

COOK COUNTY COMMISSION ON HUMAN RIGHTS
69 West Washington Street, Suite 3040
Chicago, Illinois 60602

Panichi DANIELS, Complainant)

v.)

WAYPOINT HOMES & STARWOOD)
WAYPOINT RESIDENTIAL TRUST,)
Respondents)

Case No. 2015H003

Entered: September 27, 2016

ORDER FINDING SUBSTANTIAL EVIDENCE

On November 5, 2015, Complainant Panichi Daniels (“Daniels”) filed the above-captioned complaint with the Cook County Commission on Human Rights (“Commission”) against Waypoint Homes and Starwood Waypoint Residential Trust (“Waypoint” or “Respondent”). Daniels alleges that on October 14, 2015, a Waypoint representative told Daniels that a listed property in South Holland, Illinois was not available to rent using a voucher that provides federal rental assistance, and refused to let Daniels view, apply for, or rent the property. Compl. ¶¶ I.E, H. Refusal to rent because a potential tenant plans to use such a voucher to pay for housing violates the Cook County Human Rights Ordinance. *See* Cook County Code of Ordinances (“County Code”), §§ 42-38(b)(1) (rendering source of income discrimination in residential real estate transactions unlawful). At first, Respondent admitted to Daniels’ allegations. But during the course of the Commission’s investigation into this matter, Waypoint changed its story. Now, Respondent claims that its business records demonstrate that a Waypoint representative actually showed Daniels the property and Daniels, of her own accord, decided not to file a rental application.

The Commission has completed its investigation of Daniels’ complaint and, for the reasons explained below, finds sufficient evidence of source of income discrimination to merit further proceedings on that charge.

BACKGROUND

Daniels is a participant in the Housing Choice Voucher (“HCV”) Program, a federally-funded program that provides rental assistance to low-income persons.¹ The HCV Program is

¹ For a general overview of the HCV Program, *see* HUD, “Housing Choice Vouchers Fact Sheet,” online at: http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Sept. 21, 2016); Housing Authority of Cook County, “About: Housing Choice Voucher Program,” online at: <http://thehacc.org/about/housing-choice-voucher-program/> (last visited Sept. 21, 2016) (“HUD HCV Program Summary”). Except where otherwise noted, the Commission takes notice of these sources for its understanding of the operation of the HCV Program in Cook County.

administered by local public housing authorities (“PHAs”) under rules established by the United States Department of Housing and Urban Development (“HUD”). Program participants are issued vouchers that show they are entitled to government payment assistance to rent a housing unit with a certain number of bedrooms (based on family size and composition). Participants then look in the housing rental market and (generally) select a unit that is available for rent at or below the limit set by the applicable HCV Program rules.²

For the most part, the dollar value of each voucher is tied to HUD’s published list of fair market rents (“FMRs”) for each (HUD-defined) metropolitan area in the United States. *See, e.g.*, Investig. Rep., Exh. A (FY 2015 HUD Fair Market Rents for Metropolitan Areas in Illinois) (listing FMRs for HUD’s Chicago-Joliet-Naperville, IL Metropolitan FMR Area, described as including the Counties of Cook, DuPage, Kane, Lake, McHenry and Will). In most of the country, the FMR (for each size unit) is fixed at a single amount across a geographically large metropolitan area – even though actual market rents vary considerably between the more affluent and poorer parts of each large metropolitan area. With this broad-brush approach, often voucher holders end up clustered in high-poverty, low opportunity parts of each metropolitan area because rents are lower.³

To help voucher holders move into higher-rent parts of metropolitan areas where there are greater educational and job opportunities, HUD began experimenting with setting more focused FMRs for smaller geographic areas, specifically individual zip codes within a metropolitan area. To that end, in 2012, HUD initiated the Small Area FMR Demonstration Project. Five PHAs participated, including the Housing Authority of Cook County (“HACC”), the PHA for the HCV Program in suburban Cook County.⁴ As a result, an HCV Program participant in suburban Cook County may be able to rent a higher-priced housing unit in a better neighborhood vis-à-vis an HCV Program participant looking for housing elsewhere, where the PHA is limited by HUD rules to basing its payment standards on a single FMR for the entire metropolitan area.⁵

² Strictly speaking, the value of the voucher corresponds only to the amount of the PHA’s payment assistance, not the rent that an HCV Program participant can pay for a unit of housing. Voucher holders generally must pay 30 percent of their adjusted income for rent and utilities and PHAs pay the rest up to the payment standard limit. A voucher holder may choose to pay up to 40 percent of her income to rent a unit that is somewhat above the PHA’s payment standard limit, but the Commission’s understanding is that this occurs relatively infrequently and when it does, the upward variance is small, typically no more than \$100/month over and above the PHA’s payment standard limit.

