UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

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| The Secretary, U.S. Department of Housing and Urban Development, on behalf of<br>[redacted] and<br>[redacted],<br>Charging Parties,<br>v.<br>ASTRALIS CONDOMINIUM ASSOCIATION,<br>Respondent. | HUDALJ 08-071-FH<br>September 10, 2009 |

**Appearances**

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For the Complainant

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For the Respondent

## INITIAL DECISION AND ORDER

**BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge**

On September 11, 2008, the Secretary of the United States Department of Housing and Urban Development (the "Secretary," "HUD," or the "Department") filed a *Charge of Discrimination* (the "Charge") against Respondent Astralis Condominium Association ("Astralis"). The Charge was filed on behalf of [redacted] and his wife, [redacted] (collectively "Complainants") and alleged that Respondent denied Complainants reasonable accommodations in violation of the Fair Housing Act, as amended in 1988, 42 U.S.C. §§ 3601 et seq. In particular, HUD alleged that Respondent denied Complainants exclusive use of handicapped accessible parking spaces, though such spaces were available close to their condominium unit and were rarely used by handicapped residents or visitors. HUD also alleged

that Respondent harassed, intimidated and threatened Complainants when they exercised or tried to exercise their right to a reasonable accommodation. On October 23, 2008, Respondent filed its *Answer to the Charge of Discrimination* denying the charges and alleging seventeen (17) affirmative defenses.[1]

By Order of the Court dated October 6, 2008, the hearing was set to commence on January 8, 2009, in San Juan, Puerto Rico.

The hearing started on January 8, 2009, and, due to the illness of one Counsel present, it was continued to February 9, 2009. The hearing concluded on February 10, 2009. Over the course of four days, the Court heard the testimony of: 1) [redacted]; 2) [redacted]; 3) Diana Ortíz; 4) José Alfredo Londoño; 5) Ernesto Sgroi; 6) Dr. César Ortíz-Sorrentini; and, 7) Sebastián Echeandía-Rabel. The parties filed Post-Hearing Briefs on March 23, 2009, and Reply Briefs on April 7, 2009. Accordingly, this case is ripe for decision.

## Applicable Law

**Fair Housing Act.** On April 11, 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968. Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). The Act expanded on the Civil Rights Act of 1964 to prohibit discrimination regarding the sale, rental, and financing of housing based on race, color, religion, and national origin. Id. The 1968 Act was amended twice to broaden the class of people falling under the scope of its protections: in 1974, discrimination because of sex was added, and in 1988 discrimination because of familial status or disability was included. (Pub. L. 100-430, approved September 13, 1988.)

In amending the Act, Congress recognized that people with disabilities are subject to artificial, arbitrary, and unnecessary barriers preventing them from making full use of housing. Congress also recognized that "more than a mere prohibition against disparate treatment was necessary in order that handicapped persons receive equal housing opportunities." Secretary of HUD v. Dedham Housing Authority, 1991 WL 442793, *5 (HUDALJ November 15, 1991) (Dedham I), citing H.R. Rep. No. 711, 100th Cong. 2nd Sess. 25, reprinted in 1988 U.S. Code Cong. Admin. News 2186 ("H.R. No. 711").[2]

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[1] Respondent has abandoned the affirmative defenses alleged in its Answer by failing to litigate them during the hearing or by specifically raising them in its post hearing brief. To the extent that an affirmative defense is raised as a corollary or auxiliary argument, if at all, it is addressed herein.

[2] Respondent dedicates almost 6 ¼ pages of *Respondent's Memorandum of Material Facts and Applicable Law* ("Respondent's PH Memo") to a discussion of preemption *vis-à-vis* the relationship between Puerto Rico's Condominiums Act and the FHA. HUD does not argue that the FHA preempts the Condominiums Act, but rather that Respondent cannot use Puerto Rico law "to ignore its obligations" under the FHA. *HUD's Response to Respondent's PH Memo* at 14. Respondent concludes that "as established by the evidence submitted at the hearing and made more obvious by the Condominiums Act's pertinent dispositions, Respondent's actions were legal and cannot be categorized as discriminatory." *Respondent's PH Memo* at 18.

The FHA provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615. As written, the Condominiums Act does not compel Respondent to violate resident's fair housing rights. See generally, Gittleman v. Woodhaven Condo Ass'n, 972 F. Supp. 894 (D.N.J. 1997) (to the extent the New Jersey Condominium Act could be read to compel the association to violate residents' rights, it is invalid); See also

Pursuant to the FHA, housing providers are prohibited from discriminating in the sale or rental of housing because of a handicap of a buyer or renter, anyone residing or intending to reside in the housing, or any person associated with a handicapped buyer or renter. 42 U.S.C. § 3604(f)(1). The FHA also prohibits housing providers from refusing residency to persons with a handicap, or placing conditions on their residency, because those persons may require reasonable accommodations. 42 U.S.C. § 3604(f)(2). Such discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

Reasonable Accommodation. It is unlawful to refuse to make reasonable accommodations to rules, policies, practices, or services when such accommodations may be necessary to afford handicapped persons equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(f)(3)(B). To show that a requested accommodation may be necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's handicap. U.S. v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1381 (9th Cir. 1997).

Under the FHA, handicap means, "with respect to a person – (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act." 42 U.S.C. § 3602(h). The person making the complaint (or person whom complaint made on behalf of) has the burden to show a handicap exists. California Mobile Home Park Mgmt. Co., 107 F.3d at 1380.

In order to prove a prima facie case that a housing provider failed to provide the requisite reasonable accommodation, the Complainant must show that: (1) the Complainant has a handicap or is a person associated with a handicapped person; (2) the Respondent knows of the handicap or should be reasonably expected to know of it; (3) modification of existing premises or accommodation of the handicap may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling; and (4) the Respondent refused permission for such modifications, or refused to make such accommodation. Id.

Determining whether an accommodation is reasonable is fact specific and requires a case-by-case analysis. Id. The requirement of "reasonable accommodation" means that "feasible, practical modifications must be made, but extreme infeasible modifications are not required." See generally Robert G. Schwemm, Housing Discrimination Law and Litigation, § 11.5(4)(c), pp. 11-87-88 (citing Bronk v. Ineichen, 54 F.3d 425, 429 (7th Cir. 1995)). The person making the request for the accommodation should explain what type of accommodation he is requesting and, if the need for the accommodation is not readily apparent or not known to the provider,

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U.S. v. Commonwealth of Puerto Rico, 764 F. Supp. 220, 224 (D.P.R. 1991) (application of zoning requirement to group home violates reasonable accommodation section of Act). The Condominiums Act requires that if action is to be taken on a common area, then the consent of the members is required. 31 L.P.R.A. § 1291i. Consent of the membership, however, cannot be used as an excuse for the denial of a reasonable accommodation. And, if the membership was wrong in withholding its consent, it is in violation of the law.

explain the relationship between the requested accommodation and his disability. California Mobile Home Park Mgmt. Co., 107 F.3d at 1381.

After a request for a reasonable accommodation is made, the housing provider has the burden to propose solutions. Jankowski Lee & Associates v. Cisneros, 1995 WL 399384 at *11, aff'd, 91 F.3d 891 (7th Cir. 1996). Such housing providers are in the best position to make suggestions due to their greater knowledge of the premises. Id. citing Crane v. Lewis, 551 F. Supp. 27 (D.C.C. 1982). "[A]n accommodation which permits handicapped tenants to experience the full benefit of tenancy must be made unless the accommodation imposes an undue financial or administrative burden on a respondent or requires a fundamental alteration in the nature of its program." Dedham I, citing Southeastern Community College v. Davis, 442 U.S. 397 (1979); Majors v. Housing Authority of Cty. of Dekalb, Ga., 652 F. 2d 454 (5th Cir. 1981).

Retaliation. The Act further provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. To establish a *prima facie* case of retaliation under the FHA, HUD must establish:

> (1) that the Complainant was engaged in an activity protected by the Act; (2) that Respondents took some adverse action against Complainant; and (3) that there is a causal connection between the Complainant's protected activity and the Complainant's injury." HUD v. Holiday Manor Estates Club, 2 Fair Housing - Fair lending (P-H) ¶25,027, 25,298 (November 26, 1991).

HUD v. 1430 Seagirt Boulevard Corp., 1998 WL 70138 at *8 (HUDALJ Feb. 17, 1998).

