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[NOTE: THIS DOCUMENT WAS DRAFTED BEFORE THE SUPREME COURT'S 2015 RULING IN *TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V. THE INCLUSIVE COMMUNITIES PROJECT, INC.*]

COURT

Plaintiffs,	)	Civil Action No.:
v.	)	
Defendants.	)	**[HEARING REQUESTED]**

PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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I. PRELIMINARY STATEMENT

This is an action against defendants [XXX] (collectively, "the Developers") for violations of fair housing and civil rights laws in connection with the [XXX] ("[XXX]" or "the Project"). Plaintiffs seek a temporary restraining order and preliminary injunction rectifying the discriminatory impact caused by [XXX].

The developers have unlawfully discriminated against the residents of XXX on the basis of [race and national origin in violation of Title VII of the Civil Rights Act of 1968, the Fair Housing Act; the Civil Rights Act of 1964; Violation of the Fourteenth Amendment, Equal Protection Clause of the United States Constitution; Violation of the Equal Protection Clause of the New York State Constitution; and Violation of the State and City Human Rights Laws].

Accordingly, as described in more detail below and in the proposed Order accompanying this Motion, Plaintiffs seek injunctive relief: prohibiting the Developers from continuing to discriminate against [XXX] by [XXX]; [requiring that [XXX] be built and provided by dates certain; appointing a Compliance Officer to oversee the Project and ensure that affordable housing units are being built and allocated by those dates certain; and providing further relief as discussed below].

II. STATEMENT OF THE FACTS

A. The Parties

Plaintiffs are [xxx] individual [African-American, xxx] residents ("Residents") living in [xxx], as well as [xxx] organizations representing the interests of the community and which all border and/or are largely affected by the Project. Complaint, [cite paragraphs].

The Defendants are the current Developers of the Project. Defendant [XXXX]

B. [Background of the Project xxx]

[XXX]

C. [Desription of Actions Leading to Discriminatory Impact]

[xxx].

D. [Desecription of DiscriminationThat Has and/or Will Occur]

[xxx].

III. ARGUMENT

A. Legal Standard for Injunctive Relief

A party seeking preliminary injunctive relief must demonstrate: "(1) irreparable harm should the injunction not be granted; and (2) . . . a likelihood of success on the merits." *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 223 (2d Cir. 1995) (citation omitted). As set forth below, this standard is easily satisfied here.

B. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

1. Violation of the Fair Housing Laws

Plaintiffs allege that [xxx] violates the fair housing and civil rights laws. Plaintiffs are likely to succeed on the merits of these claims.[1]

The FHA, enacted in 1968, makes it unlawful "[t]o refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familiar status or national origin." 42 U.S.C. § 3604(a). The phrase "otherwise make available" "has been interpreted to reach a wide variety of housing practices . . . ." *Le Blanc-Sternberg v. Fletcher*, 67 F.3d 412, 424 (2d Cir. 1995). Indeed, the FHA "prohibit[s] all forms of discrimination, sophisticated as well as simpleminded . . . and tactics of delay, hindrance, and special treatment must receive short shrift from the courts." *Williams v. Matthers Co.*, 499 F.2d 819, 826 (8th Cir. 1974); *United States v. Youritan Const. Co.*, 370 F.Supp. 643, 648 (N.D. Cal. 1973) ("The imposition of more burdensome application procedures, [and] of delaying tactics . . . constitutes a violation" of the FHA). [Add from Supreme Court decision: *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*].

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[1] Because the analysis of Plaintiffs' claims under the FHA parallels the analysis of their claims under the New York Human Rights Law and the New York City Human Rights Law, these claims will not be discussed separately for the purpose of this motion. *See Elmowitz v. Executive Towers at Lido, LLC*, 571 F.Supp.2d 370, 376 (E.D.N.Y. 2008) ("[C]laims of discrimination under [N.Y. HR Law] Section 296(5) are analyzed using the same approach as the FHA."); *Barkley v. Olympia Mortgage Co.*, No. 04-CV-875, 2007 WL 2437810, at *18 (E.D.N.Y. Aug. 22, 2007) ("the standards relevant to [claims under the N.Y. HR Law and the New York City Administrative Code] parallel those applicable under the Fair Housing Act"). Under the N.Y. State HR Law, it is unlawful "[t]o discriminate against any person because of race … in the terms, conditions or privileges of the … rental or lease" of "housing accommodation. Section 296(5). Under the City HR Law, it is unlawful "[t]o discriminate against any person because of such person's actual or perceived race, creed, color … in the terms, conditions or privileges of the … rental or lease" of "housing accommodation."