³ For additional background, *see* “Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs,” 81 Fed. Reg. 39218 (June 16, 2016), online at: <https://www.federalregister.gov/documents/2016/06/16/2016-13939/establishing-a-more-effective-fair-market-rent-system-using-small-area-fair-market-rents-in-housing> (last visited Sept. 20, 2016) (“HUD SAFMR Proposed Rule”).

⁴ Besides HACC, the other participants in HUD’s “Small Area FMR Demonstration” are the PHAs in Long Beach, California; Chattanooga, Tennessee; Mamoroneck, New York; and Laredo, Texas. HUD first started using “Small Area FMRs” (or “SAFMRs”) in 2010 as part of a court-ordered settlement for the Dallas, Texas metropolitan area.

⁵ Note that PHAs outside of the Small Area FMR Demonstration Project retain some flexibility in deciding the maximum amount of financial assistance that they will provide to voucher holders in their jurisdictions. PHAs use

Waypoint is a national real estate investment and management company engaged in the business of renting single-family homes.⁶ Waypoint operates in multiple states, including Illinois, and has approximately twelve regional offices, including an office that services the Chicago-area.⁷ Winship Interview (Mar. 11, 2016); Gutierrez Interview (Mar. 18, 2016).

At the time of Daniels' inquiry, Waypoint had substantial experience with renting to HCV Program participants. Victor Gutierrez ("Gutierrez"), then-Property Manager for the Chicago region, estimated that about 10 percent of Waypoint's business was with voucher holders. Gutierrez Interview (Mar. 18, 2016) (Gutierrez' position with Waypoint ended on March 18, 2016). Waypoint's organizational structure included an Affordable Housing Group, which was managed from November 2012 through February 2016 by Stacy Winship ("Winship"), then-Director of Property Management. Winship Interview (Mar. 11, 2016). As of July 2015, Waypoint had shifted the management of day-to-day interactions with local housing authorities and voucher holders from its national headquarters to its regional offices. *Id.* Explaining this role, Gutierrez said that Chicago-area staff knew to ask voucher holders the name of their counselor at HACC and partnered with those counselors to help voucher holders through the rental process. Gutierrez Interview (Mar. 18, 2016).

The parties agree on the following basic facts: At various times including in October 2015, Waypoint advertised online the availability of a 3-bedroom house located at 16905 Clyde Avenue in South Holland, Illinois (the "Property") for a monthly rent of \$1,749. Compl. ¶¶ I.B-C; Amd. Verif. Resp. ¶¶ B.2-3. Daniels saw this online advertisement for the Property and, at some point in the first two weeks of October 2015, she spoke by telephone to a Waypoint representative. Compl. ¶ I.E; Amd. Verif. Resp. ¶ B.2. During this inquiry, Daniels disclosed that she would use an HCV voucher to pay the rent. *See* Compl. ¶¶ I.F, H; Investig. Rep., Exh. E, p. 11 (Daniels Lead Report); Gutierrez Stmt. (Feb. 8, 2016).

There is some dispute between the parties about the details of their interactions beyond this. According to Daniels, the person she spoke with at Waypoint identified himself as "Serge" and told her that the Property was not available to rent using "Section 8."⁸ Compl. ¶ I.F. Daniels asserts that this phone call took place on or about October 14, 2015, and that it was her only conversation with anyone from Waypoint at or around this time. *Id.* at ¶ I.E; Daniels Interview

HUD's FMRs to determine their payment standard amounts under HUD's general rules for the HVC Program, PHAs are allowed to set payment standards at between 90 percent and 110 percent of FMRs.

