2009

Response Brief and Opening Brief of the Intervening Respondents/Cross-Petitioners, Ho v. Fung, Docket Nos. 08-1763 & 08-2159, 569 F.3d 677 (Seventh Circuit Court of Appeals 2009)

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Nos. 08-1763 and 08-2159

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jennifer Ho, Petitioner/Cross-Respondent **Chak Man Fung,** Intervening-Petitioner, Cross-Respondent **v.** **Department of Housing and Urban Development, *et al.*,** Respondents/Cross-Petitioner **and** **Meki Bracken and Diana Lin,** Intervening-Respondents/Cross-Petitioners.	Agency Case No. 05-04-1165-8 Agency Case No. 05-04-1166-8 HUD ALJ No. 07-053-FH

On Petition for Review of the Final Decision of the Department of Housing & Urban Development and Cross-Application for Enforcement of the Agency's Order

RESPONSE BRIEF AND OPENING BRIEF OF THE INTERVENING-RESPONDENTS/CROSS-PETITIONERS

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Appellate Court No: 08-1763 & 2159

Short Caption: Jennifer Ho v. Dept., Of Housing & Urban Development (HUD)

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Petitioner's brief and Intervening-Petitioner's brief is incomplete and incorrect. Intervening-Respondents, Meki Bracken ("Meki") and Diana Lin ("Diana"), seek enforcement of the order by the Secretary of the Department of Housing and Urban Development ("HUD") against Petitioner, Jennifer Ho ("Ho") and Intervening-Petitioner, Chak Man Fung ("Fung"). See 42 U.S.C. 3612(b)-(h). This Court has jurisdiction over a Petition for Review of a decision of an administrative law judge in a fair housing proceeding pursuant to 42 U.S.C. 3612(i). Meki and Diana were subjected to Ho and Fung's discriminatory housing practices in Chicago, Illinois which falls under the jurisdiction of this Circuit. See §3612(i)(2) and 24 CFR §180.710(a). Any party adversely affected by a final decision may file a petition in the appropriate Court of Appeals for review of the decision under 42 U.S.C. 3612(i), 28 U.S.C. 2342(6), and 42 U.S.C. 3612(j)(1). A default order was entered against Ho and Fung on October 18, 2007, pursuant to 24 C.F.R. 180.420(b). A damages hearing was held on November 15, 2007. On January 31, 2008, Administrative Law Judge Constance T. O'Bryant ("ALJ"), in her Initial Decision, found Ho and Fung liable for damages.

The Initial Decision, by operation of law, became HUD's final Order on March 3, 2008 pursuant 42 U.S.C. 3612(h)(1). Ho timely filed her petition for review on March 31, 2008, with this court (No. 08-1763). This court dismissed Fung's untimely petition for review but gave him leave to intervene on May 2, 2008. On May 16, 2008, HUD filed a cross-application for enforcement of the agency's order (No. 08-2159) and Intervening–

Respondents were given leave to intervene in both cases 08-1763 and 08-2159.

STATEMENT OF THE ISSUES

Response Brief:

1) Whether Ho's due process rights were violated, even though she was properly served with process, notice of proceedings and administrative orders.

2) Whether the ALJ's denial for a continuance at the hearing violated Petitioner's due process.

3) Whether the ALJ had a duty to inform Petitioner that she had the right to have an attorney present at the hearing.

4) Whether the ALJ had a duty to procure a translator for the hearing.

Intervening-Respondents/Cross-Petitioners Cross-Application Issues:

1. Whether the agency's award and decision against Petitioners was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law".

2. Whether the damages presented by Intervening-Respondents were supported by substantial evidence and whether this court should enforce the cross-application.

STATEMENT OF THE CASE

Intervening-Respondents hereby adopt Respondent HUD's statement of the case. See HUD Br. at 3.[1]

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[1] The following citations are used throughout this brief: (1) "Fung Br." refers to Respondent Fung's Brief filed on November 14, 2008; (2) "Pet. Ho Br." refers to Petitioner Ho's Brief filed on November 14, 2008; (3) "Tr." refers to the transcript from the Damages Hearing on November 15, 2007; and (6) "Initial Decision" ("I.D.") refers to

STATEMENT OF FACTS

A. The Parties

a. Intervenor Meki Bracken

Meki comes from a diverse racial background, her father is African-American and her mother is Samoan. (Tr. 169). As her father testified, the Bracken family has "just about every race of people you can possibly have."(Tr. 237). Meki grew up in Detroit, Michigan, and attended private schools which were primarily White. (Tr. 168). She is a world traveler and enjoys learning about diverse cultures. (Tr. 236). Throughout her travels, Meki has visited New Zealand, Samal, Canada, Mexico, and Japan. (Tr. 236). Before 2004, she never experienced discrimination because of her blended racial background. (Tr. 170). In May 2004, Meki graduated from Oakwood College in Huntsville, Alabama. (Tr. 170). Meki planned on living in Chicago after graduation and working at the law firm Sachnoff & Weaver, Ltd., ("Sachnoff") before entering law school in the Fall. (Tr. 171).

b. Intervenor Diana Lin

Diana Lin is a female of Chinese Taiwanese descent. (Tr. 31). She was born in Chicago and grew up in Palos Park and Palos Heights, Illinois. (Tr. 37). Diana lived in a "99 percent White" neighborhood and experienced a multitude of "racial hostility" while growing up. (Tr. 38). Neighborhood children told her, "go back to your own country," her garage door was routinely egged, and neighborhood children shot a BB

Judge O'Byrant's Initial Decision entered on January 31, 2008, and "HUD Br.", refers to Respondent HUD's brief.

gun at her father's car as he drove through her neighborhood. (Tr. 38). Such racial discrimination left Diana embarrassed to be Asian and caused her to want to "hide" her heritage. (Tr.38).

Diana attended an exchange program at Swarthmore College, [in Swarthmore, Pennsylvania], during her sophomore year. The campus spewed of racial tension as a group of skinheads had attacked several African-American students and a stolen portrait of Malcolm X which was subsequently returned with a noose drawn around Malcolm X's neck. (Tr. 39–40). The events at Swarthmore College inspired Diana to dedicate her career to fighting for civil rights. (Tr. 41). Transformed, Diana returned to Pomona College and was elected to the Asian-American Student Alliance, a group advocating Asian-American student interests and working for equality. (Tr. 41). After working at the Ford Foundation, she attended Georgetown Law School on a public interest law scholarship and focused her studies on public interest law, including teaching law to people in homeless shelters and inmates in prison. (Tr. 44). She also handled asylum cases. (Tr. 44). Diana moved back to Chicago after her law school graduation to work at the Chicago Lawyer's Committee for Civil Rights. (Tr. 44–45). In November 2003, Diana signed a lease to rent the third bedroom of the Unit 602 at 20 North State Street, in Chicago, Illinois ("the Unit"). (I.D. 5). The lease had a term from November 2003 through July 2004. (I.D. 5). Around March 2004, Diana signed a contract to purchase a two-bedroom condominium in the River North neighborhood of Chicago. (Tr. 134). In April 2004, she informed her landlord, Fung, that she had recently

purchased a condominium and wanted to move out before the end of her lease. (Tr. 50). On April 22, 2004, Fung sent Diana an e-mail granting her permission to sublet her room. (Tr. 85). Shortly thereafter, she placed advertisements in *The [Chicago] Reader* and Craigslist searching for a sub-lessee. (Tr. 52).