## Findings of Facts

Based on a thorough and careful analysis of the entire record, including evidence in the form of testimony and documents adduced at the hearing, the Court finds as follows:

Background & Pertinent Medical Conditions

1. Complainants have resided at Astralis since December 22, 2005. (Hr'g Tr. 136:19-21 and 512:10-11.)

2. Complainants' family (consisting of Complainants, their daughter, and their son) owns a total of four (4) cars. (Hr'g Tr. 130:1-11.) The cars are: a) 2006 Mitsubishi Montero; b) 2004 Audi Cabriolet; c) 2007 Mazda; and d) 1999 Mitsubishi Montero. (Id.)

3. Complainants' daughter and son reside with Complainants at Astralis. (Hr'g Tr. 130:10-11.)

4. Complainant [redacted] uses all four of the automobiles for transportation purposes indiscriminately. (Hr'g Tr. 130:2-3.) None of the vehicles are equipped with assistive devices to aid the handicapped in entering or exiting the vehicles. (Hr'g Tr. 130-132:1-7.)

5. Complainant [redacted] experiences difficulty getting in and out of each of her families' vehicles. (Id.)

6. There are two parking spaces assigned to Complainants' residence in Astralis ("Complainants' Assigned Spaces"). (JNT 1 at "A" and "B.")

7. Complainants' Assigned Spaces are located adjacent to the visitors' parking area, at a distance of approximately 230 feet from the front entrance to Complainants' building. (Hr'g Tr. 25:6-9, 110:12-16; JNT 1 at "A," "B," and "C.")

8. The Astralis Complex contains 499 parking spaces. Out of those, 442 are assigned to Unit Owners for their private use and enjoyment. The remaining 57 are distributed as follows: 41 for visitors, 10 for the handicapped, and 6 to accommodate contractors that render services to the building. Those 57 spaces are characterized in the Master Deed as "general common elements" of the Condominium. (*Respondent's PH Memo* at 3.)

9. In approximately 2002, and continuing through at least April 2007, Complainant [redacted] experienced strong pain in his left knee when he flexed (especially when entering and exiting an automobile), pain radiating down his leg when standing for an extended period of time, and pain in his lower back. (Hr'g Tr. 142:1-10.) As of May 2009, Complainant [redacted] is 75 years old.

10. In approximately 2002, Complainant [redacted] doctor advised him that he needed to have hip surgery. (Hr'g Tr. 12-13.)

11. Since at least December 2005 and continuing through April 2007, Complainant [redacted] used one or two crutches to assist him while walking. (Hr'g Tr. 142:14-25, 143:1-7, 378:1-19, 513:3-25.)

12. While using crutches to help him ambulate, Complainant [redacted] experienced difficulty parking in Complainants' Assigned Spaces. (Hr'g Tr. 30:1-6.) The Assigned Spaces were not wide enough to open the vehicle door completely. (Id.) Consequently, the Assigned Spaces could not accommodate Complainant [redacted] and his crutches when getting in and out of the vehicle. (Id.)

13. While on crutches, Complainant [redacted] occasionally walked around the Astralis complex. (Hr'g Tr. 146:10-20.)

14. In April 2007, Complainant [redacted] underwent hip surgery on his left hip. (Hr'g. Tr. 513:22-25, 142:11-21.) Immediately after the surgery, Complainant [redacted]

used a walker to assist him while walking for approximately three weeks. (Hr'g Tr. 146:21-25, 147:1-3.)

15. While using his walker, Complainant [redacted] would have to open his vehicle door "wide" to enter it, and enter backwards (with his back to the car), placing the walker in front of him. (Hr'g Tr. 147:6-15) Once he was seated, he would then have to place his legs in the car "little by little." (Id.) He still entered a vehicle in that fashion through the last day of the hearing, even though he has stopped using his walker. (Id.)

16. After his hip surgery, Complainant [redacted] doctor recommended that Complainant [redacted] use a cane to assist him while walking. (Hr'g. Tr. 142:16-21.)

17. Since his hip surgery and through the last day of the hearing, Complainant [redacted] used a cane for assistance while walking. (Hr'g Tr. 142:17-21, 147:21-23, 515:14-20.)

18. At times after his hip surgery, Complainant [redacted] feels "unbalanced" (unsteady) when he walks. (Hr'g Tr. 145:8-10.)

19. Complainant [redacted] takes medication for pain, high blood pressure and high cholesterol. (Hr'g Tr. 144:2-18.)

20. From at least April 2007 through the last day of the hearing, Complainant [redacted] continued to experience knee problems and lower back pain associated with herniated discs. (Hr'g Tr. 143:14-19, 515:9-13.)

21. Complainant [redacted] continues to experience difficulties while parking in Complainants' Assigned Spaces because individuals sometimes park too close to his vehicle, thereby increasing the difficulty with which he must enter and exit the vehicle. (Hr'g Tr. 146:2-5.)

22. Complainant [redacted] began treatment for her muscular skeletal condition in May of 2004. (Hr'g Tr. 96:16-17.) [redacted]

23. Complainant [redacted] has also been diagnosed with osteoarthritis of the knees, the diabetes-related distal neuropathy, disc protrusions, and injuries to the lumbar spine and discs. (Hr'g. Tr. 94:6-11.) These illnesses existed prior to Complainant's move to Astralis.

24. Complainant [redacted] takes more than her required dose of medication on days she needs to leave the house, in order to be able to leave the house. (Hr'g. Tr. 95.)

25. When at the supermarket to purchase groceries, Complainant [redacted] uses her shopping cart for support, rather than her cane. (Hr'g. Tr. 96.)

Complainants' Request for Accommodation

26. Complainants have requested exclusive use of two handicapped parking spaces that are approximately forty-five feet from the entrance of Complainants' building (the "Requested Spaces"). (Hr'g Tr. 206:5-15; JNT 1 at "D," "E," and "C.")

27. Complainants request for the Requested Spaces is not at issue. (Hr'g Tr. 43:16-22, 480:1-7, 536:1-24.)

28. Complainants' request for exclusive use of a single handicapped parking space began on or about January 2006 with a verbal communication to Astralis' Developer, through at least one conversation between Complainant [redacted] and Omar Alvarado, the Developer's Representative. (Hr'g Tr. 27:17.) At some point in 2006, Complainants requested exclusive use of a second handicapped parking space due to Complainant [redacted] medical conditions. At that time, the President of Astralis' Board of Directors was Attorney Roman Díaz. (Hr'g Tr. 526: 21-22.)

29. Complainants made their request for the Requested Spaces because the "spaces are closer to their building entrance." (*HUD's PHB* at 6; Hr'g Tr. 138:1-10.) In addition, the access aisles permit Complainants to maneuver as necessary to enter and exit the vehicles. (Hr'g Tr. 138:1-10.)

30. At some time during late 2006 or early 2007, Complainants furnished the board with copies of Complainants' handicapped parking placards, issued by the Commonwealth of Puerto Rico.[3] (Hr'g Tr. 98:3-6, 349:6-15.)

31. In or about Spring 2006, Dr. César Ortíz-Sorrentini, a medical doctor (Pediatrician-Trauma Specialist), was elected Board President. (Hr'g Tr. 523:14-20, 530:8-12.) Mr. Ramon Díaz told Dr. Ortíz-Sorrentini of Complainants' pending request. (Hr'g Tr. 526:21-25)

32. Complainants later met with Dr. Ortíz-Sorrentini on at least three occasions during 2006, and discussed their medical condition, as it related to the pending request. (Hr'g Tr. 31:21-25; 527:17-25; 528:1-4; 530-533; 538:15-19.) During those times, Complainants

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[3] According to Section 5022(c) of the Puerto Rico code, the conditions for which a placard is issued *include* conditions that impede the ease of mobility or that require the use of equipment to assist ambulation. 9 L.P.R.A. § 5022. A new medical certification is necessary with any placard renewal. Id. at § 5023.