A plaintiff establishes a violation of the FHA by first making a *prima facie* case that the challenged act is intentionally discriminatory, or that it has a disparate impact on a protected group. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988). After plaintiff has made a *prima facie* showing, the burden shifts to the defendant to prove that "its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* at 936. If the defendants meet this burden, then "the sole remaining issue [is] discrimination *vel non*." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 101-02 (2d Cir. 2001) (citations omitted), and "the governing standard is simply whether the evidence, taken as a whole, is sufficient to support a reasonable inference that the prohibited discrimination occurred." *MHANY Management Inc. v. Inc. Vil. of Garden City*, 2013 WL 6334107, at *19 (E.D.N.Y. 2013) (*quoting James v. New York Racing Ass'n*, 233 F.3d 149, 156 (2d Cir. 2000)).

Ultimately, in light of the FHA's mandate to lessen residential segregation in communities, where a government regulation or practice conflicts with the duty to integrate, the government's interest "must yield." *Otero*, 484 F.2d at 1135.[2]

a) Plaintiffs Have Demonstrated Disparate Impact

To establish a *prima facie* claim for disparate impact under the FHA, a plaintiff must show that an outwardly neutral practice "actually or predictably results in racial discrimination; in other words that it has a discriminatory effect." *Huntington*, 844 F.2d at 934 (*quoting United States v. City of Black Jack*, 508 F.2d 1180, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)). The plaintiff must therefore show that the "defendant's actions either (1) perpetuate

[2] A claim is stated under the Fair Housing Act when the municipality creates a land development plan or zoning classification which discriminates, even though the plan is effectuated by private developers. *See Rivera v. Incorporated Vil. Of Farmingdale*, 571 F.Supp.2d 359 (E.D.N.Y. 2008); *Broadway Triangle*, 941 N.Y.S.2d 831, 836.

segregation, harming the community in general, or (2) disproportionately impact a minority group," *Broadway Triangle Community Coalition v. Bloomberg*, 35 Misc. 3d 167, 173 (Sup. 2011) (citing *Huntington*, 844 F.2d at [xxx]).[3] In other words, the plaintiff must demonstrate a "'causal connection between [a] facially neutral policy…and the resultant proportion of minority' group members in the population at issue." *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81, 90-91 (2d Cir. 2000) (*quoting Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998)).[4]

Typically, "a disparate impact is demonstrated by statistics," *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); and a *prima facie* case may be established where "gross statistical disparities can be shown." *Hazleton Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *see also Tsomanidis*, 352 F.3d at 575-76 (2d Cir. 2003) ("The basis for a successful disparate impact claim involves a comparison between two groups – those affected and those unaffected by the facially neutral policy. This comparison must reveal that although neutral, the policy in question imposes significantly adverse or disproportionate impact on a protected group of individuals….Statistical evidence is also normally used in cases involving fair housing disparate impact claims.") (internal quotations omitted)).

Plaintiffs have conclusively established a *prima facie* disparate impact claim here based on the statistical submissions of their expert [xxx]. [xxx] *See Huntington*, 844 F.2d 926, 932

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[3] Under a "disparate impact" claim, the plaintiff "need not show the defendant's action was based on any discriminatory intent." *Tsombanidis*, 352 F.3d at 575 (citing *Huntington* 844 F.2d 926 at 934-36 (2d Cir.1988)).

[4] A defendant is liable for inaction or omissions that result in a discriminatory effect in violation of the FHA, just as the defendant would be liable for taking affirmative steps that result in a discriminatory effect. *See, e.g., United States v. City of Yonkers*, 96 F.3d 600, 617-18 (2d Cir. 1996) ("Government officials…are not permitted to engage in deliberate conduct or *deliberate omissions* that have the foreseeable effect of perpetuating known segregation…") (emphasis added).