⁶ *See* "Colony Starwood Homes Announces Closing of \$7.7 Billion Merger of Starwood Waypoint Residential Trust with Colony American Homes, Creating the Premier Single-Family REIT," *Business Wire* (Jan. 5, 2016), online at: <http://www.businesswire.com/news/home/20160105006880/en/Colony-Starwood-Homes-Announces-Closing-7.7-Billion> (last visited Aug. 24, 2016). On January 5, 2016, Waypoint merged with Colony American Homes; the combined company is known as Colony Starwood Homes. *Id.* (noting that after the January 5 merger, the company plans to retain its "Waypoint Homes" consumer brand); Imrie Interview (Mar. 11, 2016).

⁷ During the relevant time period, Waypoint had offices in both South Holland and Naperville; the former was closed on March 31, 2016. Gutierrez Interview (Mar. 18, 2016). As of June 2014, Waypoint had 7,200 homes in seven states. Allison Rice, "Homing In: Single-Family Rental Firms Ponder End Game," *Multifamily Executive*, online at: http://www.multifamilyexecutive.com/business-finance/business-trends/homing-in-single-family-rental-firms-ponder-end-game_o (last visited Aug. 24, 2016).

⁸ The HCV Program was formerly known as, and is sometimes still referred to, as "Section 8." Compl. ¶ I.G.

(July 28, 2016). Daniels alleges that even though she was “ready, willing and able to pursue rental of it with the financial assistance provided by my voucher,” “Serge” refused to allow her to view the Property or to complete an application or lease the Property because she would be using a voucher. Compl. ¶¶ I.D, H. Moreover, Daniels alleges that “Serge” told her that currently there were no “Section 8” homes in the area available to rent from Waypoint. *Id.* at ¶ I.I.

Respondent, for its part, provided two very different responses to Daniels’ claim. In its original verified response, Respondent admits to denying Daniels the opportunity to rent the Property based on her intended voucher use. Orig. Verif. Resp. ¶¶ B.7, 9. Respondent argues that this conduct should be excused because it was due to a misunderstanding of HUD’s rules for the HCV Program.⁹ *Id.* at ¶ B.9; Gutierrez Stmt. (filed together on February 8, 2016). Further, Respondent asserts that its policy has since been modified in response to learning that HACC pays higher rents in the HCV Program it administers. *Id.* Several months later, on June 23, 2016, Respondent filed an amended verified response. It now points to newly-located business records indicating that Daniels actually viewed the Property. Amd. Verif. Resp. ¶ B.2; Miller Stmt. (filed together on June 24, 2016). The reason Daniels did not rent the Property, Waypoint now explains, is that she failed to submit an application. *Id.*

Respondents’ Original Explanation

On February 8, 2016, Respondent filed a verified response (“Original Verified Response”). In it, Respondent admitted that on October 14, 2015, Daniels called Waypoint about the Property and was told it was not available to rent using Section 8 (*i.e.* a housing choice voucher). Orig. Verif. Resp. ¶ B.7; Gutierrez Stmt. In its defense, Waypoint argued that this occurred because, based on the fair market rent limits published by HUD, the Property’s rent exceeded what Waypoint believed was the maximum amount a voucher holder could pay for a 3-bedroom in the Chicago metropolitan area. *Id.* Respondent claimed to be unaware that HUD allows HACC’s HCV Program participants to pay more to rent housing units that are located in the higher-rent areas of Cook County. *Id.* See also Imrie Interview (Mar. 11, 2016).

Under Waypoint’s then-existing policy in October 2015, all inquiries about Waypoint rental properties were automatically routed to its national call center. Winship Interview (Mar. 11, 2016). If a caller said she intended to use a voucher, the agent would enter that information into screening software which automatically compared the property’s monthly rent to HUD’s fair market rent amount for a property of that size (by number of bedrooms) in that location (*i.e.* the

