

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of:

JUSTINE VAN DER POOL, and her four minor aggrieved children,

Complainants,

v.

HEATHERMOOR II, LLC and VALHALLA MANAGEMENT & REAL ESTATE, LLC d/b/a WODA MANAGEMENT & REAL ESTATE, LLC,

Respondents.

18-JM-0253-FH-022

August 8, 2019

**ORDER REJECTING “STIPULATED NOTICE OF DISMISSAL”  
AND ITS ATTACHED “CONCILIATION AGREEMENT”**

The above-captioned matter arises from a *Charge of Discrimination* filed by the U.S. Department of Housing and Urban Development (“HUD”) on behalf of Justine van der Pool (“Complainant”) and her four minor children against Heathermoor II, LLC and Valhalla Management and Real Estate, LLC, d/b/a Woda Management and Real Estate, LLC (collectively, “Respondents”) under the Fair Housing Act (“the Act”), 42 U.S.C. §§ 3601, *et seq.*, as implemented by 24 C.F.R. part 180. The *Charge of Discrimination* alleges that Respondents, as landlords of an apartment complex where Complainant resided, discriminated against Complainant on account of disability by denying her the use of a parking space near her apartment on approximately thirty occasions, over a period of two years.

**PROCEDURAL HISTORY**

The *Charge of Discrimination* was filed with this Court on September 28, 2018. Respondents filed an *Answer* on October 17, 2018. On October 23, 2018, after the time had expired under 42 U.S.C. § 3612(a) for the parties to elect to proceed with a civil action in a federal district court, this Court issued a *Notice of Hearing and Order* scheduling a hearing to commence in December 2018.

At the parties’ request, in November 2018, the hearing was rescheduled to take place in February 2019. However, a subsequent lapse in appropriations caused a partial federal government shutdown that resulted in the closure of this Court from December 22, 2018 to January 28, 2019. After consulting with the parties regarding the impact of the shutdown, the

Court rescheduled the hearing to commence on June 11, 2019. The Court's order rescheduling the hearing instructed the parties to submit documentary exhibits in advance of the hearing on or before May 28, 2019.

The parties did not file exhibits with the Court on May 28, 2019. Instead, on May 30, 2019, they submitted a *Proposed Initial Decision and Consent Order* pursuant to 24 C.F.R. § 180.450<sup>1</sup> indicating they had reached an agreement whereby Respondents would, among other things, pay \$27,500.00 to Complainant to resolve the *Charge of Discrimination*.

On June 6, 2019, the Court issued an order notifying the parties that the record contained insufficient information to allow it to determine, in accordance with 24 C.F.R. § 180.450, that the proposed settlement was "in the public interest." The record was devoid of any evidence or allegations concerning factors such as the nature of Complainant's disability and the nature and extent of the harm she had suffered, rendering it unclear how the proposed remedy related to the allegations of discrimination. Accordingly, the Court instructed the parties either to advise of agreeable dates for a hearing, or to stipulate to and file facts establishing that the agreed remedy was in the public interest. The Court noted that it would consider the stipulated facts *in camera* if requested by the parties.

On June 19, 2019, the parties filed a *Stipulated Notice of Dismissal* that failed to provide any of the additional factual information requested by the Court. Instead, the parties re-styled their proposed consent order as a "conciliation agreement" and stated that they now jointly agreed to dismiss this proceeding with prejudice. They did not cite any legal authority permitting this course of action.

On June 20, 2019, the Court issued an *Order Requesting Briefing*. The Court noted that the Fair Housing Act does allow the parties to resolve a complaint of discrimination through conciliation without the involvement of any court. See 42 U.S.C. § 3610(b)(1)-(4). However, the statute contemplates that conciliation will occur "[d]uring the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary"—in other words, before any court has assumed jurisdiction over the matter. Id. § 3610(b)(1); see also 24 C.F.R. § 103.300(a). By contrast, once HUD has filed a charge and this Court has assumed jurisdiction, the Secretary's regulations require that the Court accept a proposed settlement agreement only if it is in the public interest, and only by issuing an initial decision and consent order. 24 C.F.R. § 180.450. In consideration of this statutory and regulatory framework, the Court sought briefing from the parties on the source of its authority to dismiss this proceeding without considering the public interest.