(finding that (i) plaintiffs' town had engaged in "a pattern of stalling efforts to build low-income housing," and that the town's refusal to permit housing outside their current zoning restrictions had a "substantial adverse impact" on black residents because a disproportionate number of residents that needed affordable housing were black); *Smith v. Town of Clarkton, North Carolina*, 682 F.2d 1055. 1067 (4th Cir. 1982) ("The undisputed statistical picture leaves no doubt that the black population of Bladen County was adversely affected by the termination of the housing project, as it is that population most in need of new construction to replace substandard housing, and it is the one with the highest percentage of presumptively eligible applicants.").

b) Plaintiffs Have Demonstrated Disparate Treatment

[xxx]

c) Defendants Cannot Demonstrate a Legitimate Purpose For Their Determination to [xxx], Nor Can They Demonstrate the Absence of Less Discriminatory Alternatives

Because Plaintiffs have met their burden of demonstrating a prima facie case of disparate impact [and disparate treatment] under the FHA, Defendants can prevail on this claim only if they can show that they have a legitimate purpose for their determination to allow a prolonged delay in the project, and that no less discriminatory alternative could serve those ends. *See Huntington*, 844 F.2d at 938 (stating the analysis involves two components: "(1) whether the reasons are bona fide and legitimate; (2) whether any less discriminatory alternative can serve those ends"). This they cannot do. [xxx]

As the Second Circuit in *Huntington* determined, there is a difference between "plan-specific" and "site-specific" problems. "Plan-specific problems can be resolved by the less discriminatory alternative of requiring reasonable design modifications." *Id.* at 938.

See Broadway Triangle, 35 Misc. 2d 167, 177 (existence of less discriminatory alternatives especially apparent where defendants "ha[d] not even evaluated the proposed developments' impact on segregation").

Plaintiffs are likely to succeed on the merits of their fair housing law claims. The injunctive relief requested herein should therefore be granted.

2. Violation of the Equal Protection Clause

"The equal protection clause of the fourteenth amendment . . . prohibits invidious discrimination in the administration of any public program, including housing, administered by the states or their subdivisions unless there is a compelling reason justifying such distinctions." *Smith v. Town of Clarkton, North Carolina*, 682 F.2d 1055, 1067 (4th Cir. 1982).[5] While a violation of the Equal Protection Clause requires intentional discrimination, this standard can be satisfied by showing "deliberate indifference." "Deliberate indifference to discrimination can be shown from a defendant's actions or inaction in light of known circumstances." *Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999). As further explained by the Second Circuit in *Gant*:

> [T]o establish a violation of the Equal Protection Clause [], a plaintiff must show that the defendant's indifference was such that the defendant intended the discrimination to occur. It is not necessary to prove that the defendant fully appreciated the harmful consequences of that discrimination, because deliberate indifference is not the same as action (or inaction) taken maliciously or sadistically for the very purpose of causing harm. Instead, deliberate indifference can be found when the defendant's response to known discrimination is clearly unreasonable in light of known circumstances.
>
> *Id.* at 141.

Such deliberate indifference is apparent here. [xxx]

[5] Plaintiffs have also brought a claim under the New York State Constitution, which also contains an Equal Protection Clause that tracks that of the Fourteenth Amendment.

See Otero v. New York City Hous. Auth., 484 F.2d at 1133, 1134 (defendant was "under an obligation to act affirmatively to achieve integration in housing" and the FHA "requires that consideration be given to the impact of proposed housing programs on the racial concentration in the area in which the proposed housing is to be built"); *Langolis v. Abington Hous. Auth.*, 234 F.Supp.2d 33, 70 (D. Mass. 2002) (residency preference improper where defendants had not "met their duty to affirmatively further fair housing, which included an obligation to investigate the potential effects of their proposed residency preferences before implementation").

C. Plaintiffs Will be Irreparably Harmed if a Preliminary Injunction is Not Granted

In housing discrimination cases such as the present action, irreparable harm is presumed upon a showing of likely success on the merits. *See, e.g.*, *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1147, 1423 (11th Cir. 1984) ("[W]hen a plaintiff who has standing to bring suit shows a substantial likelihood that a defendant has violated specific fair housing statutes and regulations, that alone, if unrebutted, is sufficient to support an injunction in remedying those violations"); *see also Sunrise Development, Inc. v. Town of Huntington, New York*, 62 F.Supp.2d 762, 773 (E.D.N.Y. 1999) ("[T]he discrimination itself is presumed to cause irreparable harm to its victim.").

