

14 Civ. 7398

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PASQUALE PICARO, PRUDENCIO VALLE, JUDITH BRATNICK, SANDY CAUSE, individually and as next friend to minor child S.C., LILLIAN ANTHONY, AMOGHENE UMUDE, DOMINGO OSORIO, OLGA ORTIZ, SHARYAN VASQUEZ, MELISSA VANDERHORST, individually and as next friend to minor child A.V., SHAKEI GADSON, LETITIA JAMES, as Public Advocate for the City of New York, and CENTER FOR INDEPENDENCE OF THE DISABLED, NEW YORK,

Plaintiffs,

-against-

PELHAM 1130 LLC, PELHAM 1135 LLC, PELHAM 1540 LLC, MATTHEWS 2160 LLC, JOSHUA GOLDFARB, PHILIP GOLDFARB, MARC GOLDFARB, THOMAS FRYE, GOLDFARB PROPERTIES INC., PELICAN MANAGEMENT INC., NEW YORK CITY DEPARTMENT OF BUILDINGS, and RICK D. CHANDLER, as Commissioner of the New York City Department of Buildings,

Defendants.

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**MUNICIPAL DEFENDANTS' MEMORANDUM OF  
LAW IN SUPPORT OF THEIR MOTION TO  
DISMISS**

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SOUTHERN DISTRICT OF NEW YORK

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Defendants.

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**MUNICIPAL DEFENDANTS' MEMORANDUM  
OF LAW IN SUPPORT OF THEIR MOTION TO  
DISMISS**

**PRELIMINARY STATEMENT**

Defendants, New York City Department of Buildings (“DOB”) and Rick D. Chandler, as Commissioner of DOB, collectively referred to hereinafter as “municipal defendants,” by their attorney, Zachary W. Carter, Corporation Counsel of the City of New York, respectfully submit this memorandum of law in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Amended Complaint

(hereinafter, the “Complaint”) upon the grounds that Plaintiffs fails to state a claim against municipal defendants upon which relief can be granted.

Plaintiffs are various tenants in properties owned by Landlord Defendants, along with Letitia James as Public Advocate for the City of New York and the Center for Independence of the Disabled, New York (“CIDNY”)(collectively “Plaintiffs”). Plaintiffs commenced this action arising out of Landlord Defendants alleged failure to provide reasonable accommodations in violation of Title VII of the Civil Rights Act and violations of the New York State and New York City Human Rights Laws when Landlord Defendants removed elevators from service to conduct repairs in their buildings. Plaintiffs allege that Municipal Defendants are violating Title II of the Americans with Disabilities Act (“ADA”), Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988, New York City Human Rights Laws and the accessibility standards contained in various New York City Administrative Code provisions by issuing permits to perform elevator repair at the subject premises. Plaintiffs’ claim as to Municipal Defendants all fail.

As set forth in greater detail below, Plaintiffs fail to state a claim for a violation of the ADA because Plaintiffs have not been denied the opportunity to participate in or benefit from Municipal Defendants’ services, programs, or activities. Plaintiffs also fail to state a claim for violation of the FHA because Municipal Defendants’ actions do not implicate concerns related to the availability of housing for sale or rent and therefore cannot be the grounds for liability under the FHA. Moreover, Plaintiffs James and CIDNY lack standing in their claims against Municipal Defendants as any alleged injury in fact is not “fairly traceable” to Municipal Defendants’ actions. Furthermore, the Court should decline to exercise supplemental jurisdiction over Plaintiffs’ state and local law claims, but even if the Court does not so decline, such claims

should be dismissed. Plaintiffs' state and local law claims fail because the accessibility standards set forth in the Construction Codes relate to the accessibility standards required upon completion of the elevator work. Moreover, Plaintiffs' Human Rights Law claim fails because Plaintiffs failed to plead that the issuance of permits by Municipal Defendants for Landlord Defendants to perform elevator work in any way aided and abetted the alleged failure of Landlord Defendants to provide a reasonable accommodation. Accordingly, Plaintiffs' Complaint should be dismissed as to Municipal Defendants in its entirety.