c. Petitioner Jennifer Ho

Jennifer Ho is a female of Chinese Cantonese descent who reads and writes English. (I.D. 4). She grew up in China, but came to Chicago to study at a university. (Tr. 131). Ho is a personal friend of Fung. (I.D. 4). In the summer of 2003, Fung authorized Ho to move into one bedroom of the subject property and to receive and process applications on his behalf for the remaining two bedrooms in the Unit. (I.D. 4). Ho was the point of contact for current and prospective tenants of the Unit, and undertook such managerial duties as showing the property to prospective tenants, collecting and delivering rent checks to Fung, and overseeing minor maintenance and repair services on the property. (I.D. 4). Additionally, Fung provided Ho access to his email account so that she might communicate with him and the other tenants. (I.D. 4). In the Fall of 2003, Ho showed the Unit to Diana. (Tr. 47–48). Jae Eun Shin ("Jae"), a Korean student, was also living in the apartment at the time along with Ho. (Tr. 49). Ho provided Diana with a rental application and forwarded the completed form to Fung. (Tr. 48–49).

d. Intervening-Petitioner Chak Man Fung

Chak Man Fung is a male of Chinese Cantonese descent and is fluent in Cantonese and English. (I.D. 3). He owns the subject Unit, as well as other properties in Chicago. (I.D. 3). He is fluent in both Cantonese and English. (I.D. 3). Fung had a real estate license at the time the events in controversy transpired. (Tr. 133). Fung's rental agent was Ho who took care of collecting rents, had managerial duties, interviewed new tenants and collected rents. (I.D. 4). He sent Diana e-mails justifying Ho's discriminatory acts. (Tr. 99).

e. The Unit at 20 North State Street, #602, Chicago, IL

Unit 620 is located at 20 North State Street, Chicago, Illinois. Fung purchased the property in 2003; however, he never resided in the Unit. (I.D. 3). The Unit was originally a one-bedroom unit. (Tr. 133). However, Fung installed walls in the living room area to subdivide it into two separate bedrooms. (Tr. 133). Creating three separate bedroom units and a shared common kitchen and bathroom. (Tr. 133). The owner rented each bedroom in the Unit, with each occupant having separate leases. *Id.*

B. The Search

Meki began her housing search while still living in Alabama by using the Craigslist website. (Tr. 172). She was looking for a place that was "as close to downtown as possible", enabling her to walk to work. (Tr. 173). Additionally, Meki was looking for a unit that was in a safe neighborhood, affordable, and a sublet because she was only

going to be in Chicago for several months. (Tr. 173). On Sunday, May 9, 2004, Meki drove to Chicago with her mother from Alabama. (Tr. 174). Her internship with Sachnoff started the next day, leaving little time to find living arrangements for the Summer. (Tr. 174). The two spent the night at a Holiday Inn in the downtown area falling asleep not knowing where Meki would stay. (Tr. 174). While on her first day of work, Meki saw a listing posted on Craigslist for an apartment in the downtown area. After sending an e-mail to the posting, Meki was contacted by Diana and scheduled an appointment to see the Unit that evening. Upon inspection, the Unit appeared to meet Meki's requirements. It was four blocks from her job and located on State Street, in the heart of downtown, Chicago. (Tr. 176). She filled out a rental application at that time; however she did not sign a lease, as Diana wanted her to meet the other roommates. (Tr. 176-77). On Tuesday, May 11, 2004, Meki's mother returned to Detroit believing her daughter had found a suitable place to live. (Tr. 178). In the interim, Meki stayed with a friend of a college roommate, Keturah Scott ("Ms. Scott"), while her rental application was being processed. (Tr. 178). Ms. Scott's apartment was a one-bedroom unit and extremely cramped, forcing Meki to sleep on the floor while she kept her belongings in her car. (Tr. 179–80).

C. The Meeting

On the evening of May 12, 2004, Meki met with Diana and Ho. (Tr. 180). Ho "took one look at Meki…had this surprised look on her face, turned around and walked

back into her bedroom." (Tr. 58). Meki and Diana continued talking for approximately one hour in the kitchen in hopes that Ho would leave her bedroom and join them in conversation. (Tr. 59). Diana could hear Ho speaking on the phone in her room to someone in Cantonese--she sounded very upset. (T. 59-60). After an hour passed, it was apparent Ho had no intention of speaking with Meki. Diana was therefore prepared to proceed with the sublease agreement. (Tr. 61). Ho darted from her room upon hearing an agreement was going to be signed stating, "no, no, no…Jae Eun has to meet her. Jae Eun hasn't met her yet. We have to make sure that Jae meets her." (Tr. 61). Meki did not sign the sublease that night feeling she would not be living in the Unit because of Ho's cold reception. (Tr. 182). The meeting left Meki "disappointed" and "confused," and Diana "absolutely furious" and "livid." (Tr. 183).

D. Diana's Confrontation With Ho

Minutes after Meki left, Diana confronted Ho about her bizarre behavior. (Tr. 61). When asked why Jae was not present that evening, Ho replied, "she's new to this country. You know, she's scared of Black people. You know, I don't think you should rent to Meki. We should find somebody else." (Tr. 62). Diana inquired whether Ho was in fact the person who had a problem renting to Meki, to which Ho replied: "I thought you knew that I don't like renting, that I wouldn't want to rent to a Black person because a few months ago I told you that there was a Black woman who wanted to rent your room, and when I didn't rent it to her she accused me of discrimination." (Tr. 62).

Furthermore, Ho expanded on her overt racism claiming she had "talked to a lawyer who told [her] that [she] could discriminate" and "that there was some kind of exception in the law." (Tr. 62).

About an hour and a half after confronting Ho, Jae arrived home and was asked by Diana whether she was interested in meeting Meki. (Tr. 66). Jae stated she had no interest in meeting Meki and did not "care what race, religion that person is who rents the room as long as the person is calm and reasonable." (Tr. 66). Diana tried to set up another opportunity for Ho to meet Meki after obtaining Jae's approval. (Tr. 67). Ho rejected this opportunity. (Tr. 67). Diana warned Ho that her actions were "completely racist and…also illegal." (Tr. 67). Ho replied, "Fine, sue me," and told Diana that she was placing an advertisement in the paper to find another renter. (Tr. 67).

E. Fung's Offer to Diana

The next morning, Diana received an e-mail from Fung demanding to find another tenant. (Tr. 68). Fung was so against renting to Meki that he proposed a deal. If Diana agreed to rent to someone other than Meki for less money, he would share the difference in the rent. (Tr. 68). Diana also discovered an advertisement form for *The Chicago Reader*, a local Chicago publication, for the Unit's rental filled out by Ho. (Tr. 69). Prompted by Ho's actions, Diana contacted Ed Johnson, a friend who worked at the [Chicago] Commission on Human Relations, to get a recommendation on how to proceed. (Tr. 70). Diana decided to follow through with subleasing her Unit to Meki

based on her conversation with Ed Johnson and the findings of independent legal research she conducted on fair housing laws. (Tr. 71–72). The legal research led Diana to conclude that "it would be a violation of the local laws, and possibly state and federal laws, not to rent to Meki." (Tr. 72).

F. Signing of The Sublease Agreement

On Friday, May 14, 2004, Diana and Meki met to sign the sublease agreement. (Tr. 77). Diana gave Meki the keys to the apartment and main entrance to the building. Also, Meki gave Diana checks totaling half the rent for the month of May and two checks for $650.00 covering rent for June and July. (Tr. 78). Meki eagerly desired to move in that weekend after staying with Ms. Scott. She was scheduled to move in Sunday, May 16, 2004. That evening, Diana, with the help of her mother, father, and a friend, packed "like mad," working into the early hours of the morning so Meki could move in on time. (Tr. 82). Early in the morning of May 16, 2004, Diana sent an e-mail to Fung notifying him Meki would be moving in that day and requesting Ho and Jae Eun to be properly notified of such. (Tr. 85–86). Additionally, Diana warned Fung that refusing to rent to Meki violated numerous fair housing laws. (Tr. 85–86). Thus, Diana respectfully requested that Fung "uphold" Meki's right to sublease the unit. (Tr. 86).