On July 12, 2019, the parties submitted a *Joint Response to Order Requesting Briefing*. The parties asserted that the additional factual information sought by the Court would not be relevant to determining whether the public interest were satisfied. The parties further asserted that, because their initial proposed agreement included "universally-recognized provisions for relief in the public interest, *i.e.*, an injunction, a non-discriminatory policy, and training, it was

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<sup>1</sup> The cited rule permits the parties to resolve a charge of discrimination by submitting an agreement to the Administrative Law Judge at any time before a final decision is issued. 24 C.F.R. § 180.450. The rule further states that, "[i]f the agreement is in the public interest, the ALJ shall accept it by issuing an initial decision and consent order based on the agreement." Id.

self-evidently in the public interest and the Court was required to issue an Initial Decision and Consent Order based on it.” The parties claimed that they had filed their *Stipulated Notice of Dismissal* under Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, which permits a plaintiff to voluntarily dismiss an action without a court order by filing a stipulation signed by all parties, and that the filing of the notice had divested the Court of jurisdiction.

## LEGAL FRAMEWORK

The Fair Housing Act prohibits housing discrimination on the basis of certain protected statuses, including disability. See 42 U.S.C. §§ 3601, *et seq.* An aggrieved person who believes she has been subject to such discrimination may file a complaint with the Secretary of HUD pursuant to section 810(a) of the Act. Id. § 3610(a)(1)(A). The Secretary must then conduct an investigation, culminating in a decision either to dismiss the matter or to issue a charge of discrimination against the accused on behalf of the complainant. Id. § 3610(a)(1)(B)(iv), (g).

During the investigation, the Act requires the Secretary to engage in conciliation to the extent feasible. Specifically, section 810 of the Act, entitled “Administrative enforcement; preliminary matters,” provides as follows:

### (a) COMPLAINTS AND ANSWERS

- (1) (A) (i) An aggrieved person may ... file a complaint with the Secretary ...

### (b) INVESTIGATIVE REPORT AND CONCILIATION

- (1) During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.
- (2) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant, and shall be subject to approval by the Secretary.
- (3) A conciliation agreement may provide for binding arbitration of the dispute arising from the complaint. ...
- (4) Each conciliation agreement shall be made public ...
- (5) (A) At the end of each investigation under this section, the Secretary shall prepare a final investigative report ...

### (c) FAILURE TO COMPLY WITH CONCILIATION AGREEMENT

Whenever the Secretary has reasonable cause to believe that a respondent has breached a conciliation agreement, the Secretary shall refer the matter to the Attorney General with a recommendation that a civil action be filed under section 3614 of this title for the enforcement of such agreement.

(d) PROHIBITIONS AND REQUIREMENTS WITH RESPECT TO DISCLOSURE OF INFORMATION

- (1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. ...

(g) REASONABLE CAUSE DETERMINATION AND EFFECT

- (1) The Secretary shall, within 100 days after the filing of the complaint ... determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. ...
- (2) (A) If the Secretary determines that reasonable cause exists ... the Secretary shall ... immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title. ...
- (3) If the Secretary determines that no reasonable cause exists ... the Secretary shall promptly dismiss the complaint. ...

42 U.S.C. § 3610. In sum, the statute only permits conciliation to occur after the complaint is filed, but before the Secretary decides whether to initiate litigation by issuing a charge. Section 810 is ordered chronologically, tracing the trajectory of the pre-litigation proceedings from the time the aggrieved person files the complaint with the Secretary under subsection (a) to the time the Secretary makes a reasonable cause determination that will lead him to either dismiss the complaint or file a charge under subsection (g), and the conciliation process falls somewhere in between. See id.<sup>2</sup>

The Secretary has promulgated regulations governing the conciliation process. These regulations are catalogued in the Code of Federal Regulations in Volume 24, part 103 (“Fair Housing – Complaint Processing”), subpart E (“Conciliation Procedures”). Like the statute, the regulations expressly state that HUD will engage in conciliation “[d]uring the period beginning with the filing of the complaint and ending with the filing of a charge or the dismissal of the

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<sup>2</sup> See also Banai v. Secretary, 102 F.3d 1203, 1205 n.2 (11th Cir. 1997) (describing conciliation, in passing, as occurring “[a]t the same time” as the Secretary’s investigation of the complaint).

complaint by the General Counsel or the Assistant Secretary [for Fair Housing and Equal Opportunity].” 24 C.F.R. § 103.300(a).