⁹ In the Original Verified Response, Respondent admitted both that Daniels contacted Waypoint about the Property on or about October 14, and that she was told by telephone that the Property was not available to rent using Section 8. Orig. Verif. Resp. ¶¶ B.6-7. But then, in response to the Complaint allegation that Daniels was not allowed to complete a rental application because she would be using a voucher (Compl. ¶ I.H.), Respondent incongruously responded that it “admit[s]” that the Complainant submitted a rental application for the Property and the rental application was rejected” because the monthly rent exceeded HUD’s limits. Orig. Verif. Resp. ¶ B.9. See also Gutierrez Stmt. (same). Given that this response is both non-responsive to the Complaint allegation and contradicted by another of its own statements in the same document, the Commission will treat this response as a careless error rather than an intentional, affirmative claim. This characterization also seems appropriate for another clear error in the Gutierrez Statement where, while apparently intending to explain that HUD numbers were too low to cover rent for the 3-bedroom Property, he stated that the HUD limit for a “2-bedroom rental in Cook County, Illinois was \$1,093.” Gutierrez Stmt.

relevant HUD-defined metropolitan area or nonmetropolitan county). Waypoint’s software did not consider whether the caller’s voucher was issued by a PHA, like HACC, that uses HUD-approved “Small Area FMRs.” If the rental amount exceeded HUD’s voucher limits – as Waypoint understood them – then the call center agent’s computer screen would show that property as unavailable. *Id.*

In October 2015, the applicable HUD fair market rent for a 3-bedroom in the six-county Chicago-Naperville-Joliet Metropolitan Area (which includes Cook County) was \$1,393 per month. Investig. Rep., Exh. A. The Property’s monthly rent was \$1,749 per month. Thus, Waypoint’s witnesses told Commission investigators that the agent’s computer would have shown the Property as unavailable when Daniels called to inquire about it.¹⁰ *E.g.*, Winship Interview (Mar. 11, 2016).

But, as Daniels claimed, she actually was able to afford the Property with her voucher. *See* Compl. ¶ I.D. Under HACC’s “Small Area Fair Market Payment Standards,” Daniels’ voucher was worth up to \$1,850 per month to rent a 3-bedroom in zip codes that include South Holland, Illinois. *See* Investig. Rep., Exh. B (HACC Small Area Fair Market Payment Standards, eff. March 2015). Daniels’ voucher, therefore, more than covered the Property’s rent.

Respondent claims that it learned that in Cook County, HACC is able to provide additional assistance to meet higher rents than the HUD FMR for the metropolitan area only after Daniels filed her complaint with this Commission in November 2015. Imrie Interview (Mar. 11, 2016); Winship Interview (Mar. 11, 2016). Waypoint represents that it has since changed its procedures to avoid a repetition of this error. *Id.* Waypoint’s current protocol is to forward all calls about properties located in its Chicago region from the national call center to the Chicago regional office, where staff is aware of local standards and better equipped to advise voucher holders.¹¹ *Id.*

Giles Imrie (“Imrie”), Waypoint’s Legal Counsel, said that Waypoint is not aware of any other jurisdictions that do not use HUD’s list of specific fair market rents for each area of the country, so this change is limited to inquiries about homes in Chicago metropolitan area.¹² Imrie

¹⁰ Daniels also claims that “Serge” told her there were presently no “Section 8” Waypoint rental homes available in the area. Compl. ¶ I.I. While Respondent denied this allegation, Orig. Verif. Resp. ¶ B.10, it appears to be consistent with the mechanics of Waypoint’s software program. Winship explained that if a voucher holder asked if there were other properties in the area, and if the rental amounts for such properties exceeded the maximum amounts on HUD’s list of fair market rents, then Waypoint’s computers would show no properties available. Winship Interview (Mar. 11, 2016).

¹¹ It is not clear exactly when Waypoint implemented this policy change. The Original Verified Response and accompanying statement, filed on February 8, 2016, states that Respondent “correct[ed] promptly” any allegedly discriminatory conduct. Orig. Verif. Resp. ¶ C.15, Aff. Def. II; Gutierrez Stmt. Waypoint’s witnesses disclosed the details of the policy change to Commission investigators in March 2016 interviews, but these Waypoint representatives were unable to provide specific dates regarding the change. *See* Winship Interview (Mar. 11, 2016); Gutierrez Interview (Mar. 18, 2016). Despite requests from Commission staff, Respondent did not provide any documentary evidence on this point.