At the Hearing, Respondent objected to the admittance of the following testimony: "[h]e [Ramon Díaz] indicated to my husband that, inasmuch as the State has issued a placard and that the State had ruled on some medical evidence, they were not going to ask us for any medical information so as not to violate our privacy rights." (Hr'g Tr. 101:1-5.) Respondent has renewed its objection on brief arguing that Fed. R. Evid. 804(b) requires a showing that the declarant be unavailable prior to the allowance of testimony under the "admission against interest" exception to the hearsay rule. Respondent is correct. The Court incorrectly admitted the testimony into evidence. As such, that testimony is stricken from the record and disregarded by the Court.

showed Dr. Ortíz-Sorrentini medical documentation supporting their claim for the Requested Spaces. (Id.) Dr. Ortíz-Sorrentini has acknowledged seeing documentation diagnosing one of the Complainants with an arthritic hip condition. (Id.)

Respondent's Response to Complainants' Request

33. After meeting with Complainants, Dr. Ortíz-Sorrentini brought the matter up to the Board for consideration. (Hr'g Tr. 536:1-3.) Dr. Ortíz-Sorrentini also discussed the matter with [redacted] (Hr'g Tr. 526:21-25.) He told the Board that he "was inclined to grant [Complainants] by way of a loan, lending, without paying, obviously, to use the closest handicap parking space in exchange for their allowing [the Board] to use [Complainants'] parking spaces for the handicapped or for visitors." (Hr'g Tr. 536:4-8.) Because the Board rejected the offer, Dr. Ortíz-Sorrentini did not request a Homeowner's Association meeting. (Hr'g Tr. 536:21-24.)

34. Apparently, Dr. Ortíz-Sorrentini's election had never been ratified by the Council of Owners and he was therefore removed as President. (Hr'g Tr. 525:16-20.)

35. On November 22, 2006, Complainants wrote to the Board alleging harassment and retaliation in the form of personal attacks because of their request. (GOV 1.)

36. On November 30, 2006, Angel Ortíz, then-Board President, acknowledged in a letter that the request for exclusive use of handicap spaces was consistent with "the practice" adopted by the Board since Mr. Díaz's tenure as President of the Board. (GOV 2.) The letter reads in pertinent part:

> [I]n the case of the handicapped, these, prior petition, may have a right to use a space designated permanently, as long as they tender a non-blocked parking.

The letter also acknowledges that "the practice" had already been employed in dealing with a request by Dr. Salvador O'Neill, a resident of Astralis, who is handicapped. (GOV 2.)

37. On January 12, 2007, Complainants entered into contracts with Respondent wherein Complainants agreed that in exchange for the exclusive use of two handicapped parking spaces, they would tender their two assigned parking spaces. (GOV 3.)

38. Each contract contained a recitation that each Complainant had been issued a "handicapped placard" by the Commonwealth of Puerto Rico, then in effect. (GOV 3.)

39. On January 31, 2007, a new Board of Directors was elected. (Hr'g Tr. 74:23.)

40. On February 13, 2007, then Board Vice-President, José A. Londoño sent Complainants a letter repudiating the Contracts they had previously signed with Respondent (GOV 3) granting them exclusive use, for one year, of two handicapped parking spaces. (GOV 6.)

41. The February 13, 2007, letter stated, in part, that:

> All parties signing said agreement [the Contracts], including the notary, are Astralis condominium owners with full knowledge that the Codominio [sic] Astralis Owners Council **was never consulted** with regard to granting the exclusive use of these parking spaces to one owner in particular.
>
> Mr. Angel Ortíz does not have the authority to sign the agreement in question because he never received the mandate from the Owners Council with regard to the change in use of this property.
>
> . . .
>
> The Board of Directors of Condominio [sic] Astralis undertakes to consult the Owners Council during its next special meeting on the use that can be given to these parking spaces. You may present your case to the Council for consideration at that time.
>
> In light of the above, and understanding that the aforementioned agreement is based on an act contrary to law and our regulations, we respectfully request that you remove your vehicles from these spaces immediately and use solely the parking spaces of your property, 318A and 318B. (GOV 6.)

(Emphasis in original.)

42. On February 20, 2007, Complainants responded in writing to Mr. Londoño's February 13, 2007, letter and informed Mr. Londoño that they were being subjected to harassment because parking stickers for alleged misuse of the handicapped parking spaces were affixed to both of [their] cars even on the driver's side window, when they parked in the handicapped parking spaces. (JNT 3; GOV 4; GOV 8; Hr'g Tr. 76-78.) The parking stickers were placed on the cars by Astralis security guards at the direction of the Board. (Hr'g Tr. 76-78; *Respondent's PH Memo* at p. 9 ¶ 21.) These parking stickers were placed on the cars through approximately August 2007. (Hr'g Tr. 85.)

    The parking stickers covered large portions of the glass and prevented people inside the car from effectively seeing out. (GOV 4.) The parking stickers were large in diameter and were rectangles that at any time covered over ¾ of the side windows of the vehicles. (GOV 4.)

43. Complainants felt humiliated and ashamed while removing the parking stickers from their cars with razorblades. (Hr'g Tr. 87.)

44. On February 22, 2007, then-Board President Ernesto Sgroi sent a letter to Complainants which stated, in part:

> As you well know through our conversations and letters, *it has always been the intention of this Board to provide a reasonable accommodation to your specific needs of disabled parking.* However, as you also know, or should know, *neither the Board nor the Administrator has the power to transfer any common area property permanently or temporarily for private use via a rental contract.*
>
> . . .
>
> You also reference the HUD Conciliation Agreement of September 30, 2005, between the US [sic] Department of Housing and Urban Development and Mr. and Mrs. O'Neil (along with the project's developer, architect, contractor and Resident's Association). We refer to pages five and six of the agreement:
>
> > . . .
> >
> > However, a qualified handicapped owner whose conditions or circumstances make it necessary to have the exclusive use of a handicapped space, **may petition the Owners Association for such exclusive use**, for a stated period of time. In exchange for such exclusive use, the owner must grant to the Association the exclusive use of one of the unblocked private parking spaces belonging to such handicapped owner for use by the Association as it sees fit, in accordance with it [sic] own rules and regulations.

(JNT 2.) (Emphasis in original and added.)

45. At the end of February 2007, Complainants submitted a complaint to HUD. (JNT 3.)

46. After receiving the Complaint, Diana Ortíz, HUD Director of Fair Housing for the Caribbean Office, and the Investigator in this case, spoke with Mr. Sgroi and told him that she would postpone processing the complaint until Respondent scheduled a meeting to consider Complainants' request. (Hr'g Tr. 203:23-25, 204:1-2.) She also advised him of Respondent's obligations and responsibilities under the Act as it pertained to accommodating handicapped individuals, and offered to attend any meeting so that she could explain these obligations to the members. (Hr'g Tr. 204:3-10.)

47. On March 15, 2007, an "Extraordinary Assembly Condominium Astralis" was held (the "Assembly"). (GOV 5.) The Assembly minutes reflect, in part:

> It was established that the contract of the last Board of Directors with Owners [Complainants] of apartment [. . .]

> with regards to the handicapped parking spaces should have been taken to the Council of Owners for their approval. By not having done it properly and there being no consent of the council of owners same is null.
>
> Atty. Robert Rivera Ruiz recommended that the matter of the handicapped parking be resolved according to the case of another condominium resolved according to his knowledge, indicating that those parking spaces would be used by the first handicapped person who occupied them.[4]
>
> After the petition made by [redacted] [. . .] for the exclusive use of two handicapped parking spaces; Mr. Manuel Roca presented a motion so that those handicapped parking spaces not be given to any owner on an exclusivity basis and that they be used according to what is indicated by Atty. Rivera Ruiz until some court or superior forum determines the contrary. Mr. Roca justified why he assumes this posture and explained to the council of owners what his reasons were.
>
> It proceeded to vote whether Mr. Roca's motion [. . .] was capricious or not. The result was 2 votes considering the motion as capricious, 6 abstentions and the rest; 42 votes in favor of the motion, considering it not capricious.
>
> The use that was going to be given to parking spaces for visitors was not determined, reason for which same will continue to be used according to the custom and usage of proceedings up to now.

(GOV 5.)

48. On March 23, 2007, Mr. Sgroi, as President of the Board, filed a complaint before the Puerto Rico "First Instance Court," San Juan, against Complainants, seeking a cease and desist order preventing Complainants from exclusively using the Requested Spaces. The Parties reached an out of Court agreement . . . (Hr'g Tr. 88:2-17.)