The Secretary has delegated the decision whether to file a charge of discrimination to the Assistant Secretary for Fair Housing and Equal Opportunity. See 24 C.F.R. § 103.400. If, after investigating the complaint, the Assistant Secretary decides to file a charge on the complainant’s behalf, the parties may elect to have the case decided in a civil action in a federal district court under 42 U.S.C. § 3612(o). See 42 U.S.C. § 3612(a). If the parties choose not to proceed in district court, as occurred in this case, the action moves forward as an administrative proceeding before this Court under 42 U.S.C. § 3612(b)-(g).

In an administrative proceeding, the Act authorizes the parties to resolve the charge of discrimination<sup>3</sup> before a final order is issued, but only with the consent of the aggrieved person (the complainant) on whose behalf the charge was filed. 42 U.S.C. § 3612(e) (“Any resolution of a charge before a final order under this section shall require the consent of the aggrieved person on whose behalf the charge is issued.”). The Act so specifies because the complainant is not necessarily a party to the administrative action or to any associated settlement agreement, unlike in the case of a conciliation agreement, which is between the complainant and respondent subject to the approval of the Secretary. See id. § 3610(b)(2).

The Secretary’s regulation implementing 42 U.S.C. § 3612(e) is found in the Code of Federal Regulations in Volume 24, part 180 (“Consolidated HUD Hearing Procedures for Civil Rights Matters”), subpart D (“Proceedings Prior to Hearing”), and outlines the procedure to be followed when a charge is resolved during the course of an administrative proceeding:

§ 180.450 Resolution of charge or notice of proposed adverse action.

At any time before a final decision is issued, the parties may submit to the ALJ [Administrative Law Judge] an agreement resolving the charge or notice of proposed adverse action. A charge under the Fair Housing Act can only be resolved with the agreement of the aggrieved person on whose behalf the charge was issued. If the agreement is in the public interest, the ALJ shall accept it by issuing an initial decision and consent order based on the agreement.

24 C.F.R. § 180.450. Thus, per the Secretary’s regulations, this Court may accept an agreement to resolve an administrative proceeding only if the agreement is in the public interest. If so, the Court’s means of accepting the agreement shall be through the issuance of an initial decision and consent order.

## DISCUSSION

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<sup>3</sup> It is noteworthy that, at this juncture, the Act authorizes “resolution of a *charge*” as opposed to “conciliation with respect to [a] *complaint*.” Compare 42 U.S.C. § 3612(e) with id. § 3610(b)(1) (emphasis added).

In this case, the parties initially filed a proposed decision and consent order asking the Court to accept their settlement agreement “if he finds [it] to be in the public interest” by issuing an initial decision and consent order under 24 C.F.R. § 180.450. However, after the Court requested additional information to assist it in making a determination regarding the public interest, the parties backpedaled, submitting an agreement that was re-styled a “conciliation agreement” and asserting that they had jointly agreed to dismiss this proceeding with prejudice. Now that the Court has expressed its view that 24 C.F.R. § 180.450 governs and has asked the parties to identify the source of the Court’s authority to dismiss pursuant to the “conciliation agreement,” the parties assert that the Court no longer has jurisdiction and that their actions effected a voluntary dismissal under Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure.

The parties acknowledge that the plain language of section 810 of the Fair Housing Act contemplates that conciliation efforts will “end[ ] with the filing of a charge.” 42 U.S.C. § 3610(b)(1). They assert that this statutory provision does not preclude the Secretary from attempting to conciliate outside the specified time period.

However, “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” Home Depot USA, Inc. v. Jackson, 139 S. Ct. 1743, 1748 (2019) (quoting Davis v. Mich. Dep’t of Treasury, 489 U.S. 803, 809 (1989)). Here, the language and structure of the Act, read as a whole, reinforce the notion that conciliation is a special pre-litigation process that ends when a charge of discrimination is filed.

To begin with, as discussed above, the placement of the conciliation provisions within the chronologically ordered text of the Act indicates that conciliation is to occur during the investigation of the complaint, not during any subsequent formal litigation. Conciliation is authorized only with respect to a “complaint,” not a “charge.” 42 U.S.C. § 3610(b)(1); see also id. § 3602(l) (defining “conciliation” as “the attempted resolution of issues raised by a complaint, or by the investigation of such complaint, through informal negotiations involving the aggrieved person, the respondent, and the Secretary”). If conciliation is successful, the agreement is between only the respondent and complainant, not the Secretary, who is not yet a party to any action. Id. § 3610(b)(2). And although the agreement itself must be made public, the things said and done during conciliation are confidential for purposes of any “subsequent proceeding” under the Act. Id. § 3610(b)(4), (d).