¹² The view that Waypoint can fully rely on HUD’s published FMRs to determine, in advance, when an HCV Program participant cannot afford to pay a particular rent for a unit located outside of Cook County appears to be mistaken. *See supra* nn. 1-5 and accompanying text. As described above, under HCV Program rules, PHAs can

Interview (Mar. 11, 2016). Imrie also expressed to Commission investigators that Waypoint prefers not to rent to HCV Program participants because of the burdens associated with the HCV Program, such as additional paperwork. *Id.*

Respondent's New Explanation

On June 23, 2016, Respondent filed a document captioned, "Respondents' First Amended Verified Response." This document purports to "withdraw" Waypoint's Original Verified Response "in its entirety" and substitute a new pleading. Amd. Verif. Resp., p. 1. Respondent's revised story is that Daniels spoke to a local leasing agent and went to see the Property, but then Daniels chose not to submit a rental application. Amd. Verif. Resp. ¶ B.2; Miller Stmt. Respondent supports this claim with newly-discovered evidence from a Customer Relationship Management database ("CRM Database") that Waypoint supposedly no longer uses but used as recently as October 2015. Imrie Interview (Mar. 11, 2016); Lopez Interview (June 7, 2016). Waypoint relies primarily on a printout of pages from the CRM Database, which purports to be a complete record of Daniels' contacts with Waypoint personnel regarding the Property. Investig. Rep., Exh. E. Waypoint refers to this document as the "Daniels' Lead Report."

Respondent asserts that on October 3, 2015, Daniels spoke with Waypoint call center representative Tom Gilbert ("Gilbert") about the Property, and was referred to a Waypoint Chicago-area Leasing Specialist, LaTisha Lopez ("Lopez"). Amd. Verif. Resp. ¶ B.2; Miller Stmt. Respondent further asserts that on or about October 12, 2015, Daniels spoke to Lopez by phone and scheduled an appointment to view the Property. *Id.* Finally, Respondent claims that on or about October 14, 2015, Lopez showed Daniels the Property, explained the rental application process, and encouraged Daniels to submit an application. *Id.* According to Respondent, Waypoint's records contain no indication that Daniels ever submitted a rental application or had any further telephone contact with Waypoint. Miller Stmt.

Waypoint tendered Lopez to explain the Daniels' Lead Report and her interactions with Daniels. Lopez, however, in her interview with Commission investigators, had no specific recollection of ever speaking to a Panichi Daniels or of showing Daniels the Property. Lopez Interview (June 7, 2016) (witness explaining that she deals with so many prospective renters that she does not always remember them all).

On its face, the Daniels' Lead Report does not include any entry clearly documenting that Daniels actually saw the Property. Instead, Respondent's claim that this happened is based on extrapolation from the following facts: The first page of this Report shows that on October 12, 2015 at 4:27 p.m., Daniels' status was changed from "New" to "Outreach," and a few minutes later (at 4:31 p.m.), Daniels' status was changed again from "Outreach" to "Showing Scheduled." Investig. Rep., Exh. E, p.1. "Latisha Lopez" is recorded as the "user" for both

choose to provide rental assistance at up to 110 percent of a listed HUD FMR (and higher, with HUD permission for an exception). In addition, voucher holders may choose to spend an extra 10 percent of their income for rent if the rent on their chosen unit is higher than the PHA's payment standards. Given this possible upward variance on the amount of rent that any given inquiring voucher holder can pay, sending all voucher holders away by telling them that properties are "unavailable" – based on nothing but the HUD FMR list – is likely still contrary to federal fair housing goals, and in some jurisdictions, local law.

entries. *Id.* Lopez explained that the first entry shows that she (Lopez) called Daniels at 4:27 p.m., and that she must have reached Daniels at 4:31 p.m. because the second entry shows that Lopez scheduled a showing for Daniels. Lopez Interview (July 28, 2016).