G. The Blockade

Diana went to brunch with her parents and friend that Sunday morning when she suddenly received a phone call. (Tr. 93). Upon checking her phone, Diana realized

the caller was Meki, who had left a message stating she had "trouble getting into the Unit and wanted to know if maybe there was another lock, another key that she needed to get in." (Tr. 94). A few minutes later, Meki called again saying that she was having "trouble getting into the Unit" and that "it seemed like someone was blocking the door." (Tr. 94). Unbeknownst to Diana, earlier that morning, Meki arrived at the apartment complex with two friends and brought items from her car to the hallway just outside her new unit, but could not get into the Unit. (Tr. 186–87). Meki inserted her key in the door and unlocked it, but the door wouldn't open. (Tr. 186). Befuddled, Meki knocked on the door, but got no response. (Tr. 186). At this point, Meki believed maybe someone was just cleaning or in the shower and couldn't hear her knocks; as such, she knocked louder a second time, but to no avail. (Tr. 186). Frustrated, Meki pushed the door enough so "it would actually separate from the door jam [where she could see] that the door wasn't locked." (Tr. 188). However, the bottom of the door "[would not] budge at all." (Tr. 188). Meki and her friends spent approximately half an hour trying to figure out what was going on and tried to find a way into the Unit. (Tr. 188). She could hear water running inside the Unit, see an eye peering in the peephole, and heard someone adjusting an object blocking the door. (Tr. 94).

Upon listening to Meki's messages, Diana realized Ho blocked the door to bar Meki from entering. (Tr. 94). Diana was stunned Ho would go so far to prevent Meki from entering the Unit. (Tr. 94). Diana called Ho and left a message stating "that Meki was moving in and she had to let Meki in." (Tr. 97). Diana also contacted Fung and left

a similar message. Neither Fung nor Ho ever called back. (Tr. 97). That afternoon, Diana checked her e-mail. Upon logging into her account, Diana received an e-mail from Fung justifying Ho's discriminatory acts. (Tr. 99). Fung's e-mail stated, "I am not discriminating against anyone to rent my Unit. I think when you have to live with someone you can discriminatively choose whom you will live with." (Tr. 99).

H. Fung Demands Diana to Move Out

Instead of apologizing for his previous e-mail, Fung sent Diana a second, chastising e-mail on May 17, 2004, stating she had no legal authority to sublet the Unit to Meki. (Tr. 106). Fung also demanded that Diana return Meki's sublease application and instructed Diana that she had broken her lease because she failed to give him one month's notice before subleasing her Unit. (Tr. 107). However, Diana's lease only stated that she needed" prior written consent of the lessor." (Tr. 111). Ironically, the e-mail also contained "standard boiler plate language" regarding non-discrimination, in part, on the basis of race. (Tr. 107). None of Fung's prior e-mails contained such non-discrimination disclaimer language. (Tr. 108-109). Shortly thereafter, Diana received yet another e-mail from Fung. (Tr. 112). The e-mail claimed Diana had broken her lease and that Fung had found a "better applicant" to sublease the Unit. (Tr. 112). Fung further notified Diana that he was going to keep the full amount of May's rent even though she was moving out early. (Tr. 112). Finally, the e-mail requested that Diana return the door and entrance keys to Ho. (Tr. 112). Following Fung's request, Diana returned her keys

to him and surrendered the Unit. (Tr. 115-116). Days after moving out, Diana saw an advertisement listing her old unit for rent. (Tr. 117). The Unit was being offered for $595.00, which was $55.00 less than for what Meki was going to rent the Unit. (Tr. 117).

I. Meki Becomes Homeless

Without a place to live, Meki moved her belongings back in into her car and stayed with her acquaintance, Kethura Scott, for a couple more days while searching for another unit to sublet. (Tr. 199-200). Meki looked on the internet, but rental units were in short supply; additionally, those units that were available were either too far away from downtown or in rough neighborhoods. (Tr. 200). After finding nothing suitable, Meki continued living with Ms. Scott until the middle of July. (Tr. 210). Neither Meki nor Ms. Scott had any privacy during Meki's stay. (Tr. 204). This living arrangement made Meki uncomfortable, as she didn't want to impose or be a bad house guest. (Tr. 205). Ultimately, Ms. Scott requested that Meki move out after several weeks of living together. (Tr. 209). Ms. Scott told Meki she was going to have a houseguest staying with her, which was arranged prior to her accommodating Meki. (Tr. 210). In total, Meki lived with Ms. Scott for approximately six to eight weeks. (Tr. 210). Meki panicked upon being asked to leave by Ms. Scott, as she had no place to live. (Tr. 210). It was the middle of July and finding a sublet unit for the few remaining weeks of her internship was unrealistic. (Tr. 210). Fortunately for Meki, she remembered that Diana had offered earlier that Summer for Meki to stay with her in an extra bedroom at her new

condominium if she couldn't find a place to live. (Tr. 210). Meki contacted Diana and moved in but the situation was uncomfortable for both strangers. (Tr. 211).

J. Administrative Hearing, Intervening-Respondents hereby adopt Respondent HUD's statement of the Administrative Hearing, see HUD's Br. at 13-14.

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Review, and grant the Cross-Application for Enforcement of HUD's Final Order.

Indeed, this is a case of two very remarkable young women Meki and Diana both of whom come from racial minority backgrounds and who are both lawyers. Meki was denied the rental Unit because of her race and Diana was harassed and interfered with because she assisted Meki in renting the Unit. Petitioners were properly served with process, receiving notice of the filing of the Charge of Discrimination filed and served on August 22, 2007. Petitioners were properly served with motions for Default on October 3, 2007, Order granting Default on October 18, 2007, and November 7, 2007. Ho elected not to open her mail and did not file an answer to the Charge of Discrimination, nor moved to vacate the Default Orders. Any lack of notice stems from Ho's decisions not to open her notices, rather than any failure to fulfill the requirements of due process. Ho did not have a statutory right to be represented at the November 15, 2007, damages hearing. While Ho was permitted to have counsel present, there is no statutory right to counsel as in criminal proceedings. Ho had the option of appearing

with counsel and was informed to do so and was afforded ample time to procure representation. Ho elected to hire counsel that was unavailable on the day of the hearing and neither Ho nor her counsel properly made a request for a continuance. Thus, the last minute request was lawfully denied by Judge O'Bryant.

There was no duty to procure a Chinese Cantonese translator for Ho. Ho was afforded ample time to procure a Chinese Cantonese translator prior to the November 15, 2007, hearing. She was advised through a translator to obtain counsel for her hearing and to procure her own translator. Fung failed to participate in the process. The agency's decision is not arbitrary or capricious, the ALJ did not abuse her discretion, and the decision is in accordance with requirements of the law. Moreover, the compensatory damages awarded to Meki and Diana were supported by credible testimony and by substantial evidence, thus, the cross-application should be enforced.

ARGUMENT

I. HO'S PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED IN THE ADMINISTRATIVE LAW PROCESS

STANDARD OF REVIEW

This court reviews due process claims under a *de novo* standard of review. *Phelan v. City of Chicago*, 347 F.3d 679 (7th Cir. 2003), *see also*, *Hickey v. O'Bannon,* 287 F.3d 656, 657 (7th Cir. 2002). In order to assert a violation of the Due Process Clause, a plaintiff must be able to show that 1) she had a "property interest" and 2) that she was deprived of this interest without due process of law. *Bishop v. Wood,* 426 U.S. 341, 343, (1976).