### **STATEMENT OF RELEVANT FACTS**

#### **Factual History**

The essential factual claims as set forth in the Complaint are accepted as true by municipal defendants for the purposes of this motion only, as one must for a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Municipal defendants in no way waive their rights to contest the factual accuracy of Plaintiffs' claims if the Court denies the instant motion to dismiss or at any time in the future. Those essential factual claims are as follows:

Plaintiffs consist of disabled tenants who live or individuals who provide care to disabled tenants who live at five premises 1130 Pelham Parkway South, 1540 Pelham Parkway South, 2160 Matthews Avenue, 2166 Matthews Avenue and 1135 Pelham Parkway North in Bronx County, New York (collectively, the "subject premises"); as well as Letitia James, as Public Advocate for the City of New York, and the Center for Independence of the Disabled, New York. The subject premises are owned and/or managed by various entities and individuals named in the caption as Pelham 1130 LLC, Pelham 1135 LLC, Pelham 1540 LLC, Matthews 2160 LLC, Joshua Goldfarb, Philip Goldfarb, Marc Goldfarb, Thomas Frye, Goldfarb Properties Inc., and Pelican Management Inc. (collectively, "Landlord Defendants").

Landlord Defendants filed applications with DOB for elevator work at each of the subject buildings. In or about March and April 2014, DOB approved these applications for elevator repair work and issued permits for Landlord Defendants to perform elevator work at the subject buildings.

**Relevant Procedural History**

Plaintiffs originally commenced this action on or about September 12, 2014. A copy of Plaintiffs' original complaint is annexed to the June 25, 2015 Declaration of Pamela A. Koplik, Esq. ("Koplik Declaration") as Exhibit A. The original complaint named "Pasquale Picaro, Prudencio Valle, Judith Bratnick, Sandy Cause, individually and as next friend to minor child S.C., and Letitia James, as Public Advocate for the City of New York as Plaintiffs. See Exhibit A to Koplik Declaration. Plaintiffs also at that time moved by Order to Show Cause for a temporary restraining order and preliminary injunction precluding landlord defendants from shutting down the elevator at 1135 Pelham Parkway North. A hearing was held on September 18, 2014 before Hon. J. Paul Oetken regarding Plaintiffs' motion for a preliminary injunction. By Opinion and Order dated September 19, 2014, Judge Oetken denied Plaintiffs' motion without prejudice premised upon landlord defendants following through with the reasonable accommodations as set forth in their last best offer. A copy of Judge Oetken's September 19, 2014 Opinion and Order is annexed to the Koplik Declaration as Exhibit B.

In or about December 2014 Plaintiffs moved to amend the Complaint to add additional plaintiffs Lilian Anthony, Amoghene Umude, Domingo Osorio, Olga Ortiz, Sharyan Vasquez, Melissa Vanderhorst, individually and as next friend to minor child A.V., Shakei Gadson, and the Center for Independence of the Disabled, New York ("CIDNY"). Additionally Plaintiffs sought to add a new Landlord Defendant, Pelham 1540 LLC and to add two new claims against Municipal Defendants, one for aiding and abetting the alleged violation of the

New York City Human Rights Law and a claim for declaratory relief that Municipal Defendants violated New York City Construction and Building Codes.

Landlord Defendants opposed Plaintiffs' motion to amend and cross moved to sever, dismiss or for separate trials. Municipal Defendants consented to Plaintiffs' motion to amend, but opposed Landlords' cross motion for severance or separate trials. By Memorandum and Order dated April 21, 2015, Hon Deborah A. Batts granted Plaintiffs' motion to amend and denied Landlord Defendants' cross-motion without prejudice. A copy of Judge Batts April 21, 2015 Memorandum and Order is annexed to the Koplik Declaration as Exhibit C.

On April 21, 2015, Plaintiffs filed the Amended Complaint, a copy of which is annexed to the Koplik Declaration as Exhibit D. The Amended Complaint (hereinafter, the "Complaint") raises seven causes of action. The first three causes of action are interposed only against the Landlord Defendants, as follows: the First Cause of Action alleges violations of Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988 (42 U.S.C. §§ 3603-04 et seq.) and their implementing regulations; the Second Cause of Action alleges violations of the New York State Human Rights Law, N.Y. Exec. Law § 290 et seq.; and the Third Cause of Action alleges violations of the New York City Human Rights Law codified as New York City Administrative Code § 8-101 et seq. As against Municipal Defendants, Plaintiffs raise four causes of action, as follows: the Fourth Cause of Action alleges violations of Title II of the Americans with Disabilities Act ("ADA"); the Fifth Cause of Action alleges violations of Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988 (42 U.S.C. §§ 3603-04 et seq.); the Sixth Cause of Action alleges violations of the New York City Human Rights Law codified as New York City Administrative

Code § 8-101 et seq.<sup>1</sup>; and the Seventh Cause of Action alleges that Municipal Defendants failed to apply the City's accessibility standards contained in Administrative Code §§ 27-292.4(c), 27-292.5, 27-357(d), 28-101.4.3, and 28-213.1.2 and seeks a declaration stating same.<sup>2</sup>

Landlord Defendants interposed their Answer on May 26, 2015, a copy of which is annexed to the Koplik Declaration as Exhibit E.