A third entry on October 14, 2015 (oddly, at 3:13 a.m.) shows that Daniels' status was changed from "Showing Scheduled" to "Need Appli[cation]."¹³ *Investig. Rep.*, Exh. E, p.1. Lopez explained that, based on the regular meaning of this type of notation, this means that at some point between October 12 and October 14, 2015, Daniels must have viewed the Property. Lopez Interview (July 28, 2016). As Lopez explained how the CRM Database works, a lead report would not include the entry "Need Application" as the next step unless the prior step – a showing – had already occurred.¹⁴ *Id.*

This does not necessarily mean, however, that Lopez herself showed the Property to Daniels. *Id.* Waypoint's process allows leasing agents to provide potential renters with remote access to its rental properties. *Id.* This is done by sending a code to a device that unlocks the realtor lock box, which is located outside the property and contains the keys needed for entry. *Id.* So, Daniels could have gone to see the Property on her own without ever meeting Lopez. Lopez admitted that nothing in the Report indicates which type of showing occurred. *Id.*

Another entry in the Daniels' Lead Report notes that in Daniels' initial October 3, 2015 phone call to Waypoint about the Property, Daniels told Gilbert that she has a voucher. *See* *Investig. Rep.*, Exh. E, p. 11 ("Has a Housing Voucher"). Lopez had no personal knowledge or information about that part of the Report because the comment was inserted by Gilbert, but she did say that the Daniels' Lead Report shows that she (Lopez) first became aware of Daniels' inquiry about the Property on October 3, 2015. Lopez Interview (July 28, 2016). Asked by Commission staff why it took her more than a week to call Daniels about the Property, Lopez said that she was too busy to call sooner. *Id.* The Daniels' Lead Report notes that the "lead" (*i.e.* Daniels) "will expect a call within 24 to 48 hours." *Investig. Rep.*, Exh. E, p. 8.¹⁵

When Commission staff asked Daniels about Respondent's new version of events, Daniels stood by the veracity of her complaint. Daniels Interview (July 28, 2016). Daniels reiterated that when she called Waypoint on or about October 14, 2015, she was told that the

¹³ While the far right edge of this copy of the document page is missing, there seems to be no doubt that the full word on the original is "Application."

¹⁴ In the alternative, Respondent theorizes that Daniels may have been told that the Property was unavailable because another potential tenant had filed an application, thus temporarily taking the unit off the market while the rental application was pending. *Amd. Verif. Resp.* ¶ B.6. The only evidence Waypoint produced in support of this claim relates to rental applications submitted on the Property after Daniels had already filed this complaint. *Id.* (Waypoint submitted some business records showing that the Property was unavailable at various points from December 2, 2015 to February 3, 2016 due to pending rental applications). Waypoint has not produced any evidence of rental applications pending on the Property during the first two weeks of October 2015.

¹⁵ The Daniels Lead Report also contains the unexplained notation that it was "Last Modified By" "Ashwin Rachakonda" on January 9, 2016, two months after this complaint was filed. *Investig. Rep.*, Exh. E, p. 6. The meaning of this entry is unclear, however. It appears in the middle of the Report (in a section headed "Partner Agent Info"), and elsewhere in the Report (under the phrase "Stage Need Application") there is a "Last Modified Date" of October 14, 2015. *Id.* at 8.

Property was not available. Daniels also specifically stated that she was not given the opportunity to view the Property. *Id.*

DISCUSSION

The Human Rights Ordinance prohibits “mak[ing] any distinction, discrimination, or restriction in the price, terms, conditions, or privileges of any real estate transaction, including the decision to engage in . . . any real estate transaction on the basis of unlawful discrimination.” County Code, § 42-38(b)(1). As used in the ordinance, “unlawful discrimination” includes “discrimination against a person because of . . . that person’s . . . source of income.” *Id.* at § 42-31. “Source of income” is defined broadly to mean “the lawful manner by which an individual supports himself or herself and his or her dependents.” *Id.* This definition was amended in 2013 to remove an exclusion for the use of Housing Choice Vouchers. *See also Miranda v. Pescatore*, 2014H001, *6-7 (CCHRC Oct. 16, 2014) (citing *Godinez v. Sullivan-Lackey*, 352 Ill. App. 3d 87, 91 (1st Dist. 2004) (recognizing appellate court’s holding that Housing Choice Vouchers are a protected “source of income” under the Chicago Fair Housing Ordinance, and noting that Chicago’s ordinance definition of “source of income” is identical to that in the County ordinance)).

This protection against unlawful source of income discrimination in housing applies to the rental of residential real estate located in Cook County. County Code, § 42-38(a) (defining “real estate transaction”). The rental property at issue in this matter is located in South Holland, Illinois.