49. On October 9, 2007, HUD processed Complainants' Complaint. (JNT 3.) At some point thereafter, Ms. Ortiz met with then-Board President Sebastián Echeandía-Rabel, Respondent Attorney Manny Suarez, Mr. Londoño, and others. (Hr'g Tr. 250, 258, 346,

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[4] Respondent argues in *Respondent's PH Memo* at 7 that the decision of a local administrative agency should have some bearing on the Court. Respondent cited Héctor G. Quiñones and/or Mayra Quiñones v. Board of Directors of Condominio Parque Real, Complaint No. 1000246664, filed before the Puerto Rico Department of Consumer Affairs as precedent for interpretations under the Condominiums Act. The decisions made by the Puerto Rico Department of Consumer Affairs are not binding precedent on the Court. Moreover, to the extent Respondent's conduct is excused by Puerto Rico law or laws, those laws are preempted. 42 U.S.C. § 3615.

434.) Prior to that meeting, Ms. Ortíz had provided the Board with a copy of the Department of Justice's joint statement with HUD entitled "Reasonable Accommodations under the Fair Housing Act." (Hr'g Tr. 250:15-22.) In addition, Ms. Ortíz testified that she provided the joint statement so that:

> [W]e could discuss these requirements in detail at the end of the meeting, if they had any questions. I asked Mr. Suarez if he had any questions in particular about the materials I had given him prior to the meeting. And he told me *'well, you know, this creates a personal problem for me, because why my visit me, I live in – I am resident of this building, and when my parents visit me, they – I like them to use those handicap parking spaces that* [redacted] *Requested.'*

(Hr'g Tr. 250:21-25, 251:1-3.) (Emphasis added.)

Prior Conciliation Agreement

50. In September of 2006, HUD, the Astralis Condominium Residents Association, and others entered into a Conciliation Agreement wherein, among other things, the parties to the Conciliation Agreement agreed that:

> However, a qualified handicapped owner whose conditions or circumstances make it necessary to have the exclusive use of a handicapped space, may petition the Owners Association for such exclusive use, for a stated period of time. In exchange for such exclusive use, the owner must grant to the Association the exclusive use of one of the unblocked private parking spaces belonging to such handicapped owner for use by the Association as it sees fit, in accordance with its own rules and regulations.

(GOV 7 at VII ¶ 20.)

51. The Residents Association was included in the Conciliation Agreement:

> . . . in order to agree to accept certain changes in the common areas that were necessitated by the Fair Housing Act and which the developer was going to do for free . . . [And so ] that the Association would assume the responsibility of having the parking spaces repainted, put the logos on, and create a process by which they would insure [sic] that handicapped residents could petition

> the Association to that exclusive use of the parking or a parking space so long as they were willing to exchange exclusive use of their regular spaces.

(Hr'g Tr. 196:15-25.)

52. From the dates of signature, through February 9, 2009 (a day of hearing), the Conciliation Agreement had never been disavowed by any President or Board member of the Residents Association. (Hr'g Tr. 237-240.) In fact, at times various Presidents and/or Board members had discussed the agreement with HUD seeking an interpretation of its provisions. (Id.)

53. On February 22, 2007, then President of the Board of Directors Ernesto Sgroi referenced the Conciliation Agreement in a letter to Complainants with regard to advising them of the procedure they needed to follow. (JNT 2, p. 2.)

## Discussion

Congress passed Section 3604 in recognition that an affirmative obligation was necessary to ensure that handicapped individuals receive equal housing opportunities. Dedham I; see also 42. U.S.C. § 3604.

**Reasonable Accommodation.** To establish that Respondent discriminated against them in failing to provide a reasonable accommodation, Complainants must demonstrate that: (1) the Complainants have a handicap; (2) the Respondent knows of the handicap or should be reasonably expected to know of it; (3) modification of existing premises or an accommodation of the handicap may be necessary to afford the complainant an equal opportunity to use and enjoy the dwelling; and (4) the Respondent refused permission for such modifications, or refused to make such accommodation. California Mobile Home Park Mgmt. Co., 107 F.3d at 1380; Dedham I, 1991 WL 442793 at *5.[5]

[5] Respondent argues that the Court should consider, in applying its analysis, whether or not Respondent had "discriminatory intent." *Respondent's PH Memo* at 19-21. In support of its assertion, Respondent cites Macone v. Town of Wakefield, 277 F.3d 1 (1st Cir. 2002). Respondent's reliance on Macone is inapposite.

Although it is true that Macone states "[t]o prove a violation of the Fair Housing Act, appellants can show either discriminatory intent or disparate impact," (Macone, 277 F.3d at 5) Macone involved a claim of racial discrimination, not disability discrimination based on a failure to reasonably accommodate. Reasonable accommodation claims are different. As Respondent recognizes: "[t]he ADA and the FHA [as indeed are all disability statutes] are inexorably interrelated to one another, at least as to the common public interest of eradicating discrimination when benefiting government programs or services." *Respondent's PH Memo* at 20. To wit, Respondent's motivation (discriminatory or otherwise) is not a factor in reasonable accommodation cases. Jankowski Lee & Assocs., 1995 WL 399384 at *10 citing HUD v. Ocean Sands, Inc., 2 Fair Housing – Fair Lending (P-H) ¶ 25055 (HUDALJ Sept. 3, 1993); Enica v. Principi, 544 F.3d 328, 339 (1st Cir. 2008) (intent relevant but not required); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (no proof of a particularized discriminatory animus is exigible).

Complainants Are Handicapped. Under the Act, an individual is handicapped if she satisfies the requirements enumerated in 42 U.S.C. § 3602(h). Namely:

> 'Handicap' means, with respect to a person--
>
> **(1)** a physical or mental impairment which substantially limits one or more of such person's major life activities,
>
> **(2)** a record of having such an impairment, or
>
> **(3)** being regarded as having such an impairment,
>
> but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

In turn, a "major life activity" is defined as " . . . functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. § 100.201(b). "A record of having such an impairment" means "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 24 C.F.R. § 100.201(c). At issue here is whether or not Complainants' major life activity of "walking" constitutes a handicap as defined under Section 3602(h).

Respondent asserts that "Complainants are not disabled within the provisions of the FHA." *Respondent's PH Memo* at p. 23. Respondent adds that it "saw Complainants using and enjoying their property without any limitations," and that "Complainants were regularly seen enjoying the general common facilities of the Condominium which required them to walk long distances, as well as areas located outside the Condominium." Id. Regarding Complainant [redacted] specifically, Respondent states that "she walks to the supermarket and strolls regularly at *Plaza Las Americas* shopping mall, attends her medical appointments and uses the common area facilities of the Condominium, visiting on several occasions the Administration [sic] Office. Id. She also uses the gymnasium facilities, walks around the Condominium's premises and attends Council of Owners meetings." *Respondent's PH Memo* at p. 4. Regarding Complainant [redacted] specifically, Respondent states that "he is very strong, on sunny days walks without a cane; walks to the supermarket; walks regularly around the Condominium premises; visits the bank weekly on Wednesdays and uses the swimming pool facilities. He also washes his automobile at a service station located on the Loiza Street [sic] at Santurce and strolls regularly at *Plaza Las Americas* shopping mall." Id.

Respondent has taken liberties with its characterizations. By glossing-over Complainants' testimony in summary fashion, without specific citations to the record, Respondent attempted to create the appearance that Complainants engaged in continuous activity since moving to Astralis. As the Secretary notes, however, such was not the case:

> [Complainant [redacted]] testified that the supermarket is located nearby and she may walk there *once every four to six*

> *months*; the majority of the time, however, she drives. Once inside, she uses a shopping cart for support to walk. When describing her errands, [Complainant [redacted] ] testified, *inter alia*, that she goes to her medical appointments; she did *not* state that she walks to these appointments. When asked if she walked around the common areas, she testified that she did so *only* to go to the Administration Office to pay her fees; if she has her car parked in the handicapped parking space, however, she drives to the Office. In mid-2006, she may have walked to the common areas to meet with other residents, but she has not done so since then. Furthermore, walking around the common areas physically exhausted her and required her to go home and lie down.