### **APPLICABLE STATUTORY PROVISIONS**

#### **DOB Authority**

Pursuant to Chapter 26 of the New York City Charter ("Charter"), DOB is empowered to enforce statutes, laws and rules relating to the construction, alteration and maintenance of buildings or structures in the City of New York. Section 643 of the Charter provides, in pertinent part, as follows:

The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city ....

Effective July 1, 2008, the statute formerly known as the New York City Building Code was repealed and replaced with the New York City Construction Codes (the "Construction Codes") were enacted, under Title 28 of the Admin. Code. The Construction Codes contain five

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<sup>1</sup> Plaintiffs do not allege that the Municipal Defendants violated the New York State Human Rights Law.

<sup>2</sup> While the Complaint also cites to §§ 27-291.1(4)(b)(2), 5(c) and 5(d), upon being advised that said sections do not exist, and never have existed, counsel for Plaintiffs advised that these sections were cited in error.

volumes: the Building Code, the Energy and Conservation Code, the Plumbing Code, the Mechanical Code and the Fuel Gas Code.

The intent of the Construction Codes is set forth under Admin. Code § 28-101.2, which provides, in pertinent part, as follows:

**§ 28-101.2 Intent.**

The purpose of this code is to provide reasonable minimum requirements and standards ... for the regulation of building construction in the city of New York in the interest of public safety, health and welfare....

Pursuant to Admin. Code § 28-105.1:

It shall be unlawful to construct, enlarge, alter, repair, move, demolish, remove or change the use or occupancy of any building or structure in the city, or to erect, install, alter, repair, or use or operate any sign or service equipment in or in connection therewith, or to erect, install, alter, repair, remove, convert or replace any gas, mechanical, plumbing or fire suppression system in or in connection therewith or to cause any such work to be done unless and until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code, subject to such exceptions and exemptions as may be provided in section 28-105.4.

Permits to perform elevator work are classified as “service equipment permits” pursuant to Admin. Code § 28-105.2.8.

N.Y.C. Admin. Code §28-105.8 states, in pertinent part:

**Validity of permit.** The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other law or rule. Permits presuming to give authority to violate or cancel the provisions of this code or other law or rule shall not be valid.

N.Y.C. Admin. Code § 28-104.8.1 states, in pertinent part:

The application shall contain ... (1) A statement certifying that the applicant is authorized by the owner to make the application and certifying that, to the best of the applicant's knowledge and belief, the construction documents comply with the provisions of this code or the 1968 building code, if applicable, and other applicable laws and rules ... .

DOB's rules relating to elevators, escalators, personal hoists and moving walks are set forth in Chapter 11 of Title 1 of the Rules of the City of New York ("RCNY").

## **ARGUMENT**

### **POINT I**

#### **PLAINTIFFS FAIL TO STATE A CLAIM UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT**

Plaintiffs' articulated grievance in their Fourth Cause of Action is that Municipal Defendants have violated Title II of the ADA by not applying the "accessibility laws and standards" contained in the Building and Construction Codes to elevator permit applications. (Complaint at ¶¶ 213-214). As set forth below, this argument is faulty for many reasons and misconstrues Title II and its implementing regulations.

Title II(A) of the ADA provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination<sup>3</sup> by any such entity." 42 U.S.C. §12132. The Title II Technical Assistance Manual ("TAM") clarifies that, for a public entity's licensing, certification, and regulatory activities, "the licensee's activities themselves are not covered. An activity does not

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<sup>3</sup> Plaintiffs do not allege that Municipal Defendants have discriminated against Plaintiffs. Amended Complaint at ¶ 214.

become a ‘program or activity’ of a public entity merely because it is licensed by the public entity.” ADA TAM II-3.7200. See also 28 C.F.R. § 35.130(b)(6) (“The programs or activities of entities that are licensed or certified by a public entities are not, themselves, covered by this part.”).

To prevail under Title II(A), “plaintiffs must demonstrate that they are (1) ‘qualified individuals’ with a disability; (2) that the defendants are subject to the ADA; and (3) that plaintiffs were denied the opportunity to participate in or benefit from defendants’ services, programs, or activities, or were otherwise discriminated against by defendants, by reason of plaintiffs’ disabilities.” Noel v. New York City Taxi & Limousine Comm’n, 687 F.3d 63, 68 (2d Cir. 2012) [quoting Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2002)].