A Direct Admission of Unlawful Housing Discrimination

In determining whether there is sufficient evidence of unlawful discrimination in this matter to merit further proceedings on Daniels’ claim, the Commission must first consider whether Waypoint simply admitted to engaging in conduct that violates the Human Rights Ordinance. Given that Respondent’s Original Verified Response admitted the truth of Daniels’ allegations about her call to Waypoint, arguably the legal standards for a direct admission apply. “Direct evidence is that which can be interpreted as an acknowledgment of the defendant’s discriminatory intent.” *Kormoczy v. U.S. Dep’t of Hous. & Urban Dev.*, 53 F.3d 821, 824 (7th Cir. 1995). *See, e.g., Cato v. Jilek*, 779 F. Supp. 937, 941-42 (N.D. Ill. 1991) (court found sufficient direct evidence of racial discrimination where landlord testified that the reason he rejected the black plaintiffs’ rental application and instead offered the unit to a white couple was that he was “afraid of [his] tenants and what they would do to [his] new building or to the Plaintiffs” after an existing tenant told him, “[I]f you rent the apartment to the two people you just showed the apartment to, you will have a lot of trouble around here.”); *Krieman v. Crystal Lake Apts. L.P.*, 2006 U.S. Dist. LEXIS 35379, *27-29 (N.D. Ill. May 31, 2006) (direct evidence was plaintiffs’ testimony that on numerous occasions, each plaintiff had heard defendant making derogatory statements about the male plaintiff’s race to other residents of the apartment complex).

For the first six months of this investigation, Waypoint admitted Daniels’ claim that a Waypoint representative told her that the Property was unavailable because she was going to use a housing choice voucher to pay the rent. *See Orig. Verif. Resp.* ¶ B.7. Moreover, as part of the

Commission's investigation into Daniels' complaint, Waypoint produced witnesses who confirmed that the conversation reported in Daniels' complaint is consistent with the expected process and outcome under Waypoint's then-current policy for fielding calls from HCV Program participants. Gutierrez Interview (Mar. 18, 2016); Imrie Interview (Mar. 11, 2016); Winship Interview (Mar. 11, 2016).

According to Respondent, however, what happened to Daniels was an innocent mistake. It occurred only because the national home rental company was unaware that the local housing authority in Cook County was in a HUD pilot program which allowed its voucher holders to choose housing with higher rents than those seen on HUD's published list of FMRs for the metropolitan area that includes Cook County. Orig. Verif. Resp. ¶ B.9; Gutierrez Stmt.; Imrie Interview (Mar. 11, 2016). *See also* Imrie Interview (Mar. 11, 2016); Winship Interview (Mar. 11, 2016).

The Commission has taken the position that the requirement not to discriminate on the basis of a tenant or buyer's source of income does not preclude a landlord or seller from favoring the party who will pay more to lease or purchase a property. *See Miranda v. Pescatore*, 2014H001, *3 (CCHRC Oct. 16, 2014) (holding that it is not source of income discrimination for a home seller to accept an offer that is worth more money than complainant's offer). And so, Waypoint's genuinely held belief that Daniels could not afford to rent the Property would diminish the Commission's willingness to assume ill intent from Respondent's conduct at this stage of the proceedings.

The difficulty for Waypoint, however, is that Respondent also produced evidence which undercuts its claim that it genuinely believed Daniels could not afford to rent the property with her housing choice voucher.¹⁶ Namely, Waypoint produced evidence that it characterizes as demonstrating that it showed Daniels the Property. *See, e.g.*, Investig. Rep., Exh. E; Lopez Interview (July 28, 2016). This new evidence, of course, correspondingly suggests that Waypoint knew at the time of her inquiry that Daniels was able to rent the Property using her voucher. This is precisely the type of factual dispute that the Commission advances cases to a hearing to resolve.