The filing of the charge initiates a “subsequent proceeding” that becomes a formal litigation before either a federal district court or this administrative Court. See 42 U.S.C. § 3612. The charge is filed not by the complainant, who initiated the prior proceedings by filing the complaint, but by the Secretary through his delegee, the General Counsel, acting upon the reasonable cause determination made by the Assistant Secretary for Fair Housing and Equal Opportunity (“Assistant Secretary”). See 24 C.F.R. § 103.405.

Previously, the Assistant Secretary, as the HUD official responsible for evaluating the merits of the complaint, presided over the investigation and any conciliation efforts. But upon the filing of the charge, the Assistant Secretary’s office becomes a party to the proceedings, pursuing the allegations of discrimination on the complainant’s behalf, and a federal district

court or this administrative Court assumes jurisdiction over the matter, replacing the Assistant Secretary as the referee and ultimate arbiter of the dispute. In an administrative proceeding before this Court, this separation of functions is necessary to allow the Secretary to provide a forum for impartial review of the case within HUD.

Once this Court has assumed jurisdiction, settlement efforts are governed not by the conciliation provisions, but by 42 U.S.C. § 3612(e) and the implementing regulation at 24 C.F.R. § 180.450, which take into account the separation of functions between, and altered roles of, the Secretary's respective delegees. Recognizing that the Secretary is now pursuing the action on the aggrieved person's behalf and will be a necessary party to any out-of-court resolution, the statute requires the consent of the aggrieved person. Compare 42 U.S.C. § 3612(e) (stating that resolution of charge "shall require the consent of the aggrieved person on whose behalf the charge is issued") with id. § 3610(b)(2) (stating that conciliation agreement shall be between the respondent and complainant and "shall be subject to approval by the Secretary"). And, importantly, whereas the Secretary previously delegated to the Assistant Secretary the duty of ensuring that a conciliation agreement would serve the public interest, the Secretary now transfers this public interest review function to the ALJ. Compare 24 C.F.R. § 103.310(b)(ii) (authorizing Assistant Secretary to approve a conciliation agreement only if it "will adequately vindicate the public interest") with id. § 180.450 (authorizing ALJ to approve an agreement resolving a charge only if it "is in the public interest").

In this case, the Secretary has filed a *Charge of Discrimination* and this Court has received jurisdiction over the matter. Accordingly, in the Court's view, the roles of the Secretary's delegees have shifted and the time for the parties to engage in conciliation, which assumes roles that are no longer in force, has passed. At this time, the sole avenue for the parties to resolve the allegations of discrimination through settlement is by following the procedure set forth in 24 C.F.R. § 180.450.

The parties assert that Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure ("FRCP") authorizes them to voluntarily dismiss this action without the Court's involvement. The cited rule permits a plaintiff to dismiss an action without a court order by filing a stipulation of dismissal signed by all the parties, "[s]ubject to Rules 23(e), 23.1(c), 23.2, and 66<sup>[4]</sup> and any applicable federal statute." Fed. R. Civ. Pro. 41(a)(1)(A)(ii).

However, the FRCP are not binding authority on this Court. Rather, in administrative proceedings under the Act, the FRCP serve only as a general guide in the absence of a more specific provision. See 24 C.F.R. § 180.105(b) ("In the absence of a specific provision, the Federal Rules of Civil Procedure shall serve as a general guide."). Here, as noted, the Secretary has promulgated a specific provision that applies to the circumstances at issue. Namely, 24 C.F.R. § 180.450 applies where, as here, the parties have reached a settlement after a charge has been filed and this Court has assumed jurisdiction. Thus, 24 C.F.R. § 180.450 governs this case and serves to qualify and/or preempt the more general rules set forth in the FRCP, including Rule 41(a)(1)(A)(ii).

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<sup>4</sup> Rule 23 pertains to class actions and Rule 66 deals with actions involving receivers. See Fed. R. Civ. Pro. 23, 66. Neither are relevant to the instant case.

This outcome is consistent with the ancient interpretive canon *generalia specialibus non derogant*, which means that, for the purposes of interpreting two apparently conflicting textual provisions, “the specific governs the general.” RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012). This canon holds full force in situations where a general authorization and a more limited authorization exist concurrently, in which case “the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, violating the cardinal rule that, if possible, effect shall be given to every clause and part of a statute.” Id. (internal quotation marks omitted).