“Public entities are prohibited under the ADA from affording to qualified individuals with disabilities opportunities to participate in or benefit from benefits or services that are not equal to the opportunities afforded to non-disabled individuals. See 28 C.F.R. § 35.130(b).” Burgess v. Goord, 1999 U.S. Dist. LEXIS 611 at \*20 (SDNY 1999), citing Clarkson v. Coughlin, 898 F. Supp. 1019, 1047 (SDNY 1999). The ADA “requires only that a particular service provided to some not be denied to disabled people.” Rodriguez by Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999). The ADA “does not establish an obligation to meet a disabled person’s particular needs.” Keitt v. New York City, 882 F. Supp. 2d 412, 453 (SDNY 2011) (internal quotations omitted). The ADA “mandate[s] only that the services provided [] to non-handicapped individuals not be denied to a disabled person because he is handicapped.” Doe v. Pfrommer, 148 F.3d 73, 83 (2d Cir. 1998).

Municipal Defendants acknowledge that, as a public entity, DOB is generally subject to the prohibitions set forth in the ADA. What Municipal Defendants dispute is the

applicability of the ADA to Municipal Defendants' permitting function as alleged by Plaintiffs. Setting aside the issue of whether or not all named Plaintiffs are "qualified individuals" with a disability as alleged in the Complaint, Plaintiffs here have not been denied the opportunity to participate in or benefit from Municipal Defendants' services, programs, or activities. Nor were Plaintiffs otherwise discriminated against by Municipal Defendants by reason of their disabilities. The activity at issue – DOB's issuance of work permits – is pursuant to its permit issuing function. See Admin. Code § 28-105.1 et seq.<sup>4</sup> Plaintiffs have not asserted that they have applied for or been denied permits based upon their alleged disabilities.

The case of Tyler v. City of Manhattan, 849 F. Supp 1429 (D. Kan 1994) is instructive regarding the reach of the ADA. In that case, the Court held that the issuing of liquor licenses and building permits to a private enterprise did not make that enterprise a "service, program or activity" of a public entity under the ADA. The Court, citing 28 C.F.R. § 35.130(b)(6), explained that the regulations implementing Title II of the ADA do not cover the programs and activities of entities that are licensed or certified by a public entity. Tyler, 849 F. Supp. at 1442. See also, Noel, 637 F.3d 63. The Tyler Court stated:

Title II of the ADA and its implementing regulations ... simply do[] not go so far as to require public entities to impose on private establishments, as a condition of licensure [or building-permit issuance], a requirement that they make their facilities physically accessible to persons with disabilities.

Tyler, 849 F. Supp. at 1442.

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<sup>4</sup> A key component of DOB's permitting program is the fact that no permit issued by DOB can authorize the violation of any law, and any permit that presumes to do so is inherently invalid. See N.Y.C. Admin. Code § 28-105.8 ("The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation ... of any other law or rule. Permits presuming to give authority to violate or cancel the provisions of this code or other law or rule shall not be valid.").

Similarly, in Alford, et al. v. City of Cannon Beach, 2000 U.S. Dist. Lexis 20730 (D. Ore. 2000), plaintiffs argued that the City violated 28 C.F.R. § 35.130(b)(6) by approving building permits for structures that were not ADA compliant. In rejecting that argument, the Court reasoned:

[P]laintiffs' argument that the City's alleged discriminatory administration of its building inspection program constitutes a violation of the ADA, is without merit....Plaintiffs fail to demonstrate that the City's alleged actions amount to an ADA violation. The ADA claim remains, in essence, an argument that the City must force third party licensees or permittees to build compliant structures. Under the regulations and as explained in Tyler, this argument cannot be sustained.

2000 U.S. Dist. Lexis 20730 at \*64.

Although the ADA is to be interpreted broadly, the scope of Title II is not limitless. Reeves v. Queen City Transp., Inc. 10 F. Supp. 2d 1181, 1185 (D. Col. 1998). The case of Noel, 637 F.3d 63, is also instructive. In Noel, plaintiffs alleged, inter alia, that the TLC violated the ADA because it failed to provide meaningful access to taxis for persons with disabilities. The Second Circuit rejected plaintiffs' claims. As set forth in Noel:

Section 35.130(b)(6) prohibits the TLC from refusing to grant licenses to persons with disabilities who are otherwise qualified to own or operate a taxi (i.e., qualified medallion purchasers and drivers); it does not assist persons who are consumers of the licensees' product.