A. Ho Admits Receiving, But Not Opening, Her Mail After October 27, 2006.

The Supreme Court has held that "[the] primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999). *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). This Circuit has held that to prevail on a due process claim, "a [movant] must produce 'concrete evidence' indicating that the due process violation 'had the potential for affecting' the outcome of the hearing." *Kuschchak v. Ashcroft*, 366 F.3d 597, 602 (7th Cir. 2004). "It has long been established that due process allows notice of a hearing (and its attendant procedures and consequences) to be given solely in English to a non-English speaker if the notice would put a reasonable recipient on notice that further inquiry is required." *Nazarova v. I.N.S.*, 171 F.3d 478, 483 (7th Cir. 1999).

In this case, Ho concedes that from October 27, 2006, until November 15, 2007, "petitioner did not open any of the written communications or pleadings sent to her by HUD and the Complainants-Intervenors". (Pet. Ho Br. 7). Ho alleges that she did not open the mail due to "her difficulty with English and because she knew she would not understand the meaning or import of those documents without the help of an attorney."*Id.* Ho admitted that she knew the mail was from HUD and Counsel for Meki and Diana and that she may need to show such documents to an attorney. (Pet. Ho Br. 7.) Thus, Ho knew such mailings required further inquiry and failed to take any action to protect he rights. Moreover, Ho spoke and understood English as was determined by

the ALJ on November 15, 2007; therefore she could have read the documents herself and understood their importance.

Ho further argues that she "did not have a meaningful opportunity to participate in the hearing of liability because she did not have actual notice of that hearing." (Pet. Ho Br. 19). Ho's assertion is false as she has conceded to receiving the notices. Ho was given notice of the hearing and deliberately chose not to open her mail. Had Ho opened her mail and acted with any semblance of diligence and inquiry possessed by a reasonable recipient of mail, Ho would have had a meaningful opportunity to participate in the process and avoid the default order entered on October 18, 2007. It is not the responsibility of HUD, Meki, or Diana to ensure that Ho opens her mail. Therefore, this Court should find that Ho's procedural due process rights were not violated and affirm the October 18, 2007, Default Order finding liability against Ho and Fung.

B. The ALJ Properly Denied Ho's Last Minute Request for Continuance of the Hearing to Obtain Counsel.

a. The request for continuance of the Hearing was correctly denied.

In evaluating whether to grant a continuance, the court must weigh a number of factors, including:

> 1) the amount of time available for preparation; 2) the likelihood of prejudice from denial; 3) the defendant's role in shortening the effective preparation time, 4) the degree of complexity of the case; 5) the availability of discovery from the prosecution; 6) the likelihood a continuance would satisfy the movant's needs; and 7) the inconvenience and burden to the court and its pending case load.

U.S. v. Farr, 297 F.3d 651, 655 (7th Cir. 2002). "The factors will be deserving of varying weight in each situation confronted by a [ ] judge, and the [ ] judge is in 'the best position to evaluate and assess the circumstances presented by movant's request for a continuance.'" *Id.* "It is well established that the grant or denial of a continuance is within the discretion of the judge and will not be overturned absent a clear showing of abuse." *N.L.R.B. v. Pan Scape Corp.*, 607 F.2d 198, 201 (7th Cir. 1979). *See e.g., Washington v. Sherwin Real Estate, Inc*. 694 F.2d 1081 (7th Cir. 1982).

First, Ho had adequate time to prepare for the damages hearing. The Default Order was entered October 18, 2007 and modified on November 7, 2007. The damages hearing occurred on November 15, 2007. Thus, Ho had a month to obtain counsel or to prepare a defense for the damages hearing. Instead, Ho stalled until the day of the hearing to request, what was construed by the ALJ as a continuance, so she could obtain counsel. Ultimately, Ho had sufficient time to obtain representation and to prepare adequately for the damages hearing. Second, Ho argues that her request for continuance prevented her from introducing testimony and from cross-examining witnesses. (Pet. Ho Br. 22). Ho had the opportunity to cross-examine Meki, Diana, witnesses, and to introduce affirmative testimony on her behalf in mitigation of damages, but she chose not to.

Third, a continuance would not have satisfied Ho's need to obtain counsel. To date, attorney Shearer has not filed an appearance on Ho's behalf. Even if Judge

O'Bryant had granted Ho's continuance, and Shearer filed an appearance on Ho's behalf, the outcome of the damages trial would have remained the same. Ho's primary argument is that the denial of her continuance deprived her of being represented by counsel who would have introduced testimony and effectively cross-examined witnesses that would have mitigated damage amounts. Again, Ho provides no indication of having any potential witnesses that could have introduced affirmative testimony on her behalf to mitigate damages. Furthermore, Meki, Diana, and Mr. Bracken, Meki's father, were deemed to be credible by the ALJ. (I.D. 12 - 15). Finally, continuing the damages hearing would have placed a significant burden on the ALJ, HUD, as well as on Meki, Diana and their attorney. Judge O'Bryant and Meki flew in from Washington D.C. Additionally, Mr. Bracken flew in from Detroit, Michigan. (I.D. 17). Thus, a continuance would have inconvenienced Judge O'Bryant, witnesses, the parties and their attorneys.

Similarly, in *Washington v. Sherwin Real Estate, Inc*. 694 F.2d 1081 (7th Cir. 1982), a housing discrimination case under the FHA, the plaintiffs requested a continuance on the day of trial. The trial court denied the continuance and ordered the plaintiffs to proceed to trial. *Id.* at 1086. Here, Ho was aware of the fact that there would be hearing on November 15, 2007. She admits retaining attorney Shearer "a few days" prior to the hearing. (Pet. Ho Br. 7, 16). At that time, it would have appeared to Shearer that he would not be able to attend the damages hearing due to another commitment. Neither Ho nor Shearer contacted HUD, counsel for Meki and Diana or filed an emergency

motion with the ALJ. Instead of notifying the ALJ (who was still in Washington, D.C.), requesting a continuance, and inquiring about a translator, Ho and her counsel did nothing. Judge O'Bryant was not even aware of Shearer's alleged representation until the morning of the November 15, 2007, hearing. (Tr. 10). Rather, Ho decided to arrive at the hearing with a hand-scrawled note from Shearer. (Tr. 7). When requested to stay for the hearing she requested to leave. (Tr. 8). When ordered to stay, for the hearing again she requested to leave. (Tr. 18). Ho was advised that the hearing would take place with or without her, and yet she still insisted on leaving. (Tr. 18). Ho is now requesting, that Meki and ALJ, both of whom had flown in from D.C., counsels for HUD, and for Meki, who all were in attendance, be rescheduled at more suitable time for her.

Ho argues the short length of her requested continuance would not have prejudice the parties involved. As evidence, Ho provides in her brief that, "[a] few days before November 15, 2007, [she] asked [ ] Shearer to represent [her] and he agreed to do so for a nominal fee." (Pet. Ho Br. 11-20). However, to date, Shearer has not filed an appearance on her behalf with this Court. This supports Judge O'Bryant's finding that, "one could only speculate when [Shearer] would be prepared for a hearing in this case." (I.D. 2-3). Ho fails to provide any "concrete evidence" indicating that the ALJ's denial of her request for a continuance to obtain counsel at the last minute affected the outcome of the hearing.

Therefore, based on the record, the *Farr* factors and the *Washington* case on point, the ALJ's denial of the request for continuance at the damages hearing should be

upheld by this Court.

b. Ho did not have a right to counsel.