*HUD's Response to Respondent's PH Brief* at pp. 4-5 ("*HUD's Response*") (emphasis in original, internal citations omitted). Furthermore:

> [Complainant [redacted] ] testified that when he walked with crutches, he used his strength to avoid falling. Perhaps *on one or another occasion* he has walked without a cane; he did *not* testify that he does so every time there is a sunny day in tropical Puerto Rico. When asked if he goes to the supermarket, he replied yes, but he did *not* state that he walks there. In the past, he walked the premises, but only to go to the association meetings, which do not occur on a regular basis. In the last year, he has *not* walked the premises. He *drives* to his bank once a week and parks in the handicapped space upon his return. In the four years he has lived in Astralis, he has used the swimming pool *twice*; he uses the thermal baths more often as treatment for bad circulation in his feet. His son washes his car for him or he pays for the service, but he does *not* wash the car himself. He goes to the shopping mall and sits on a bench, which Londoño confirmed; and did *not* state that he walks there.

*HUD's Response* at p. 5 (emphasis in original, internal citations omitted).[6]

The record shows that Complainants were substantially limited in their ability to walk – when they moved to Astralis and through the date of the hearing. Both Complaints have and continue to use various ambulatory devices to assist them in their walks, and experience severe pain and restricted movement when attempting to ambulate. For the sake of brevity, the Court will not repeat the findings of facts enumerated earlier. Based on the Findings of Facts supra (particularly those at ¶¶ 9-25), and those contained in this section, the Court finds that

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[6] Respondent also appears to place great weight on the testimony provided by José Alfredo Londoño to contradict some of Complainants' claims. After careful observation of Mr. Londoño's demeanor, candor, and responsiveness, the Court finds that his testimony lacks credibility. During one portion of the proceeding, the Court found it necessary, sua sponte, to specifically instruct Mr. Londoño to answer the questions being posed to him, due to the evasiveness he was exhibiting. He had to be reminded of the Court's instruction a second time, a few minutes later. At best, some of Mr. Londoño's answers were equivocal in nature. (See generally, Hr'g Tr. 430, 454-455, and 448.)

Complainants are substantially limited in the major life activity of walking and that they have a record of such impairment. Complainants are thereby handicapped individuals under the FHA. See generally Jankowski Lee, 1995 WL 399384 at *2; Dedham I, 1991 WL 442793 at *6.

Respondent Knew of Complainants' Handicaps. Once established that Complainants are handicapped under the Act, Complainants must demonstrate that the Respondent knew of the handicap or should be reasonably expected to know of it. California Mobile Home Park Mgmt. Co., 107 F.3d at 1380; Dedham I, 1991 WL 442793 at *5. "A Respondent must also know of, or reasonably be expected to know of, the existence of the handicap in order to be held liable for discrimination." Dedham I, 1991 WL 442793 at *5, citing Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1381 (3rd Cir. 1991). "It is not, however, required that the Complainant speak 'magic words' to provide some minimum level of documentation of his disability to avail himself of the protections of the law." Jankowski Lee, 1995 WL 399384 at *11, citing Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Ore. 1994); see also Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6 (1st Cir. 2004) (request must be sufficiently specific to give notice of need for accommodation). As an ALJ from the Court has previously determined:

> Once informed of the possibility that a tenant may need an accommodation, it is the landlord's responsibility to explore that need and suggest accommodations. Accommodation of individuals with disabilities is an "informal interactive process" involving cooperation by both landlord and tenant in identifying the causes of the difficulty the tenant is having and exploring possible accommodations. See generally Rosiak v. U.S. Dep't of Army, [679 F. Supp. 444 (M.D. Pa. 1987)] 845 F.2d 1014 (3rd Cir. 1988); Crane v. Lewis, 551 F. Supp. 27 (D.C.C. 1982).

Jankowski Lee, 1995 WL 399384 at *11. As the Court in Crane determined, because Respondents possess greater knowledge about their facility's ability to provide an accommodation, they bear the responsibility of suggesting reasonable accommodations to Complainant; not vice versa. Crane, 551 F. Supp. 27 (D.C.D.C. 1982).

The FHA's statutory scheme imposes a requirement to engage in the "interactive process" to resolve requests for accommodation. Jankowski Lee, 1995 WL 399384 at *11. Mere suspicion that an individual may not actually be disabled is not sufficient to deny an accommodation without further inquiry. Id. As the Jankowski Lee judge so elegantly notes:

> For instance, in [Shapiro v. Cadman Towers, Inc., 844 F. Supp. 116, 121 (E.D.N.Y. 1994)] the plaintiff, who suffered from MS, requested an assigned parking space. This request was denied, in part because of the managing board's skepticism over the existence of plaintiff's mobility problems. The court stated: [D]iscrimination against the handicapped often begins with the thought that she looks just like me – that she's normal – when in fact the handicapped person is in some significant respect different. Prejudice, it bears recalling, includes not just mistreating another

> because of the difference of her outward appearance but also assuming others are the same because of their appearance, when they are not. Id.

Jankowski Lee, 1995 WL 399384 at *11-12. See also Armant v. Chat-Ro, L.L.C., 2000 WL 1092838 at *2 (E.D. La. 2000); Auburn Woods I Homeowners Ass'n v. Fair Employment & Hous. Com'n, 121 Cal. App.4th 1578. 1598 (2004).

Surprisingly, Respondent argues in *Respondent's Memorandum of Material Facts and Applicable Law* that "[t]he record also fails to show the direct and specific request that usually triggers the interactive process." *Respondent's Memo* at p. 24. This statement is in direct contradiction to Respondent's Counsel's representation at the Hearing. During the Hearing, the following colloquy took place between the Court and Counsel for Respondents:

> *THE COURT: Okay, so the letters provide the request [the request for the parking spaces].*
>
> *MR. DE LA CRUZ: It's not an issue, the petition.*
>
> *THE COURT: The request?*
>
> *MR. DE LA CRUZ: The request, yes.*
>
> *THE COURT: All right.*

In addition, Mr. Ernesto Sgroi, a President of the Board in 2007, also acknowledged:

> *WITNESS: That [the Complainants] had a need, the [sic] alleged a need for disabled parking, verbally and through letters, and if our job to accommodate them is – arranged for an assembly meeting, so that they can present the case. . . .*

See also *Findings of Facts* ¶ 44. And, Dr. Ortíz-Sorrentini, further acknowledged:

> *Q.: And that happened in approximately June, July of two thousand six (2006)?*
>
> *A.: I cannot be precise, that could be correct.*
>
> *Q. Okay. At that time, when you met with them, you knew that they requested permission to use the handicap parking spaces near their apartments, right alongside their apartments?*
>
> *A.: Yes, that request they had made to the previous president.*

As is evident from the quoted transcript portions above, Complainants' request for a reasonable accommodation was never at issue. See also ¶¶ 26-32, contained in the *Findings of Facts*, supra (detailing Complainants' requests). It was a clear and direct request for the exclusive use of two

handicapped parking spaces near the entrance to their building. See e.g. Calero-Cerezo, 355 F.3d at 23 (request for transfer deemed sufficiently specific). Complainants did not ask once, but asked several times. Consequently, Respondent's responsibility to explore Complainants' needs was triggered.

Respondent further asserts that Complainants' alleged failures to trigger the interactive process precluded Respondent from engaging in said process.[7] Respondent, however, had numerous opportunities to engage. At the time Complainants requested their accommodations, Respondent did not dispute the existence of a disability. In addition to the transcript citations and the paragraphs enumerated above, former Board President Angel Ortiz acknowledged their handicap in a written contract. *Findings of Fact* ¶¶ 36-38. Furthermore, Dr. Ortiz-Sorrentini, met with the Complainants on at least three different occasions, discussed their medical conditions with them, saw medical documentation supporting their requests and told the Board that he "was inclined to grant [Complainants] by way of a loan, lending, without paying, obviously, to use the closest handicap parking space in exchange for their allowing [the Board] to use [Complainants'] parking spaces for the handicap or for visitors." *Findings of Facts* 31-34. If at any time during the interactive process Respondents were skeptical about Complainants' requests they should have requested additional information from Complainants.[8] The record is devoid of any such request prior to HUD commencing its investigation.[9] As Jankowski Lee reminds us, mere suspicion is not enough to deny an accommodation without further inquiry. 1995 WL 399384 at *11.

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[7] Respondent mistakenly relies on White v. York Int'l Corp., 45 F.3d 357 (10th Cir. 1995) for the proposition that the interactive process in the case at bar is triggered only after the Respondent makes a determination that the Complainant can be accommodated and is "qualified." *Respondent's Memo* at 23 (Complainants have to establish *prima facie* that they suffered a qualifying disability.). White merely reiterates the Fifth Circuit's test for determining whether or not a person is "qualified" within the meaning of the ADA. The Fifth Circuit articulated a two-part analysis for determining whether a person is qualified within the meaning of the ADA:

> First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

White, 455 F.3d at 361-362.