In this case, the parties seek to avoid the specific provision at 24 C.F.R. § 180.450 by citing the broad, general authorization of Rule 41. But if the parties could voluntarily dismiss a Fair Housing proceeding any time they reached a settlement without following the specific procedure set forth by the Secretary in 24 C.F.R. § 180.450, then the general authorization in Rule 41 would swallow § 180.450 and render it inconsequential. This would violate the canon against surplusage. See Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (cautioning against “reading a text in a way that makes part of it redundant”); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (noting “cardinal principal” that statute should be construed such that “no clause, sentence, or word shall be superfluous, void, or insignificant”).

Clearly, the Secretary did not intend this result. In Fair Housing cases, unique among all cases heard by this Court,<sup>5</sup> the Secretary contemplated that the parties would submit settlement agreements to the ALJ for consideration of the public interest and issuance of an initial decision and consent order under 24 C.F.R. § 180.450. Although the parties seek to frame this regulation as permissive, if the Secretary’s authorization of the specific procedure described in the regulation is to have any effect, it must be viewed as mandatory and as preempting Rule 41.<sup>6</sup>

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<sup>5</sup> For example, this Court routinely hears, among other actions, cases brought by HUD under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801 *et seq.*, as implemented by 24 C.F.R. part 28; administrative actions brought by HUD’s Mortgage Review Board pursuant to 12 U.S.C. § 1708(c)(1), as implemented by 24 C.F.R. part 25; and actions for civil money penalties brought by HUD under various statutes implemented by 24 C.F.R. part 30. In all of these cases, the parties may simply move for dismissal upon reaching a settlement. Fair Housing proceedings are the only type of case in which the parties must submit a copy of the agreement to the ALJ and the ALJ must consider the public interest and issue an initial decision and consent order approving the proposed agreement, thereby placing the judge’s imprimatur upon it. For the Secretary to have departed from the standard settlement procedure in this manner signifies a calculated decision to treat Fair Housing cases differently.

Also noteworthy is Congress’ decision to require ALJs to apply the Federal Rules of Evidence in administrative hearings under the Fair Housing Act: “The Federal Rules of Evidence apply to the presentation of evidence in such hearing as they would in a civil action in a United States district court.” 42 U.S.C. § 3612(c). By contrast, most hearings conducted by ALJs are governed by the less formal evidentiary standard set forth in the Administrative Procedure Act, which permits “[a]ny oral or documentary evidence” to be admitted subject only to any provisions the agency promulgates for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. See 5 U.S.C. § 556(d). For example, HUD’s procedural rules for hearings before ALJs—which apply to the above-mentioned program fraud cases (see 24 C.F.R. § 28.40(a)), Mortgage Review Board cases (see 24 C.F.R. § 25.10(c)), and civil money penalty cases (see 24 C.F.R. § 30.95)—generally require the ALJ to admit any relevant nonprivileged evidence, and expressly state that the Federal Rules of Evidence are not binding. See 24 C.F.R. § 26.47 (also providing that “technical and hearsay objections to testimony as used in a court of law will not be sustained”).

<sup>6</sup> The regulation is permissive in that the parties do not have to reach an agreement resolving the charge. See 24 C.F.R. § 180.450 (the parties *may* submit). Alternatively, they *may* litigate the matter before an ALJ. However, Section 180.450, entitled “Resolution of charge or notice of proposed adverse action” is determinative in that it lists the exclusive mechanism through which the charge may be resolved once litigation is initiated before an ALJ.



Moreover, even if Rule 41 were not preempted, the rule itself contains an exception to the general authorization to enter into a voluntary dismissal when an “applicable federal statute” bars dismissal without a court order. Fed. R. Civ. Pro. 41(a)(1)(A). For example, in Cheeks v. Freeport Pancake House, Inc., the Second Circuit found that the Fair Labor Standards Act (“FLSA”) was an “applicable federal statute” for purposes of the Rule 41 exception, thereby requiring stipulated dismissals settling FLSA claims with prejudice to be approved by a reviewing district court or by the Department of Labor. 796 F.3d 199 (2d Cir. 2015). The Second Circuit acknowledged that FLSA was silent as to whether court approval was required before dismissal under Rule 41. Id. at 204. However, the Court reasoned that the unique policy considerations underlying FLSA, as well as the potential for abuse in FLSA settlements, placed FLSA within the “applicable federal statute” exception. Id. at 206-07.