It is well established that, as a general matter, there is no constitutional right to counsel… in civil cases. *See, e.g., MacCuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988). Instead, the rule is that counsel's errors are imputed to the client who chose his counsel, and that the client's sole remedy is a suit for malpractice against counsel and not litigation do-over. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.* 507 U.S. 380, 397 (1993) and *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005).[2]

Ho concedes that there is no right to counsel in her brief. (Pet. Ho. Br. 1). But then asserts that she had a statutory right to counsel at the November 15, 2007, damages hearing pursuant to 42 U.S.C. §3612(c). (Pet. Ho Br. 21). However, Ho misquotes the law. Section 3612(c) states in pertinent part, "at an [Administrative Law] hearing under this section, each party *may*…be represented by counsel." 42 U.S.C. §3612(c) (emphasis added). A party's opportunity to retain counsel for an administrative hearing is discretionary in nature and not mandatory, as demonstrated by the use of the word "may" as opposed to "shall." Ho admits retaining counsel two days before the hearing.

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[2] Recently, the U.S. Department of Justice Office of the Attorney General rendered an interim opinion holding that, there is no constitutional right … to counsel…although the Fifth Amendment's Due Process Clause applies in removal proceedings, as it does in any civil lawsuit or in any administrative proceeding, that Clause does not entitle a person to effective assistance of counsel, much less the specific remedy of a second bite at the apple based on the mistakes of his own lawyer. *Matter of Compean and Sylla Banglay*, 24 I. & N. Dec. 710, Interim decision 3632, 2009 WL 47338 (January 07, 2009).

(Pet. Ho Br. 7). Ho selected counsel of her choice and as in *Pioneer Inv. Servs. Co, supra,* at 21. her remedy is not with this court but with her counsel.

Thus, the ALJ did not violate Ho's procedural due process by denying her request for a continuance to obtain counsel because the law does not provide for such a right.

C. The ALJ Properly Denied Ho's Request for a Continuance to Obtain an Interpreter.

Ho relies on immigration cases to state her claim that her procedural due process rights were violated when the ALJ failed to order HUD to provide a Chinese Cantonese translator, and then subsequently failed to grant Ho a continuance so she could obtain the services of a translator. The first of these cases is *Kerciku v. INS*, 314. F.3d 913 (7th Cir. 2003). However, the case at bar is distinguishable from *Kerciku*. In *Kerciku*, the individuals seeking asylum were actually present at the hearing. *Id.* at 916. In fact, testimony was heard from several individuals in *Kerciku,* however, they were not allowed to have one lay witness and one expert witness testify. *Id.* In this case, not only was Ho allowed to stay and testify, but she was strongly advised and at one point ordered to stay and refused to do so. (Tr. 14). Ultimately, Ho was advised, that she would need to make a request to the court either on her own or through counsel and that HUD would not make any such request on her behalf. (Tr. 9). This meeting took place over two months prior to the November 15, 2007, hearing.

Ho also cites, *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999), which held that "a

non-English speaking petitioner has a due process right to an interpreter at an administrative liability or damage hearing …". (Pet. Ho Br. 25). The petitioner in *Nazarova* sought out and provided her own translator. *Id.* at 481. However, Ho completely misstates the law. *Nazarova* only extends the right to a translator at immigration hearings. *Id.* at 484. It does not extend to administrative liability or damage hearings. Analogizing administrative liability or damage hearings to immigration cases, Ho has cited no authority or proffered any argument why this court should make such analogy. Ho attempts to interpret the rule in *Nazarova* as requiring the government to conduct every administrative liability or evidence hearing in the presence of a translator, but also to provide one whether one has been requested or not. *Nazarova* does not stand for either proposition.

Finally, Ho proffers what can only be interpreted as an estoppel argument. (Pet. Ho. Br. 27). Ho states that in a September 2007 meeting, HUD provided an interpreter. (Pet. Ho. Br. 27). At this meeting, she was strongly encouraged to locate and procure her own counsel and HUD informed her that HUD did not represent her or her interests. (Tr. 9). Regardless of the fact that a translator was provided at HUD's "behest," Ho was informed that HUD would not provide an interpreter in the future. (Tr. 9). This information was conveyed to Ho in Chinese by the Chinese interpreter. (Tr. 9). Ho then argues that because she was provided with a translator at an informal meeting she requested with opposing counsel, she expected to be provided with a translator, without having made any request, at a hearing conducted by an administrative law

judge who was not present at the September meeting. (Pet. Ho's Br. 27). Ho argues this was her expectation despite being explicitly informed to the contrary. (Tr. 9). Ho goes on to state that the HUD attorneys first claimed that Ho had not requested a translator and then claimed that she did not need one, as if these two arguments were mutually exclusive. (Pet. Ho Br. 27). It was Ho who claimed at the hearing that she needed an interpreter but did not procured one.

Moreover, Ho contends that the ALJ was obligated to supply a translator. (Pet. Ho Br. 26). However, Ho is unable to cite any authority requiring an ALJ in a damages hearing to provide a translator. In the alternative, Ho offers the argument that Judge O'Bryant was obligated to grant Ho a continuance to obtain the services of a Chinese Cantonese translator. (Pet. Ho. Br. 26-27). Yet once again, Ho is only able to cite immigration cases, and she is unable to cite any authority analogizing immigration hearings to administrative liability or evidence hearings. Nevertheless, the ALJ made an observation and made the determination that Ho understood English well enough to participate in the hearing. (Tr. 14).

Therefore, the ALJ correctly denied Ho's request for a continuance.

D. The ALJ Properly Informed Ho of Potential Consequences of Not Participating in the Hearing.

The court in *Clark v. Harris*, 638 F.2d 1347 (5th Cir. 1981), declared an implied obligation on the part of an ALJ to notify a claimant of his or her right to be represented at a social security benefits hearing. Ho argues that from this implied duty stems a

responsibility of the ALJ to inform the claimant of potential consequences of the claimant's non-participation in a proceeding, with or without representation. This Circuit, however, has never made a ruling expressly or impliedly that an ALJ's has an obligation to notify a claimant of his or her right to representation in a social security benefits hearing or, more specific in a Fair Housing Administrative Proceeding. Judge O'Bryant nevertheless advised Ho to remain throughout the proceeding. Judge O'Bryant went beyond her outlined responsibilities, twice advising Ho to stay through the hearing and informing Ho that it was "in [her] best interest to stay." (Tr. 8 and 14). The ALJ then amended her advice to Ho and stated, "I think I'm going to revise that and require you to stay," after Ho again cited her desire to leave because she did not want to participate in the damages hearing. (Tr. 14). After Ho's third request to leave the ALJ told her that if she wished to leave, the hearing would proceed on in her absence. (Tr. 8, 14, 17-18). Ho left despite the ALJ's warnings and against advice of her own future counsel to attend. (Pet. Ho Pet. 11-12). The ALJ took the appropriate steps and advised Ho to stay.

The ALJ exceeded the scope of her responsibilities in making multiple efforts to secure Ho's participation in the damage hearing on November 15, 2007, and further advised Ho that the hearing will continue in her absence. Ho was advised to participate in the hearing even though the ALJ had no duty to do so. Thus, her procedural due process rights were not violated.