637 F.3d at 69.

Here, Plaintiffs have not been denied the opportunity to participate in or benefit from Municipal Defendants' services, programs, or activities. Plaintiffs have not been denied any DOB permits by reason of their disabilities. Here, like in Noel, Plaintiffs are consumers (or

tenants) of DOB's permittees. As such, Plaintiffs fail to state a claim for a violation of Title II of the ADA by Municipal Defendants.

Furthermore, Plaintiffs mischaracterize the accessibility standards set forth in the Construction Code that they claim DOB has failed to apply. The provisions regarding the accessibility standards contained in the Construction Code are standards that applicants must comply with (Admin. Code § 28-104.8.1) and when applications are "based on the professional certification of an applicant who is a registered design profession," construction documents may be accepted by DOB with less than full examination. See Admin. Code § 28-104.2.1.<sup>5</sup> DOB's function is to ensure that permits are not issued unless applicants professionally certify that the elevator work will comply with accessibility standards as set forth in the Construction Code. See Admin. Code §§ 28-105.1 and 28-104.2.1. In the event that an application does not comply with accessibility standards or applicable laws, the permit is invalid. Admin Code § 28-105.8.

Moreover, the accessibility standards set forth in the Construction Codes relate to the standards required upon completion of the work. Plaintiffs have pointed to no requirement in the Construction Code or elsewhere for compliance with the accessibility standards during the

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<sup>5</sup> Municipal Defendants rely upon the code provisions contained in the 1968 Building Code (codified in Title 27 of the Administrative Code) for the accessibility standards that are allegedly applicable to the elevator work at the subject premises. Amended Complaint at ¶ 231. However, pursuant to Admin. Code § 28-101.4.3.3, an owner is not permitted to opt to use the 1968 Building Code for the installation and alteration of elevators, conveyors, and amusement rides. The installation and alteration of elevators, conveyors and amusement rides "shall be governed by chapter 30 and appendix K of the 2008 New York city building code and the rules of the department subject to special provisions for prior buildings as set forth therein." Id. Moreover, Chapter 30 of both the 2008 Building Code and the 2014 Building Code (effective December 31, 2014) point to Chapter 11 of the Building Code and ICC A117.1 (International Code Council technical standards) for the accessibility standards. Nevertheless, regardless of which accessibility standards are applicable, the onus is upon the owner to certify compliance. Furthermore, DOB would not violate the Building Code by issuing an invalid permit purporting to authorize work contrary to the Building Code. See Admin Code § 28-105.8.

duration of the elevator work.<sup>6</sup> While 1 RCNY § 11-02 provides that an elevator out-of-service when there is only one elevator in the building is dangerous to human life and safety and provides for the imposition of civil penalties in such a situation, the rules contemplate a waiver of such penalties while “work is in progress for the replacement or installation of a new elevator or major renovation requiring that the elevator be deactivated during the work.” See 1 R.C.N.Y. § 103-02(k)(2)(iii). Clearly, a non-functioning elevator at the subject premises that are out of service because of a breakdown or because an elevator has surpassed its useful life would equally impact Plaintiffs.

Based upon the foregoing, Plaintiffs fail to state a claim for a violation of Title II of the ADA by Municipal Defendants and such claim must be dismissed.

## POINT II

### **PLAINTIFFS FAIL TO STATE A CLAIM UNDER TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 AS AMENDED BY THE FAIR HOUSING AMENDMENTS ACT OF 1988**

Plaintiffs allege in their Fifth Cause of Action that Municipal Defendants deprived the individual Plaintiffs of their rights in violation of 42 U.S.C. § 3604(f)(1) and (2). See Complaint at ¶¶ 217 – 220.

The FHA as amended by the FHAA makes it unlawful “[t]o discriminate in the sale or rental, or otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap...” 42 USC § 3604(f)(1). The FHA as amended by the FHAA further makes it unlawful “[t]o discriminate against any person in the terms, conditions, or privileges of sale or

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<sup>6</sup>Because elevator work requires a “service equipment permit” pursuant to Admin Code § 28-105.2.8, as opposed to a “alteration permit,” Admin Code § 28-104.8.4, which requires a tenant protection plan for alterations of buildings in which any dwelling unit will be occupied during construction, is inapplicable.

rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap...” 42 USC § 3604(f)(2).