Even if not presumed, here, the irreparable harm that will result absent immediate injunctive relief is readily apparent. In *Stewart v. McKinney Foundation, Inc. v. Town Plan & Zoning Commission*, 790 F.Supp. 1197, 1208-09 (D.Comm. 1992), the court, though presuming irreparable harm, explained that the following factors would support an independent finding of irreparable harm: (i) the plaintiff's goal of providing housing to a protected group would be "thwarted by each passing day"; (ii) a shortage of housing for the protected group; (iii) persons interested in occupying the housing have had to look elsewhere rather than wait; (iv) monetary

damages would not adequately compensate plaintiffs for their inability to provide housing for that protected group.

Considering these factors, irreparable harm to the [plaintiffs] is indisputable. [xxx].

D. Plaintiff's Are Entitled to Injunctive Relief

The FHA expressly authorizes courts to award injunctive relief:

> If the court finds that a discriminatory housing practice has occurred…the court…may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

42 U.S.C. 3613(c)(1). If a violation is found, the Court should "craft injunctive relief with a view toward the statute's goals of preventing future violations and removing lingering effects of past discrimination. The scope of the injunction is to be determined by the nature and extent of the legal violation." *United States v. Space Hunters, Inc.* 2004 WL 2674608, at *8 (S.D.N.Y. Nov. 23, 2004) (*citing Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F.Supp. 79, 83 (E.D.N.Y. 1984)). The "choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial judge." *United States v. Yonkers Bd. Of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987) (citations omitted). Plaintiffs seek both prohibitive injunctive relief forbidding Defendants from [xxx], as well as affirmative equitable relief calculated to eliminate the discriminatory effects of [xxx].

See Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 51 (2d Cir. 1996) ("[A]n injunction must be more specific than a simple command that the defendant obey the law."); *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979) (The FHA "gives the district court the power it needs to fashion affirmative equitable relief calculated to eliminate as far as possible the discriminatory effects of violation of the Fair Housing Act.").

As set forth in their Complaint, and in the accompanying draft Order, Defendants specifically request the following injunctive relief:

- **Prohibitive Injunctive Relief**: as the Court in *MHANY* found, "at a minimum, prohibitive injunctive relief enjoining future FHA violations is appropriate." *MHANY*, [cite March 2014 opinion].
- **Additional Specific Requested Relief: [xxx]**
- **[xxx]**
- **[Construct and Provide Affordable Housing by Dates Certain:** [xxx] *United States v. City of Parma, Ohio*, 661 F.2d 562, 577 (6th Cir. 1981) ("The requirements that the City take whatever action may be necessary to permit construction of public housing, adopt a plan to utilize and existing section 8 program and take required steps for submitting an acceptable application for CDBG funds are reasonable.").]
- **[Anti-Displacement Fund:** [xxx]]
- **[Appoint a Compliance Officer:** [xxx] The use of special masters to administer relief in fair housing cases is an accepted practice. *See MHANY*, [cite March 2014 Opinion] (*citing Baltimore Neighborhoods, Inc. v. LOB, Inc.*, 92 F.Supp.2d 456, 473 (D. Md. 2000)).

E. Plaintiffs Are Not Required to Post a Bond

The Second Circuit has recognized that where a plaintiff seeks an injunction to enforce laws in the public interest, an exception exists to the rule requiring the posting of a bond. *See Pharm. Soc'y v. N.Y. State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174-75 (2d Cir. 1995) (affirming district court's waiver of bond requirement due to enforcement of the public interest); *Acorn v. United States*, 662 F.Supp.2d 285, 299, n.12 (E.D.N.Y. 2009) (waiving bond requirement because the action was brought in the "public interest"). This includes claims involving enforcement of the Fair Housing Act. *See Brown v. Artery Org.*, 691 F.Supp. 1459, 1462 (D.D.C. 1987) ("Requiring [plaintiffs] to post a bond that would provide security to defendants would stifle the purpose of the Fair Housing Act since [plaintiffs] would be precluded from obtaining judicial review of defendants' actions until after the irreparable injury would already

have occurred, and the status quo in all likelihood never be restored . . . To require [plaintiffs] to post anything more than a nominal bond would effectively deny them relief to which they may be entitled.”).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant its motion for a temporary restraining order and preliminary injunction against Defendants [xxx].