II. HUD'S ORDER IMPOSING LIABILITY PURSUANT TO A MODIFIED DEFAULT ORDER SHOULD NOT BE SET ASIDE AS AN "ABUSE OF DISCRETION"

Standard of Review

The standard for reviewing an entry of a default judgment is "abuse of discretion". *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 250-51 (7th Cir. 1990). "To reverse…an abuse of discretion, [the Court] must conclude that no reasonable person could agree with the trial court's judgment." *Id.* at 251. In *Jones* v. *Phipps*, 39 F.3d 158, 162 (7th Cir. 1994), the court applied Fed. R. Civ. P. 55(c) and 60(b), as a three-part standard and burden on the moving party to show: (1) 'good cause' for the default; (2) quick action to correct the default; (3) the existence of a meritorious defense to the original complaint. ." *Id.* A defaulted party must show a good faith reason for failing to appear, meaning that we will grant relief only where the actions leading to the default were not willful, careless, or negligent. *Swaim* v. *Moltan Co.*, 73 F.3d 711, 721 (7th Cir. 1996) (quotation marks omitted). "A litigant must show 'exceptional circumstances' to justify setting aside a default judgment." *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.*, 722 F.2d 1319, 1323 fn. 6 (7th Cir. 1983).

A. The ALJ's Clarification of Language in Judge Liberty's Original Default Order Was Not Arbitrary, Capricious, or Abuse of Discretion.

In *HUD ex rel. Sheila White v. Wooten*, 2004 WL 3201000 (H.U.D. A.L.J., Order Dec. 3, 2004), the Administrative Law Judge discussed the effect of the respondent's default was to admit all well-pled facts as true and to require the ALJ to analyze

whether hearing-established facts actually support a liability finding by a preponderance of the evidence. In ruling, the ALJ found two necessary elements for a default order: (1) "non-responsiveness on the part of the Respondent" and (2) a "need to show that a *prima facie* case could also be established; in other words, that there was non-response in an actual case as opposed to just non-response." *Id* at 4. This Circuit likewise has held that:

> A default judgment establishes, as a matter of law, that defendants are liable to plaintiff as to each cause of action alleged in the complaint…Although upon default, *the well-pleaded allegations of a complaint relating to liability are taken as true*, allegations in a complaint relating to the amount of damages suffered ordinarily are not. Rule 55(b)(2) of the Federal Rules of Civil Procedure provides in part that 'if, in order to enable the court to enter judgment or to carry it into effect, it is necessary ... to establish the truth of any averments by evidence ... the court may conduct a [damages] hearing. (Emphasis added).
>
> *U.S. v. Di Mucci*, 879 F.2d 1488, 1497 (7th Cir. 1989) (internal citations deleted).

Fung concedes the Default Order issued by Judge Liberty on October 18, 2007, adhered to *White's* two-part default process. (Fung Br. at 17.)

Therefore, this Court should hold that Judge O'Bryant's modifying Default Order did not depart from prior Agency precedent and adhered to the standards required in *DiMucci*, and uphold Fung and Ho's liability.

B. Even if the Court Finds That Meki and Diana Had to Prove Liability at the Damages Hearing, the Record Supports Their Burden.

Fung further argues "the facts of Record are demonstrably-insufficient to

support a prima facie section 3604(a) violation." (Fung Br. 20). The Fair Housing Act at §3604(a) provides that it shall be unlawful: "To refuse to…rent after the making of a bona fide offer, or to refuse to negotiate for…rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color…or national origin." 42 U.S.C. §3604(a). Under section 3604, a prima facie case is established by a showing that: 1) the Complainant belongs to a minority; 2) the Respondent was aware of it; 3) the Complainant was ready and able to accept the Respondent's offer to rent; and 4) the Respondent refused to deal with Complainant. *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985). *See also*, *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982). "Direct evidence is that which can be interpreted as an acknowledgment of defendant's discriminatory intent." *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). Plaintiff may through circumstantial evidence show defendants' discriminatory intent directly. *Id.* The types of circumstantial evidence that [plaintiff] can present are: "suspicious timing, ambiguous statements, behavior toward or comments directed at other [people] in the protected group, and other evidence from which an inference of discriminatory intent might be drawn . . ." . *Huff v. Uarco Inc.,* 122 F.3d 374, 380 (7th Cir. 1997).

The record overwhelmingly provides each element of Meki and Diana's *prima facie* case of discrimination. First, Meki's father is African-American and her mother is Samoan, thus making Meki a member of a racial minority. (Tr. 169). Next, the facts indicate on Friday, May 14, 2005, Diana and Meki met and signed the sublease

agreement. (Tr. 77). Meki gave Diana checks totaling half the rent for the month of May and two checks for $650.00, covering rent for June and July. (Tr. 78). These facts indicate Meki's financial ability and qualifications to rent Fung's apartment. Next, Ho prevents Meki from moving into the unit by barricading the door. (Tr. 186–88). Fung acquiesced to Ho's improper actions, stating "I am not discriminating against anyone to rent my unit. I think when you have to live with someone you can discriminatively choose whom you will live with." (Tr. 99). Finally, Fung's apartment remained on the market listed for $595.00 per month rent which was less than what Meki was going to pay. (Tr. 117). Furthermore, Ho and Fung rented to a tenant of Asian descent. (I.D. 10). Neither Fung nor Ho has shown that race was not a factor in the decision to deny Meki the opportunity to rent housing. Therefore, this Court should find that Meki and Diana established a *prima facie* case of racial discrimination under the FHA as required by the Default Order.

C. Exemptions Under Section §3603 Do Not Apply to Petitioners.

"Under general principles of statutory construction, '[o]ne who claims the benefit of an exception from the prohibition of a statute has the burden of proving that [the] claim comes within the exception.' *"Mills Music, Inc., v. Snyder*, 469 U.S. 153, 188 n. 20 (1985) (White, J., dissenting). The Court has held the FHA is to be given "generous construction" in order to achieve the purpose of the Act, which is to "replace the ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211–12, (1972). Courts have found that exemptions to the FHA should

be construed narrowly. See *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990) and *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D.Va. 1975).

Here, Fung finds it troubling that "the Order fail[ed] to analyze (or even identify) a single fact which, on its face, could establish that Fung and Ho were not exempted by §3603,". (Fung Br. 21). The law does not require such analysis. Fung and Ho bear the burden of proving an exemption claim. Fung and Ho had sufficient opportunity to assert a possible exemption under §3603(b) at the time of entry of the Default Orders. Fung and Ho could have asserted a defense even at the time HUD investigated the case. However, Fung and Ho waived such exemption by not participating in the legal process, by not responding, or attending a single hearing on these matters. Section 3603(b) supplies two possible exemptions. Even assuming *arguendo*, section 3603(b) would not exempt Ho or Fung from their discriminatory actions towards Meki and Diana.

a. Exemption under §3603(b)(1)

In this case, §3603(b)(1) does not apply to Fung because he used the rental services of Ho as his agent. The record provides that in the fall of 2003, Ho showed Diana the Unit. Ho provided Diana with a rental application and forwarded the completed form to Fung. Accordingly, Ho acted as Fung's agent when she showed his apartment; ensured Diana properly filled out the rental application, and forwarded the

rental application to Fung's attention.

Moreover, §3603(b)(1) does not apply to Ho because she is not the owner of the subject unit. In *Singleton v. Gendason*, 545 F.2d 1224, 1226 (9th Cir. 1976), the court held that, "tenants of a dwelling cannot claim the protection of Section 3603(b)(1) because that exemption is only available to owners." [3] Finally, section 3603(b)(1) does not apply because the Unit is an apartment converted into three rental bedrooms and therefore, not considered a "single-family home." Multiple circuits have similarly strictly construed the term "single-family house." See*, e.g., Lincoln v. Case*, 340 F.3d 283, 287-88 (5th Cir. 2003) (house converted into four rental units is not "single-family" house and thus, not exempt under §3603(b)(1)); *Lamb v. Sallace*, 417 F. Supp. 282, 285 (E.D. Ky. 1976) (duplex is not covered by the term "house" in §3603(b)(1)); *Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1477 (11th Cir. 1993) (use restrictions placed on a home in a cooperative or condominium development may sufficiently distinguish the unit from a "single-family house" so as to remove it from the §3603(b)(1) exemption). Based on strict construction of the term "single-family house," this Court should find that the exemption was waived and that §3603(b)(1) does not apply to Fung's converted three-bedroom rental apartment.

b. Exemption under §3603(b)(2)

[3] The Court in *Singleton* found "[t]he legislative history of Title VIII indicates that Congress intended that the word "owner" in Section 3603(b)(1) be given its plain meaning." *Singleton* fn.3 at 1226.