An FHA violation may be established on the theory of disparate impact or one of disparate treatment. LeBlanc-Sternberg v. Fletcher, 67 F3d 412, 425 (2d Cir. 1995). “A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group.” Huntington Branch, NAACP v. Town of Huntington, 844 F2d 926, 933 (2d Cir. 1988).<sup>7</sup>

For the reasons set forth herein, Plaintiffs’ claims under the FHA fail. The FHA speaks to the conveyance of a rental or ownership interest in a dwelling unit. DOB’s issuance of permits is not related to the sale or rental of the subject premises and therefore cannot serve as a basis for liability under the FHA. The Court’s ruling in Cox v. City of Dallas, 430 F.3d 734 (5th Cir. 2005) is on point. In Cox the Court held that the FHA, specifically 3604(b), was inapplicable to the City’s zoning enforcement, stating as follows:

Even assuming that the enforcement of zoning laws alleged here is a “service,” we hold that § 3604(b) is inapplicable here because the service was not “connected to the sale or rental of a dwelling as the statute requires.

The district court observed that “it is necessary to decide whether the language ‘in connection with’ refers to the ‘sale or rental of a dwelling’ or merely the ‘dwelling’ in general.” And as the district court correctly concluded, it is the former. This reading is grammatically superior and supported by the decisions of many courts. There is more.

Although the FHA is meant to have a broad reach, unmooring the “services” language from the “sale

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<sup>7</sup> While not articulated in the Complaint, it appears that Plaintiffs planned to proceed on a disparate impact analysis.

or rental” language pushes the FHA into a general anti-discrimination pose...

Cox at 430 F.3d 745-6. See also AHF Cmty. Dev., LLC v. City of Dallas, 633 F. Supp. 2d 287 (D. Texas 2009).

In AHF Cmty. Dev., a non-profit organization that provides housing to low and moderate income persons sued the City of Dallas alleging, inter alia, that Dallas’ crime prevention actions were unlawful under the FHA. The Court therein likewise rejected the reach of the FHA to the City’s actions. Citing Cox, the Court stated:

Section 3604(b) prohibits discrimination in “the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” In Cox the Fifth Circuit addressed this provision as well. The panel held that the phrase “in connection therewith” refers to the sale or rental of a dwelling rather than to the dwelling itself. This reading of [§ 3604(b)] aligns its focus with that of § 3604(a) on the availability and acquisition, rather than on the habitability and enjoyment, of property.

AHF Cmty Dev., 633 F. Supp. 2d at 301-2 (citations omitted).<sup>8</sup>

Furthermore, DOB’s issuance of permits is not related to the municipal provision of services or facilities in connection with the sale or rental of a dwelling. The duty under the FHA “to furnish housing services in a nondiscriminatory manner...resides primarily with [the] landlord.” See Clifton Terrace Assoc. v. United Techs. Corp., 929 F. 2d 714, 719 (D.C. Cir.

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<sup>8</sup> *But see* Davis v. City of New York, 902 F. Supp. 2d 405 (SDNY 2012) holding that the provisions of § 3604(b) apply to both pre- and post-acquisition conduct. The Davis case concerned the alleged discrimination in the provision of police services. In Davis, the Court acknowledged that the Second Circuit had not addressed the question of whether § 3604(b) reached post-acquisition conduct and advised that the circuits have reached differing conclusions. 902 F. Supp. 2d at 435 and fn. 174.

1991). As stated in Jersey Heights Neighborhood Ass'n. v. Glendening, 174 F.3d 180 (4th Cir. 1999):

The Fair Housing Act's services provision simply requires that "such things as garbage collection and other services of the kind usually provided by municipalities" not be denied on a discriminatory basis. It does not extend to every activity having any conceivable effect on neighborhood residents. To say that every discriminatory municipal policy is prohibited by the Fair Housing Act would be to expand that Act to a civil rights statute of general applicability rather than on dealing with the specific problems of fair housing opportunities [citations omitted].

174 F.3d at 193.

Municipal Defendants' actions in issuing permits to perform elevator work do not implicate concerns related to the availability of housing for sale or rent, or to the provision of services or facilities in connection with the sale or rental of a dwelling, and therefore cannot be the grounds for liability under the FHA.

### POINT III

#### **THE PUBLIC ADVOCATE AND CIDNY DO NOT HAVE STANDING IN THEIR CLAIMS AGAINST MUNICIPAL DEFENDANTS**

Even assuming arguendo that individual Plaintiffs state a cause of action, the Public Advocate and CIDNY do not have organizational standing as Plaintiffs in their causes of action against Municipal Defendants. Standing is the threshold question in every Federal case determining the power of the Court to entertain the suit. Nnebe v. Daus, 644 F.3d 147, 156 (2d Cir. 2011) citing Denney v. Deutsche Bank AG, 443 F. 3d 253, 263(2d Cir. 2006). To establish Article III standing "a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be

likely redressable by a favorable decision.” Id. quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61(1992). To establish organizational standing, Plaintiffs must independently satisfy the requirements of standing enumerated in Lujan. Id.