[8] Indeed, not only did Respondents fail to request any information from Complainants, during an "Extraordinary Assembly Condominium Astralis" held on March 15, 2007, a vote was held determining: "[a]fter the petition made by [redacted] . . . for the exclusive use of two handicapped parking spaces, Mr. Manuel Roca presented a motion so that those parking spaces not be given to any owner on an exclusivity basis and that they be used according to what is indicated by Atty. Rivera Ruiz until *some court or superior forum determines the contrary*." *Findings of Facts* ¶ 47. Consequently, the only way Complainants would receive their requested reasonable accommodation would be through court order.

Respondent argues that Complainants chose to stay silent during the March 15, 2007, meeting and that they refused to provide information about their handicap or alternative accommodations. Respondent's argument is unsupported by the record. Prior to that meeting, as already explained, past Boards already had information pertaining to Complainants' handicaps. Moreover, no data exists in the record evidencing the fact that Complainants were asked to provide such information.

[9] Interestingly, Respondent never requested medical information from Complainants or from HUD during the conciliation efforts.

Rather than request additional information, it appears that Respondent, to a certain degree, may have chosen to forgo requesting information because of Complainants' outward appearance as perceived by Respondent's witnesses, or fundamental misunderstandings of their obligations under the law. A portion of Mr. Echeandía-Rabel's testimony is illustrative of this point. In relating what transpired during a meeting with HUD, Mr. Echeandía-Rabel testified (in part):

*Q. What transpired in that first meeting? You already told us the purpose of your visit.*

*A. Well, she explained to us her position and what they thought. The enormous risks that we were running if we didn't coincide with her points of view. And . . .*

*Q. And what were those points of view?*

*A. Well, to me, the sensation that I gathered was that we the handicapped were a different kind of citizen, that we don't have to respect other's rights, that we have a right to everything. And that we have a right to be given whatever we ask for.*

*Q. And what was being asked?*

*A. Well, to give them what they didn't have a right to because . . .*

*THE COURT: Mr. Echeandía, answer the question without a judgment please.*

*WITNESS: But the question . . .*

*Q. What was being asked for you to do?*

*A. To give them the exclusive use of the two (2) parking spaces.*

*Q. To whom?*

*A. To the claimants.*

*Q. What alternatives, if any, were presented to you other than giving the exclusive use of those two (2) parking spaces?*

*A. None.*

*Q. Now, what information, if any, did you receive in that meeting to sustain that both complainants were qualified individuals to petition reasonable accommodation from the Condominium?*

*A. Well, the only ones that I received were the placard that authorizes temporary use of the handicap parking space, that they used canes, that he on occasions used crutches. But he moved better than I did. And, I thought that it wasn't enough being handicapped,*

*nor to have a hip operation, because the Third Baseman from Boston was operated on the hip. And . . .*

*THE COURT: How old is he?*[10]

*WITNESS: Much younger.*

The Board's skepticism notwithstanding, Respondent had a duty to engage in the interactive process and engage in further inquiry.[11] In failing to request any information from Complainant, Respondent failed in its duty. Jankowski Lee, 1995 WL 399384 at *12 ((D)iscrimination against the handicapped often begins with the thought that she looks just like me -- that she's normal -- when in fact the handicapped person is in some significant respect different.) (internal citation omitted); see also Armant, 2000 WL 1092838 at *2 (once advised of a possible handicap, landlord has duty to inquire or investigate further; landlord cannot rely on observation that tenant does not appear disabled); Auburn Woods I Homeowner's Ass'n, 121 Cal. App.4th at 1598 (condominium association cannot base denial of reasonable accommodation on lack of information regarding plaintiff's medical condition when it had not requested additional information).

As seen above, Respondent has admitted, on several occasions, that Complainants are handicapped individuals as defined in the FHA. In arguing that Complainants are not handicapped, and/or that it did not know about Complainants' handicaps, Respondent failed in its duty to engage in the interactive process. As such, Respondent not only knew of Complainants' handicaps, but should have reasonably known of them as well.

A Reasonable Accommodation of Complainants' Handicaps is Necessary. Respondent argues that Complainants do not have an impairment that substantially limits their ability to walk. *Respondent's PH Memo* at 4. This argument has already been addressed supra.

The record demonstrates that accommodating Complainants' handicaps is necessary to afford them an equal opportunity to use and enjoy their residence. Complainants' Assigned Spaces are approximately 230 feet from the front entrance of Complainants' building. *Findings of Facts* at ¶ 7. Complainants' Requested Spaces are approximately 45 feet from the entrance of Complainants' building. *Findings of Facts* at ¶ 26. The resulting difference in "travel length" is approximately 190 feet -- a considerable difference to Complainants who have significant pain and mobility issues. Moreover, in providing Complainants with the Requested Spaces,

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[10] The Court inadvertently asked this question in Spanish and it was translated by the interpreter present. The transcript reflects the proceedings accurately.

[11] Respondent also argues that the interactive process was not truly interactive because during its conciliation discussions with HUD it voiced concerns about Complainants' handicapped status that (Respondent claims) were not addressed and Respondent offered a settlement proposal that was rejected. As HUD persuasively argues: "[t]he interactive process, however, is intended to avoid litigation, not to run concurrently with discussions of settlement of a complaint. To hold otherwise would essentially condone [a] Respondent's tactics . . . and permit a property owner to sit back passively for months, and even years, until a resident files a complaint and only then be obliged to commence the interactive process." *HUD's Response to Respondent's PH Memo* at 2.

Respondent would also be providing them with a necessary access aisle, to be used by Complainants while entering and exiting a vehicle. See *Findings of Facts* at ¶¶ 5, 12, 15, 21-23.

Respondent Refused to Make the Necessary Accommodations. It is undisputed that Respondent refused to make the requested reasonable accommodations.[12] In defense of its actions, Respondent essentially offers that it did not have the opportunity to engage in the interactive process because of Complainants' various alleged failures. Although the Court has already dedicated much verbiage to pointing out the fruitlessness of Respondent's argument vis-à-vis its failure to engage in the interactive process, additional points will be addressed below.

Respondent argues that "Respondent never had the opportunity to show that the proposed accommodation would impose undue hardship. Complainants completely evaded any real and meaningful interactive process towards that end, and thus, could not react or give any opinion as to possible scenarios that could meet Complainants' needs." *Respondents PH Memo* at p. 24. As explained throughout this opinion and specifically in Footnote 11, supra, Respondent's unhappiness with settlement proposals that were rejected is not a sufficient allegation to establish that Complainants "prevented" Respondent from participating in the process that Respondent had a duty to conduct.[13] Moreover, Respondent's undue hardship argument is at best misplaced because at one point in the history of this case a Board President actually entered into contracts with Complainants to provide them the Requested Spaces and no undue hardship claim was ever made. (GOV 3.) In fact, even when Respondent later repudiated the contracts, it did not make an undue hardship claim and instead only said that the President had not been authorized to enter into the agreement. (GOV 6.)

Respondent argues that "Complainants sought to undermine the interactive process by not submitting themselves to it and refused to provide information or alternatives at the Assembly, if only to later allege that the process was not held." *Respondents PH Memo* at p. 24. As noted in Footnote 8, it was at this Assembly that the individuals present decided that

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[12] 24 C.F.R. § 100.204 reads, in pertinent part:

(b) The application of this section may be illustrated by the following examples:

. . .

Example (2): Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John is mobility impaired and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of § 100.204 for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The accommodation is reasonable because it is feasible and practical under the circumstances.

[13] There is some indication in the record that alternative parking spots were offered to Complainants. However, the record reveals that these spots would not have been suitable as the spaces lacked an access aisle, had an unsuitable barrier, were exposed to irregular traffic, and cars on the opposite side of the spots backed out into the designated area. (Hr'g Tr. 445-446, 449-452.) The offered spots were in a service area for the building. (Id.) Interestingly, these spots were offered without prior approval from the membership.