Similarly, the Fair Housing Act promotes policy considerations that caution against allowing voluntary dismissal with prejudice absent the involvement of a court. Through the Act, Congress recognized and attempted to rectify discrimination against persons seeking equal housing opportunities. Congress authorized this Court to resolve Fair Housing disputes by holding administrative hearings and issuing orders under 42 U.S.C. § 3612(g), but conferred upon the Court a duty to ensure that any relief awarded is appropriate and the public interest is vindicated. 42 U.S.C. § 3612(g)(3) (instructing ALJ to award “such relief as may be appropriate” and to assess a civil penalty “to vindicate the public interest”). Consistent with this mandate, when a case before this Court settles prior to the issuance of a final order, the Secretary requires the ALJ to consider the public interest and affix her imprimatur upon the agreement by entering an initial decision and consent order, which is enforceable in the same manner as any other order under § 3612(g).<sup>7</sup> Thus, the Secretary ensures that settlement orders will comply with the Congressional mandate in § 3612(g)(3) and serve the public interest. If dismissal without Court approval were allowed under Rule 41, this purpose would be defeated.

The parties assert they have already determined that their proposed settlement agreement satisfies the public interest in this case. They claim that the additional factual information the Court seeks is not relevant to the public interest determination. “Inasmuch as the agreement contain[s] universally-recognized provisions for relief in the public interest, *i.e.*, an injunction, a non-discriminatory policy, and training,” the parties assert, “it [is] self-evidently in the public interest and the Court was required to issue an Initial Decision and Consent Order based on it.”

Whether a particular course of action serves “the public interest” is a contextually dependent determination that often necessitates balancing divergent interests. See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 824 (1973) (noting that “the public interest is not a simple fact, easily determined by courts” because it requires balancing of competing interests). Courts have noted that “public interest” is susceptible to varying interpretations depending on perspective. See, e.g., Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1433 (7th Cir. 1986) (characterizing public interest as a “wild card”).

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<sup>7</sup> An order issued by an ALJ in an administrative proceeding under the Act becomes final after 45 days and is enforceable in the U.S. court of appeals for the circuit in which the discriminatory act is alleged to have occurred upon a petition by the Secretary or by any person entitled to relief. See 42 U.S.C. § 3612(j)-(m). By contrast, a conciliation agreement is enforceable by the Attorney General through a separate civil action in which a federal district court may, at its discretion, award relief to the complainant and/or assess a civil penalty “to vindicate the public interest.” See id. §§ 3610(c), 3614(b)(2), (d).

For example, in Winter v. Natural Resources Defense Council, Inc., a federal district court in the Ninth Circuit had granted an environmental group's request to enjoin the U.S. Navy from using "mid-frequency active" sonar during training exercises on grounds that incidental exposure to the sonar may harm or alter the behavior of marine mammals such as whales. 555 U.S. 7, 17 (2008). The Supreme Court, called upon to weigh the public interest in conducting naval training exercises against the interest in not hampering the public's ability to study and observe marine mammals without sonar interference, struck a very different balance than the Ninth Circuit and vacated the injunction. See id. at 25-26. Clearly, various divergent interests may qualify as public interests, but "the" public interest is in the eye of the beholder.

In this case, the beholder is this Court, which has been charged by Congress with awarding "appropriate" relief and assessing a penalty that "vindicate[s] the public interest" and has been instructed by the Secretary to ensure that any settlement agreement "is in the public interest." 42 U.S.C. § 3612(g)(3); 24 C.F.R. § 180.450. Thus, it is not dispositive that the parties have already decided amongst themselves that certain provisions within their agreement satisfy the public interest, as this is not their decision to make. "The public interest," in this case, means what this Court says it does.<sup>8</sup>

By delegating the public interest decision to the ALJs of this Court and requiring the Court to accept Fair Housing settlements by issuing an initial decision and consent order, the Secretary ensured that any settlement of an administrative proceeding under the Fair Housing Act would be subjected to a layer of impartial review and publicized through the issuance of a formal order. By virtue of the ALJs' independence from the rest of HUD, this Court is well-suited to render an impartial determination as to whether the prosecutorial arm of HUD has resolved a particular case in a manner consistent with the public interest. For example, review by this Court can guard against inappropriate situations such as back room dealings where HUD gives preferential treatment to certain respondents or cases of prosecutorial overreach where HUD wields a charge of discrimination as a cudgel against disfavored persons.