Plaintiffs allege that the Public Advocate’s office has expended resources attempting to resolve the complaints relating to Landlord Defendants’ tenants (individual Plaintiffs herein) and expects to continue to expend resources. Amended Complaint at ¶ 23. Plaintiffs allege that Plaintiff CIDNY has expended resources assisting disabled New Yorkers, generally, with obtaining reasonable accommodations, but does not allege that CIDNY has been directly involved with any of the individual Plaintiffs. Amended Complaint at ¶ 27.

Here, any injury in fact that could be established by Plaintiffs is not fairly traceable to the challenged action – the issuance of permits by DOB for elevator repair work. Any alleged injury in fact is only traceable to Landlord Defendants’ alleged failure to provide reasonable accommodation. In contrast, in Nnebe, the injury in fact was fairly traceable to the City’s actions – the City had initiated proceedings against one of New York Taxi Workers Alliance’s members. See Nnebe, 644 F.3d 156-158. See also Brooklyn Ctr. For Independence of the Disabled v. Bloomberg, 290 F.R.D. 409 (S.D.N.Y. 2012)(organizational standing found in lawsuit directly challenging the City’s emergency preparedness plans). Here, the issuance of the permits by DOB for elevator repair work did not cause any alleged injury in fact to Plaintiffs James and CIDNY. Moreover any future expended resources of Plaintiffs James and CIDNY are speculative.

Based upon the fact that Plaintiffs James and CIDNY cannot establish any injury in fact fairly traceable to Municipal Defendants’ actions, they lack standing as to the claims asserted against Municipal Defendants.

POINT IV

**THIS COURT SHOULD DECLINE TO  
EXERCISE SUPPLEMENTAL  
JURISDICTION OVER PLAINTIFFS' STATE  
AND CITY LAW CLAIMS**

This Court should decline to exercise supplemental jurisdiction over Plaintiffs' purported state law claims. Plaintiffs' Sixth Cause of Action alleges that Municipal Defendants violated New York City Human Rights Law codified as Admin. Code § 8-107 (6) by "aiding and abetting discrimination." Complaint at ¶ 228. As stated in footnote "1" above, Plaintiffs do not allege that the Municipal Defendants violated the New York State Human Rights Law even though the New York City Human Rights Law is practically verbatim. It is not known whether such omission was by design. Plaintiffs' Seventh Cause of Action alleges that Municipal Defendants violated the New York City accessibility standards set forth in various Admin. Code provisions and seeks a declaration stating same. Complaint at ¶ 231.

The District Court's power to decide state claims is governed by 28 U.S.C. § 1367(a). However, pursuant to 28 U.S.C. § 1367(c), the federal court has the discretion to decide whether to entertain such claims and may decline to exercise supplemental jurisdiction if there are compelling reasons to do so. See Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006). Section 1367(c)(3) provides that the court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." See Kolari, 455 F.3d at 122. In determining whether to exercise its discretion to exercise supplemental jurisdiction over state law claims, "district courts should balance the values of judicial economy, convenience, fairness, and comity." Klein & Co. Futures Inc. v. Board of Trade of New York City, 464 F.3d 255, 262 (2d Cir. 2006)[citing Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988)]. In weighing these factors, district courts

consider “(1) the length of time the matter has been pending before the federal court; (2) the proximity of the trial date; and (3) the predominance of issues of federal, as opposed to local concern.” Birch v. Pioneer Credit Recovery, Inc., 2007 U.S. Dist. Lexis 41834 at \*16 (W.D.N.Y. 2007).

Here, because all of Plaintiffs’ Federal claims against Municipal Defendants should be dismissed, the exercise of supplemental jurisdiction over the state and city law claims is not appropriate. None of the state and city law claims alleged by Plaintiffs implicate any federal question or any issue of federal policy or interest. Further, the case remains in its initial stages and no trial date has been set. See Birch, 2007 U.S. Dist. Lexis at \*16. See also Valencia v. Lee, 316 F.3d 299, 305 (2d Cir. 2003); Giordano v. City of New York, 274 F.3d 740, 754-755 (2d Cir. 2001); Megna v. Food & Drug Admin., 2009 U.S. Dist. Lexis 21359 at \*35-36 (E.D.N.Y. 2009); Nealy v. Berger, 2009 U.S. Dist. Lexis 20939 at \*33-35 (E.D.N.Y. 2009); Rafano v. Patchogue-Medford School Dist., 2009 U.S. Dist. Lexis 23731 at \*39-41 (E.D.N.Y. 2009). Accordingly, this Court should refrain from exercising supplemental jurisdiction over Plaintiffs’ purely state and city law claims.

