Tex. Apr. 13, 2004) (citing Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 385 (5th Cir. 1989). Plaintiff has failed to demonstrate that it would be able to secure service over these non-parties.

CONCLUSION

WHEREFORE, Defendants respectfully request that the Court enter judgment summarily in favor of Defendants on all counts of Plaintiff's Complaint or, alternatively, a portion thereof with the remainder to be scheduled for trial by jury.

[65]This right to be heard extends not only to the liability or subject matter of the case, but also to the issue of whether the nonparty would be considered in "active concert or participation" with the parties to the case pursuant to Rule 65(d). Zenith Radio, 395 U.S. at 112 (holding that the lower court erred in entering judgment against a nonparty entity without making the Rule 65(d) determination in a proceeding to which that entity was a party).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2011, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means:

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