Complainants would only receive an accommodation pursuant to a court order.[14] Moreover, at this same assembly, Attorney Robert Rivera advised the attendees that "the matter of the handicapped parking be resolved according to the case of another condominium resolved according to his knowledge, indicating that those parking spaces would be used by the first handicapped person who occupied them." *Findings of Fact* at ¶ 47. In facing what could have only been a hostile audience, as concluded by the Court, it is not surprising that Complainants may have chosen to remain silent during the Assembly. Given all of the opportunities Respondent had to participate in the interactive process, and all of the attempts Complainants made to have their request heard, it is a stretch for Respondent to assert that Complainants did this as a way to undermine them.

Respondent also argues that granting Complainants' accommodations would deprive other residents with handicapped parking placards from access to appropriate spaces on a first come/first served basis. On this point, however, Respondent has failed to provide any evidence. The only evidence regarding the availability of parking spaces in the record is provided by HUD, to wit:

> *Q. Okay, the Respondents' Association has forty-one visitor parking spaces. What were your observations of those forty-one parking spaces?*
>
> *A. From the seven or eight or so times I've been on-site since 2005, I would say that, generally, the vast majority were not in use at those times I was there.*
>
> *There were always some of them in use, maybe six, seven, eight. But, my experience from those occasions that I was there, well, the majority, perhaps thirty, were not in use.*
>
> *I also observed, in my visits, that the handicap parking spaces, the spaces that had the access aisles, where not in use during my visits.*
>
> *Q. Do you recall what was your most recent visit to the premises?*
>
> *A. I was on the premises in December 2008.*

(Hr'g Tr. 8.) There is additional evidence in the record. However, that evidence elucidates Respondent's self-interest rather than a desire to guarantee first come/first served access:

> *[W]e could discuss these requirements in detail at the end of the meeting, if they had any questions. I asked Mr. Suarez if he had any questions in particular about the materials I had given him prior to the meeting. And he told me 'well, you know, this creates a personal problem for me, because why my visit me, I live in -- I am resident of this building, and when my parents visit me, they -- I*

[14] To the extent that Respondent argues that it was not authorized to provide a resident with exclusive use of a parking space because the parking spaces are owned by the association as tenants in common, its argument is specious. See Gittleman v. Woodhaven Condo Ass'n, 972 F. Supp 894 (D.N.J. 1997); Shapiro, 844 F. Supp. at 116.

*like them to use those handicap parking spaces that* [redacted] *Requested.'*

(Hr'g Tr. 250:21-25, 251:1-3.) (Emphasis added.) Moreover, Respondent's reliance on the first come/first served policy is legally unavailing. Respondent has failed to demonstrate that there is a handicap parking shortage at Astralis. It has also failed to demonstrate how assigning Complainants their own handicap parking spaces would eliminate a first come/first served rule. As such, Respondent's argument fails.

Lastly, Respondent cites United States ex rel. Woodruff v. Fairways Villas Condominium Ass'n, 879 F. Supp. 798 (N.D. Ohio 1995), and encourages the Court to take a look at "broader considerations." Respondent neglected to point out, however, that the Woodruff case was vacated. Woodruff, 879 F. Supp. 798, vacated by, U.S. v. Fairways Villas Condominium Ass'n, 920 F. Supp. 115 (N.D. Ohio 1996).

**Retaliation.** The Act further provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. § 3617. To establish a prima facie case of retaliation under the FHA, HUD must establish:

> (1) that the Complainant was engaged in an activity protected by the Act; (2) that Respondents took some adverse action against Complainant; and (3) that there is a causal connection between the Complainant's protected activity and the Complainant's injury." HUD v. Holiday Manor Estates Club, 2 Fair Housing - Fair lending (P-H) ¶ 25,027, 25,298 (November 26, 1991).

1430 Seagirt Boulevard Corp., 1998 WL 70138 at *8.

Complainants Established a Prima Facie Case of Retaliation. By requesting reasonable accommodations under the FHA (see supra), Complainants engaged in protected activity. 42 U.S.C. § 3604(f)(3)(B). In addition, Complainants filed a complaint with HUD, thereby engaging in further protected activity. 42 U.S.C. § 3610(a); see Seagirt Boulevard Corp., 1998 WL 70138 at *8.

Rather than engaging in the interactive process, Respondent took actions against Complainants which the Court finds to be adverse and causally linked to their protected activities:

1. Respondent placed and/or caused to be placed parking stickers for alleged misuse of the handicapped parking spaces on Complainants' cars, even on the driver's side window, when they parked in the handicapped parking spaces. The parking stickers covered large portions of the glass and prevented people inside the car from effectively seeing out. (GOV 4.) The parking stickers were placed on the cars by

Astralis security guards at the direction of the Board. These parking stickers were placed on the cars through approximately August 2007.

2. Respondents filed a law suit against Complainants for the sole purpose of preventing them from using the handicap parking spaces on an exclusive basis. *Respondent's PH Memo* at p. 9; *Findings of Fact* ¶ 48.

3. Sometime after Respondent withdrew its lawsuit against Complainants, it modified the handicap parking spaces by identifying them with a "big sign" which read "Visitors," sometime towards the end of July 2007. (Hr'g Tr. 90.)

4. The Board ignored the advice of Dr. Ortiz-Sorrentini to provide Complainants with the Requested Spaces in exchange for Complainants' Assigned Spaces. Instead, Complainants were forced to appear before an Assembly that the Court has found could only have been hostile. *Findings of Fact* at ¶¶ 31-34.

5. Board members made a series of public, disparaging remarks about Complainants, which, for the sake of discretion will not be repeated here, but are contained in Government's Exhibit 1.[15]

## Conclusion

Based on the foregoing discussion and analysis, the Court holds that Respondent violated 42 U.S.C. § 3604(f)(2)(A), 42 U.S.C. § 3604(f)(3)(B), and 42 U.S.C. § 3617.

## Remedy

Generally, Complainants are entitled to damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by Respondent's discrimination. See e.g. HUD v. Blackwell, HUDALJ 04-89-0520-1, (Dec. 21, 1989), aff'd, 908 F. 2d 864 (11th Cir. 1990) (Blackwell I); 42 U.S.C. § 3612(g)(3); HUD v. Godlewski, 2007 WL 4578540 (Dec. 21, 2007).[16] Damages for emotional distress may be based on inferences drawn from the circumstances of the act of discrimination, as well as on testimonial proof. Blackwell I. "Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury." Godlewski, 2007 WL 4578540, at *2.

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[15] Government Exhibit 1 was admitted into evidence without objection.

[16] 42 U.S.C. § 3612(g)(3) states, in part:

> If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent . . . .

Respondent may also be assessed a civil penalty to "vindicate the public interest." 42 U.S.C. § 3612(g)(3). In a case such as this one, that penalty can total up to $16,000. 24 C.F.R. § 180.671(a)(1). In determining the amount of the penalty, the Court considers the following factors: (i) whether Respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) Respondent's financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of that Respondent's culpability; (v) the goal of deterrence; and (vi) other matters as justice may require. 24 C.F.R. § 180.671(c)(1).

**Complainants' Damages.** The record contains instances of humiliation, embarrassment and emotional distress suffered by Complainants as a result of Respondent's discrimination. The following colloquy is illustrative. Complainant [redacted] testifies about how she felt regarding the parking sticker incidents:

> *Q. Ms. Vélez, how did you feel when you received those sticker?*
>
> *A. Well, I felt indignant, abused, humiliated, a lot of shame, because the entire neighborhood was seeing that spectacle.*
>
> *They would see us removing those sticker with the blades. And, in all honesty, at this stage of our lives, at this age, the only thing we have is our reputation.*
>
> *And, we had earned the respect of the community. And, at that time, we were feeling very much ashamed that the community would see.*
>
> *They were treating us as people who do not obey the laws because that's exactly what the sticker says.*
>
> *Q. How did you remove the stickers?*
>
> *MR. DE LA CRUZ: She already answered that question, Your Honor.*
>
> *THE COURT: Well, I'll let her answer it again.*
>
> *A. With a razorblade, very carefully.*
>
> *BY MS. ALVARADO:*
>
> *Q. How long did it take to do that?*
>
> *A. Hours.*

(Hr'g Tr. 87:3-23.) Complainant [redacted] adds through his testimony:

*Q. The first time you received the stickers, what was your reaction?*

*A. Well, I was upset. I felt offended. I felt they were being disrespectful because, as an owner, citizen, and a fellow of the neighborhood, I understood that they should have contacted me and not take that action.*

*Q. Did you receive other stickers after their first one?*

*A. Yes, they continue putting stickers on us for some time, until I became aware that the people from HUD had arrived.*

*Q. How did you feel when you saw the addition of stickers?*

*A. I felt, like I said before, offended, humiliated, persecuted, discriminated against. That they were violating my rights because I understood that that was not the correct manner.*

*There are ways to solve things, with dialogue, and, above all with good faith.*

(Hr'g Tr. 149-150.) Respondent also bullied and intimidated Complainants. These tactics had an impact on Complainants' health [when referring to a different litigation caused by Respondent]:

*Q. . . . After the Court case, you decided that you were not going to use those two handicap parking spaces?*

. . .