In the event that this Court decides to exercise jurisdiction over any of Plaintiffs’ state or city law claims, or that Plaintiffs’ federal claims are not dismissed, Plaintiffs’ Sixth and Seventh Causes of Action should nonetheless be dismissed.

Both the Sixth and Seventh Causes of Action erroneously allege that Municipal Defendants have violated the Administrative Code accessibility standards by issuing permits for elevator work. However, Plaintiffs fail to state a claim upon which relief can be granted because the issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of any provisions of the Code or any other law. See Admin. Code 28-105.8. The

accessibility standards set forth in the Construction Codes relate to the accessibility standards required upon completion of the work. Plaintiffs have pointed to no requirement in the Construction Code or elsewhere that relate to accessibility standards during the duration of the elevator work. Moreover, as stated, supra, although 1 RCNY § 11-02 provides that when there is only one elevator in a building an elevator out-of-service is dangerous to human life and safety and provides for the imposition of civil penalties in such a situation, DOB's rules also contemplate a waiver of such penalties while "work is in progress for the replacement or installation of a new elevator or major renovation requiring that the elevator be deactivated during the work." See 1 R.C.N.Y. § 103-02(k)(2)(iii). Clearly, a non-functioning elevator at the subject premises due to breakdown or because an elevator has surpassed its useful life would equally impact Plaintiffs. The Code was not meant to - and should not be interpreted to mean that - a building owner should to keep a broken elevator in operation so as not to violate the ADA and HRL.

Moreover, Plaintiffs' claim that the issuance of a permit to allow Landlord Defendants to perform elevator work somehow aids and abets Landlord Defendants' alleged failure to provide a reasonable accommodation to the Individual Plaintiffs in violation of New York City Human Rights Law is without merit. Here there is no nexus between the actions of Municipal Defendants - the issuance of the permits to rebuild or repair elevators - and the alleged actions of the Landlord Defendants - the alleged failure to provide a reasonable accommodation. Absent from Plaintiffs' pleading is any allegation that that Municipal Defendants "encouraged, condoned or approved" of the alleged failure to provide a reasonable accommodation. See, e.g., Dewitt v. Lieberman, 48 F. Supp. 2d 280 (S.D.N.Y. 1999)(dismissing state and local claims under the New York State Human Rights Law and New York City Human

Rights Law as to New York State Housing Finance Agency [“HFA”] because HFA could not be deemed an “aider or abettor” because no proof that HFA encouraged condoned or approved of employees’ alleged discriminatory conduct. Dewitt, 48 F. Supp. 2d at 293-294.)

Furthermore, to the extent that Plaintiffs are challenging the actual issuance of the permits for elevator work, it should be noted that the issuance of a permit is a determination of DOB Commissioner, which is appealable to the New York City Board of Standards and Appeals (“BSA”) pursuant to Admin. Code Section 28-103.11 and New York City Charter §§ 648 and 666(6)(a). Moreover, determinations of the DOB are appealable to BSA within thirty days from the determination. See 2 RCNY § 1-06.3. Here, the elevator permits at issue were issued in March and April of 2014. See printouts from DOB’s Buildings Information System (“BIS”) available to the public at <http://www.nyc.gov/html/dob/html/bis/bis.shtml> which are annexed to the Koplík Declaration as Exhibit “F.” The issuance of the permits to perform elevator work were not appealed to the BSA<sup>9</sup> and the time to do so has long since expired. As such, the determinations to issue the permits for elevator work are not ripe for judicial review because administrative remedies have not been exhausted.

Accordingly, the Sixth and Seventh Causes of action must be dismissed for failure to state a claim.

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<sup>9</sup> The fact that no appeal was filed with BSA was confirmed by BSA’s General Counsel’s office and Plaintiffs do not allege otherwise.

CONCLUSION

For the foregoing reasons, municipal defendants respectfully request that the Complaint be dismissed in its entirety. In the event that the Court denies this motion, the undersigned requests 30 days from service of the Court's decision to serve an answer to the Complaint.

Dated: New York, New York  
June 25, 2015

Respectfully submitted,

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