The second exemption §3603(b)(2) applies when "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. §3603(b)(2). The exemption does not apply to Fung because he did not "maintain and occupied" the Unit The exemption does not apply to Ho because she again does not own the Unit. *Id.*

Additionally, §3603(b) exemptions do not apply when discriminatory statements are made under §3604(c). Section §3604(c) states in pertinent part: It shall be unlawful…to make…statement, with respect to the…rental of a dwelling that indicates any preference, limitation, or discrimination based on race…or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. §3604(c). The record states that on May 17, 2004, Fung sent Diana an e-mail stating: "I think when you have to live with someone you can discriminatively choose whom you will live with." (Tr. 99). Fung sent this e-mail demonstrating his ability to prevent Meki from renting one of his units and upholding Ho's actions of preventing Meki from taking possession of her rental unit. Thus, Fung violated §3604(c) when he made and published the statement with respect to the rental of his unit indicating discrimination based on race.

Therefore, section 3604(b)(2) does not apply because, the exemption was waived, Fung did not live in the property and discriminatory statements were made under 3604(c). For the foregoing reasons, this Court should deny the Petition for Review.

INTERVENING/CROSS-PETITIONERS MEKI BRACKEN AND DIANA LIN'S OPENING BRIEF

I. THE HUD DECISION WAS NOT "ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH THE LAW

Standard of Review

This court's reviews an entry of a default by applying the "abuse of discretion" standard. *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 250-51 (7th Cir. 1990). "To reverse…an abuse of discretion, [the court] must conclude that no reasonable person could agree with the trial court's judgment." *Id.* at 251.

A. Meki Bracken And Diana Lin Were Denied Housing By Ho And Fung In Violation Of The Fair Housing Act.

B. Ho and Fung Refused to Rent to Meki, Made Discriminatory Statements with Respect to Meki Bracken and Diana Lin's Sublease Agreement on Account of Meki's Race.

Intervening-Respondents hereby adopt Respondent HUD's Argument I, sections A., B., and subsections 1-3, discussing Petitioners' violations of the Fair Housing Act. See HUD Br. at 17-30.

C. Ho and Fung failed to answer to the Charge of Discrimination and default decision was entered.

The failure to answer to the charge within thirty-days of its filing shall deem the allegations in the charge admitted. 24 CFR 180.420. See also *HUD v. Cabusora,* 1992 WL 406524 (HUD Order March 23, 1992). In *Jones* v. *Phipps*, 39 F.3d 158, 162 (7th Cir. 1994)

the court applied Fed. R. Civ. P. 55(c) and 60(b), as a three-part standard and burden on the moving party to show: (1) 'good cause' for the default; (2) quick action to correct the default; (3) the existence of a meritorious defense to the original complaint. *Jones* v. *Phipps*, 39 F.3d 158, 162 (7th Cir. 1994). A defaulted party must show a good faith reason for failing to appear, meaning that we will grant relief only where the actions leading to the default were not willful, careless, or negligent. *Swaim* v. *Moltan Co.*, 73 F.3d 711, 721 (7th Cir. 1996) (quotation marks omitted).

In this case, Ho only offers that she could not find an attorney to represent her. This reason must fail as it is not 'good cause'. It is abundantly clear that Ho took no action to correct the default orders. Additionally, Ho raises no apparent defense to the Charge of Discrimination. Both Ho and Fung failed to answer to the charge which led to the entry of a default judgment. Ho appeared at a damages hearing on November 15, 2007, but she left shortly after the proceeding had commenced and before she was able to offer any testimony. (I.D. 2). Fung failed to appear. Similarly, see also, Argument Part II at page 25-6, *supra.*

Therefore, the default orders were proper and should be upheld.

II. MEKI AND DIANA SUFFERED COMPENSATORY DAMAGES AND SUCH DAMAGES WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Standard of Review

Intervening-Respondents hereby adopt Respondent HUD's standard of review. See HUD Br. at 30.

A. Meki and Diana suffered out-of-pocket expenses as a result of Petitioners discriminatory actions.

It has been held that the amount of compensatory damages should be adequate to redress the deprivation of a complainant's civil rights. *Corriz v. Narajo*, 667 F.2d 892 (10th Cir. 1981). Complainant is entitled to compensation for the tangible expenses caused by Respondents' denial of housing. *See, e.g., HUD ex rel. Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990).

Meki visited a couple of places after not being allowed to sublet the Unit, but they were not close to downtown and were not in neighborhoods with which she was comfortable with. (Tr. 200). Meki spent approximately a week searching for a new apartment after not being allowed to sublet the Unit. (Tr. 203). As a result of Ho's discriminatory acts, Meki was forced to move in with an acquaintance, Ms. Scott. Living at Keturah's place was manageable, but certainly not comfortable. There was no privacy. (Tr. 191). Meki had to sleep on the floor and did not sleep well. (Tr. 203).

a. Meki's out of pocket expenses as a result of Fung and Ho's discriminatory actions.

b. Diana's out-of-pocket expenses and inconvenience as a result of Fung and Ho's discriminatory actions.

Intervening-Respondents hereby adopt Respondent HUD's discussion on out of pocket expenses for Meki and Diana. See HUD Br. at 33-34.

B. Meki loss of housing opportunity and inconvenience.

To recover for loss of housing opportunity the complainant must describe any

injury with specificity. *HUD v. Tucker,* 1992 WL 406533 n.23 (HUD A.L.J. Aug. 24, 1992). Complainants who are unlawfully denied housing may receive compensation for time spent seeking alternative housing and for additional expenses associated with living in alternative housing. *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971); *HUD v. Edelstein,* 1991 WL 442784 (HUD A.L.J. Dec. 9, 1991); *HUD v. Kelly*, 1992 WL 406534 (HUD A.L.J. Aug. 26, 1992) (award for emotional distress and loss of housing opportunity caused by denial of home located near parents, friends, direct bus route to work, drug or convenience store, library, and park).

Here, Meki spent approximately a week and a half searching for a new apartment after not being allowed to sublet the Unit. She continued to look for similar housing in the downtown area close to her job. Over that time, she also looked on line, went to see various apartments and spoke to landlords on the phone about the availability of housing. During that week, Meki stayed in a hotel. Thereafter, she was forced to impose upon an acquaintance, Ms. Scott. Ms. Scott allowed her to stay with her in her one bedroom apartment. Meki had to sleep on a mattress on the floor in her living room. (I.D. 10-11). Ms. Scott's house was located far north from the downtown area and it took Meki twenty minutes on the bus to get to work everyday versus a five minute walk from the Unit. Meki felt that she was imposing on her friend's privacy and after approximately six to eight weeks, she moved out.