*A. Your Honor, that case to which references is being made is a case in which my husband and I had to go on four occasions, to the Court. On the last occasion, which was in June, and while my husband had been recently operated on and using a walker, we were sitting for 6 hours on a bench for the Judge who was going to see the case to show up.*

*The Judge did not show up. And, my husband and I were very affected because it was draining our energy. There was interference with our medical appointments.*

*Being in Court was really detrimental to our health. It caused me, personally, depression. And, I asked our attorney to see how we could solve this case to be done with it.*

. . .

*And, the negotiations were ended.*

*And, then the attorney for the other party [Respondent] presented a Motion to Dismiss and threatened to take us to the Superior Court with an Injunction.*

*We left and we spoke at home. And, we decided neither our anemic state, nor our financial health was going to be able to bear an [sic] case with an Injunction in the Superior Court.*

(Hr'g Tr. 127-128.)

The Court also draws inferences of humiliation and embarrassment from Complainants' appearance before the Assembly on March 15, 2007, during which the Board, which already was aware of Complainants' request and did nothing to engage in the interactive process, stood by while a motion from another owner to prevent the exclusive use of the two handicapped parking spaces was passed. Blackwell I. (Damages for emotional distress may be based on inferences drawn from the circumstances of the act of discrimination, as well as on testimonial proof.) Moreover, there are indications in the record that the vote was a foregone conclusion, as an attorney present at the meeting counseled the attendees to basically ignore the FHA.

[redacted]

Also noteworthy is the humiliation that Complainants suffered as a result of the public, disparaging remarks members of the Board made about Complainants while Complainants were trying to secure a reasonable accommodation.

As evident throughout this opinion, Respondent refused to engage in the interactive process – in essence blaming Complainants for failing to take actions Respondent itself should have taken. Respondent's failures have had a severe and profound impact on Complainants' lives. Based on the foregoing, the Court finds that Complainants are entitled to damages in the amount of $25,000, for the humiliation, embarrassment and emotional distress they suffered as a result of Respondent's actions. See e.g., HUD v. Timmons, 2000 WL 1753713 (HUDALJ Nov. 16, 2000); HUD v. Kocerka, 1999 WL 280377 (HUDALJ May 4, 1999); HUD v. Housing Authority of City of Las Vegas, 1995 WL 678326 (HUDALJ Nov. 6, 1995); HUD v. Simpson, 1994 WL 497538 (Sept. 9, 1994).

**Civil Penalty.** In determining the amount of the penalty, the Court considers the following factors: (i) whether that Respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) Respondent's financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of that respondent's culpability; (v) the goal of deterrence; and (vi) other matters as justice may require. 24 C.F.R. § 180.671(c)(1).

There is no evidence in the record of any previous judgment against Respondent for unlawful housing discrimination.

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence for the record. If they fail to produce evidence which would tend to mitigate against assessment of a civil penalty, a penalty may be imposed without consideration of financial circumstances. See Campbell v. United States, 365 U.S. 85, 96 (1961) HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) ¶¶ 25,001, 25,015 (HUDALJ Dec. 21, 1989) aff'd 908 F.2d 864 (11th Cir. 1990). Respondent did not provide any financial information. Thus, the record does not contain any evidence that Respondent could not pay a maximum civil penalty without suffering undue hardship.

With regard to the nature and circumstances of the violation, the Court observes that Respondent's conduct has not only violated the letter of the law, but also its spirit. Not only has Respondent refused to provide Complainants with reasonable accommodations, but it also refused to engage in the synergistic process designed to ensure communication between the parties – the interactive process.

Respondent ignored Complainants' requests. It entered into contracts with Complainants and then rescinded them. It harassed, humiliated, embarrassed, and retaliated against Complainants. It determined that no accommodations would ever be provided unless they were ordered by a court. It disavowed previous Conciliation Agreements. In short, Respondent behaved like a bully.

Moreover, although Respondent had not been previously adjudged to have committed unlawful housing discrimination, the Court notes that Respondent had entered into a previous Conciliation Agreement that covered essentially the same issues addressed in this matter. *Findings of Facts* at ¶¶ 50-53. The Court considers this "other matter" as part of this analysis in that Respondent has had, at minimum, prior notice of its obligations under the Act as they specifically apply to the case at bar.

The Court finds that, given Respondent's actions, in order for a penalty to have any deterrent effect in this matter, a substantial penalty is properly imposed.

Respondent is solely responsible for the consequences of its actions. Based on the foregoing, the Court assesses a substantial civil money penalty $10,000. 24 C.F.R. § 180.671(a)(1).

## ORDER

Based on the foregoing, it is **HEREBY DECLARED AND ORDERED:**

1. Respondent has violated 42 U.S.C. § 3604(f)(2)(A), 42 U.S.C. § 3604(f)(3)(B), and 42 U.S.C. § 3617.

2. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to Complainants the sum of $25,000.00.[17]

3. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to the Secretary the sum of $10,000.00 in Civil Money Penalties.

4. Respondent, its officers, members, agents, employees, and successors are enjoined from discriminating because of handicap against any person in any aspect of the rental, sale, use or enjoyment of a dwelling.

5. Respondent, its officers, members, agents, employees, and successors are enjoined from coercing, intimidating, threatening or interfering with Complainants' exercise or enjoyment of rights granted or protected by the FHA.

6. Respondent will provide Complainants with the exclusive use of Requested Spaces designated as "D" and "E" on JNT 1 for as long as Complainants require a reasonable accommodation. In exchange, Complainants will yield to Respondent the use of their currently Assigned Spaces designated as "A" and "B" on JNT 1.

7. HUD will provide, at no cost to Respondent, training on Fair Housing issues, including reasonable accommodation requirements and the Fair Housing Amendment Acts of 1988. This training will be open to all Astralis residents and will be provided on the Astralis premises in a suitable location provided by Respondent. The date for the training will be set by HUD in cooperation with Respondent – multiple dates may be used at HUD's discretion. Training must be completed within ninety (90) days of the date on which this Order becomes final. HUD will make training materials available to those residents who wish to attend the training but are unavailable to attend.

8. All members of Respondent's Board must complete the training referenced in ¶ 7, supra. If a new election of Board members occurs within 6 months of the completion of the training identified in ¶ 7, any newly elected members must complete the training as well as soon as HUD determines is practicable, but within a reasonable amount of time.

[17] Lest remedy seem harsh to the unit owners, one must recall that they, as the assembly of members, authorized and tolerated the inaction of the board members, and in a meeting ultimately refused to provide any remedy to Complainants, unless imposed by a Court.

9. Within thirty (30) days of the date on which this Order becomes final, Respondent must place Notices, as provided by HUD, regarding individuals' rights under the Fair Housing Amendments Act of 1988, in at least five visible common areas located throughout the complex. Those Notices must remain posted for at least one calendar year.

/S/
Alexander Fernández
Administrative Law Judge

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**Notice of appeal rights**. The appeal procedure is set forth in detail in 24 C.F.R. § 180.675 (2009). This Initial Decision and Order may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this Initial Decision and Order. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this Initial Decision and Order.

**Service of appeal documents**. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
1250 Maryland Ave, S.W., Portals Bldg., Suite 200
Washington, DC 20024
Facsimile: (202) 708-3498
Scanned electronic document: secretarialreview@hud.gov

**Copies of appeal documents**. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

**Finality of decision**. The agency decision becomes final as indicated in 24 C.F.R. § 180.680.

**Judicial review of final decision.** Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 42 U.S.C. 3612(i). The petition must be filed within 30 days after the date of issuance of the final decision.