There are no overt signs of such mischief in this case. However, it surprises the Court that the parties have gone to great lengths not to comply with the Court's minimally burdensome request to provide supplemental information. If the Court allows the parties to circumvent its public interest review function in this case through voluntary dismissal, the parties would be able to exercise the same tactic to avoid review in any future case, even where there may be blatant indicia of abuse of discretion.

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<sup>8</sup> Humpty Dumpty's insightful commentary on the subjective nature of language is instructive here:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, *THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE* 99 (Rand McNally & Co. 1917).

The parties claim that the additional factual information the Court requests from them is irrelevant to the public interest inquiry in this case. But there are many facets to the “public interest” determination, and, as noted above, the ALJ is the person ultimately charged with making the determination and signing the consent order. The Court believes that, when conducting a public interest review, it must generally consider whether the proposed agreement is reasonable and fair to both sides considering the facts alleged. For the Court to simply accept the proposed consent order without review would be a dereliction of its duty to ensure that the orders it enters are proper. See SEC v. Citigroup Global Mkts., 752 F.3d 285, 298 (2d Cir. 2014). In this case, the Court is unable to fully consider whether the agreement serves the public interest because the record is devoid of information concerning the nature of the complainant’s disability and the extent of the harm she suffered. The Charge contains the bald assertion that Complainant is “a person with a disability” without a scintilla of additional information regarding the alleged disability or any circumstances surrounding it other than a vague reference to the alleged discriminatory acts. No other document filed with the Court provides any further illumination. Absent a hearing, or factual stipulation, the Court is left in the dark to ponder matters regarding the public interest. Because it is not clear what harm is alleged, the Court cannot ensure that the agreed remedy is appropriately tailored to it and is, therefore, reasonable and in the public interest.

The Court is not unwilling to approve a settlement of this matter and does not wish to appear hostile to the parties’ proposed remedy. However, the Secretary has directed the Court to approve settlements of Fair Housing matters only where the agreement is “in the public interest,” 24 C.F.R. § 180.450, and the Court is reluctant to lend its imprimatur in this manner when the factual record is so sparse that it is unclear how the proposed remedy relates to the alleged harm. The Court continues to believe that additional factual information would help it carry out its duties of performing a meaningful review under 24 C.F.R. § 180.450 and reaching a rational determination as to whether the settlement is in the public interest.

Despite this Court’s specific order requesting evidence bearing upon its determination of the public interest in resolving the charge, the parties have jointly declined to inform the court of facts sufficient to reach such a rational determination in this matter, stating that “Notably, that information [sought by the Administrative Law Judge] would not be relevant to whether the ‘public interest’ had been satisfied.”

To put a fine point on the matter, the case having been charged in accord with the law, it is not for the HUD attorneys who prosecute it, or the charged Respondents, or even the Complainants, or any combination of them, to determine whether a proposed settlement is “in the public interest.” That duty befalls the Secretary, in whose stead the ALJ stands.

As a consequence, the filed “*Stipulated Notice of Dismissal*” and its attached “*Conciliation Agreement*” are of no legal effect in this matter and are hereby **ORDERED REJECTED**.

In view of this resulting impasse, three paths diverge for resolution:

1. As the default, the Court will schedule and order a hearing to fulfill its obligation to ensure that the proposed *Initial Decision and Consent Order* is in the public interest; or
2. As an alternative, the parties may elect to resolve this impasse by availing themselves of the opportunity previously offered by the Court's order of June 6, 2019, requesting they provide information sufficient for the ALJ to ascertain that the proposed consent order is in the public interest; or
3. As another alternative, the parties—or any of them—in lieu of the foregoing, may choose to request, within 10 days of this interlocutory ruling, that the Court certify it for review by the Secretary.<sup>9</sup>

Accordingly, if the parties do not choose to avail themselves of either of the foregoing alternatives before August 19, 2019, a scheduling order for hearing will issue.

So **ORDERED**,



J. Jeremiah Mahoney  
Chief United States Administrative Law Judge

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<sup>9</sup> Pursuant to 24 C.F.R. § 26.51, a party seeking review of an interlocutory ruling shall file a motion with the ALJ within 10 days requesting certification for review by the Secretary.