Similarly, in *HUD v. Banai*, 1995 WL 72441 (H.U.D. A.L.J. February 3, 1995) affirmed in *Banai v. HUD,* 102 F.3d 1203 (11th Cir.1997), the plaintiffs were a Black

unmarried couple who applied for an apartment following Hurricane Andrew and were denied by Respondent upon learning that plaintiffs were Black. Complainant's loss the housing opportunity when the landlord denied the housing that was uniquely suited to their special needs, resulting from one of the plaintiff's physical injuries. Complainants were force to live with their friends to avoid homelessness. As a result Complainants relationship as a couple was negatively affected by losing their privacy and a suitable place to live all because of the landlord's racial discrimination. The court awarded the Complainants $35,000 for emotional distress, inconvenience and lost housing opportunity. See also *Parker v. Shonfeld,* 409 F. Supp. 876 (N.D. Cal. 1976).

Meki lost her housing opportunity of the Unit because Ho and Fung refused to rent to her solely because of her race. Had she lived at the Unit, she would have been able to walk to work, would have had her own private room with a bed, a closet to keep her clothes as opposed to having to keep her clothes in her car, could have cooked her own meals and would have avoided the experience of sleeping on the floor.

Therefore the ALJ award for loss of Housing Opportunity was reasonable.

C. Meki suffered significant emotional distress as a result of Petitioners' discriminatory actions.

Emotional distress damages are a proper remedy for fair housing cases. *United States v. Balistrieri,* 981 F.2d 916, 931 (7th Cir. 1992). However, damages for emotional distress may be inferred from the circumstances, as well as established by testimony and no evidence of economic loss or medical evidence of mental or physical symptoms

need be submitted. *HUD v. Blackwell*, 908 F.2d 864, 872 (11th Cir. 1990). The finder of fact is in the best position to evaluate both the humiliation inherent in the circumstances and the witness' explanation of her injury. *Balistrieri*, 981 F.2d at 933. *See also, Seaton v. Sky Realty,* 491 F.2d 634, 636 (7th Cir. 1974). In determining the proper amount to award a plaintiff for emotional distress, a tribunal should "look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused the distress." *Balistrieri*, 981 F.2d at 932. "The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action." *Id.*

Here, Meki was very confused and frustrated as a result of being locked out of the Unit by Ho. (Tr. 189). She was shocked, disappointed, and frustrated when she learned that Ho did not want her to live in the Unit because she was Black. Meki described the situation as a "rough welcome to the real world." (Tr. 195). Meki could not even fathom what Ho was thinking. (Tr. 196). Meki called her best friend, Nicole Carryl to discuss what had happened and she cried on the phone to her. (Tr. 197). Meki and Nicole Carryl prayed on the phone together. (Tr. 197). Everyday that passed Meki was losing opportunities to rent an apartment, which was a concern to her. (Tr. 198). Searching for another place to sublet was very draining on Meki. (Tr. 201). Meki has developed a new consciousness about what other people may be thinking of her. (Tr. 201). As a result of Ho's discriminatory act, Meki was forced to move in with an acquaintance, Ms. Scott. Living at Ms. Scott's place was manageable, but certainly

not comfortable. She had no privacy. (Tr. 191).This incident resulted in Meki's withdrawal from the City of Chicago. (Tr. 212). After law school, Meki applied to jobs in Los Angeles, New York, Atlanta, and Washington D.C., but not Chicago because of this incident, despite the fact that she would have been much closer to her family located in Detroit. Even when Meki talks to others today, she still thinks of the incident as shocking and disappointing. Prior to this incident, Meki would normally get eight hours of sleep every night and after the incident, she would normally sleep for four to five hours per night.

Similarly in *Broome v. Biondi,* 17 F. Supp. 2d 211 (S.D. N.Y. 1997), plaintiffs were an African American husband and White wife couple who applied to sublet an apartment in a cooperative ("Co-op") building. They were denied the sub-let application by the Co-op board solely because of the husband's race. *Id.* at 215. Plaintiffs cited feelings of embarrassment, humiliation, anger, and demoralization from treatment by the defendants in the Co-op board interview. *Id.* at 223. They testified that the experience was their "worst nightmare," "reduced to tears" twice, "difficult for feelings to go away," fear of lack of trust from others. *Id.* Based on their experience of discrimination the court awarded $228,000 for emotional distress and mental anguish. The court stated that the Plaintiffs were credible and the evidence was persuasive to sustain the award. *Id.* at 225.

In *Kreuger v. Hud*, 115 F.3d 487, 492 (7th Cir. 1997), the court upheld an award of damages by the ALJ in the amount of $22,000 where the emotional distress was based

almost entirely on the plaintiff's own testimony that the Respondent made her feel "real dirty," "like a bad person," and that he scared her. *Id.* In *Dubin v. LaGrange Country Club*, 1997 WL 323831, 1 (N.D.Ill. 1997), a plaintiff who was discriminated against was awarded $40,000 after he became jittery, suffered from headaches, stomach aches, was very upset, depressed, and had trouble sleeping. *Id.* Also, in *HUD v. Godlewski,* 2007 WL 4578540 **(**HUD A.L.J. December 21, 2008), the ALJ held Respondent to be in violation of section §3604(c) for posting a for rent sign that said "for rent…no kids." *Id.* The court awarded $18,000, in emotional distress. The court stated that emotional distress award was reasonable, because the sign itself caused the complainant great emotional distress, above and beyond the unavailability of the housing. *Id.*[4] These cases are in line with Meki's unfortunate discriminatory experience of humiliation, embarrassment and stress caused by Ho and Fung solely because of Bracken's race. Mr. Bracken testified and confirmed Meki severe emotional distress. (Tr. 239).

Therefore, the ALJ's award for emotional distress was reasonable given the testimony and egregiousness of the case.

a. Complainant Lin suffered significant emotional distress as a result of Petitioners' discriminatory actions.

[4] The key factor in determining the size of an award is the victim's reaction to the discriminatory conduct; gauges of reasonableness and extent of a victim's reaction to the conduct are the egregiousness of the discriminatory conduct and susceptibility of the victim. *HUD v. Banai*, 1995 WL 72441 (HUD A.L.J., February 3, 1995).

Intervening-Respondents hereby adopt Respondent HUD's discussion on emotional distress for Diana Lin. See HUD Br. at 33-34.[5]

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review, affirm the HUD Secretary's Order, grant the Cross-Application for Enforcement and for leave for Intervening-Respondents to petition for reasonable attorneys' fees and for any other relief this Court deems just.

Respectfully submitted,

MEKI BRACKEN & DIANA LIN
Intervening-Respondents/Cross-Petitioners

Dated: January 23, 2009

By: _____
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[5] Note that the appendix attached to Petitioner Ho's brief includes an incomplete copy of the Initial Decision, and that Intervening-Petitioner Fung's brief includes an ineligible copy of the Initial Decision. Thus, Intervening-Respondents have attached a complete and legible copy for the Court's review in the appendix.

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J. Damian Ortiz
Attorney for Intervening-Respondents/Cross Petitioners

Dated: January 23, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 31(e)

Pursuant to Federal Rule of Appellate Procedure 31(e), I hereby certify that the brief and appendix have been submitted in digital form and hereby comply with Rule 31(e) requirements.

The John Marshall Law School
Fair Housing Legal Clinic

By: _____
One of the attorneys

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Pursuant to Circuit Court Rule of Appellate procedure 30(d), I hereby certify that an appendix with all materials required by Circuit Rule 30(a) and 30(b) has been submitted.

By:_____
One of the attorneys

CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned does certify that 15 copies of the foregoing amicus brief and accompanying diskette were filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 2722, Chicago, IL 60604 by personal delivery on January 23, 2009.

I further certify that on January 23, 2009, two copies of the foregoing Intervening-Respondents Cross-Petitioners Brief and accompanying diskette were sent via United States mail, first class postage prepaid to: Petitioner and parties listed below:

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APPENDIX

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