Whether Waypoint admitted a violation in this case, however, is a moot point because Respondent has since recanted its initial admission to Daniels' allegation that she was told that the Property was unavailable in early October 2015 because Daniels was an HCV Program participant. Respondent now claims that Daniels' contacts with Waypoint are documented in its business records, and that these records instead show that on or about October 14, 2015, Daniels actually viewed the Property but then failed to follow through by submitting a rental application,

¹⁶ Respondent's claim that it was ignorant of HACC's ability to pay higher rents in Cook County is similarly weakened by evidence that it produced as part of the Commission's investigation. Waypoint produced evidence that it is a sophisticated home rental company with significant experience renting to HCV Program participants. *See, e.g.*, Gutierrez Interview (Mar. 18, 2016) (estimated that 10 percent of Waypoint's rental business comes from voucher holders and noting that Chicago-area Waypoint staff worked closely with HACC counselors to help HACC voucher holders with the rental process); Winship Interview (Mar. 11, 2016) (Waypoint had a dedicated Affordable Housing Group).

as expected. Given Respondent’s current position, the Commission must turn to indirect methods to determine whether there is sufficient evidence of an ordinance violation to merit a hearing.

Indirect Evidence of Unlawful Housing Discrimination

Except in the rare case of a direct admission of discrimination, the Commission evaluates discrimination claims using a “hybrid” test, which combines the well-established *McDonnell-Douglas* burden-shifting method with the expanded types of proof allowed in the newer “mosaic” test. *See, e.g., Bell v. Parkville Autobody, Inc.*, 2014E010, *5 (CCHRC Apr. 20, 2014).

While adapting this test for the refusal to rent context, the Commission takes a fresh look at the *prima facie* case for this permutation of housing discrimination. The common formulation, employed in Commission precedent, generally requires a complainant to show that: (1) she is a member of a group protected by the Human Rights Ordinance; (2) she applied for and was qualified to rent the property in question; (3) she was rejected as a prospective tenant; and (4) the rental property remained available thereafter. *See, e.g., Piesen v. Fluerisca*, 1998H032, *6 (CCHRC Apr. 11, 2002); Robert G. Schwemm, *Housing Discrimination* § 10-2 (2014) (collecting cases).

Though generally adequate for most applications, a more expansive approach is necessary to reach ordinance violations where, as here, a complainant alleges that he or she was deterred from submitting a rental application at all. A violation of the Human Rights Ordinance will be found in the traditional case where a respondent rejects a rental application on discriminatory grounds, but the ordinance equally prohibits a respondent from acting out its discriminatory animus by preventing a complainant from even submitting an application in the first instance. The Commission now modifies the second element of its *prima facie* housing discrimination case so that it may be satisfied if there is substantial evidence that either the respondent did not allow the complainant to submit an application or it was clear that doing so would be a “futile gesture.”¹⁷

Similarly, while respondents can be presumed to be aware when interacting with members of many protected classes, there is no reason to presume that a respondent intent on engaging in source of income discrimination would recognize a member of that class absent notice of the fact. The Commission now modifies the first element of its *prima facie* housing discrimination case to require evidence that the respondent was aware of complainant’s membership in a protected class before inferring a discriminatory motive. *Cf. LaCaria v. Gail’s Carriage Inn, Inc.*, 2015E002 (Apr. 6, 2016) (imposing a similar requirement in pregnancy discrimination cases).

¹⁷ Federal courts have adopted a similar approach to the enforcement of federal housing discrimination laws. *See, e.g., Darby v. Ridge*, 806 F. Supp. 170, 173-75 (E.D. Mich. 1992) (following *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990)) (rejecting the common approach of requiring a submitted and rejected application; applying “futile gesture” rationale, found sufficient evidence that plaintiff did not submit application because she had been reliably informed of lessor’s discriminatory policies against persons in her protected class).

Putting these modifications together, in the refusal to rent context, the Commission's hybrid test works as follows: First, a complainant must establish a *prima facie* case of housing discrimination by identifying substantial evidence showing that:

- 1) She is a member of a group protected by the Human Rights Ordinance and respondent knew or had reason to know this;
- 2) She attempted to and was qualified to rent the property at issue;
- 3) Respondent denied her the opportunity to rent the property; and
- 4) Some strongly probative evidence raises the inference that respondent had a discriminatory motive to do so.

Paralleling the Commission's hybrid test in the employment discrimination context, satisfying the fourth element of this *prima facie* case is not limited to the traditional method (*i.e.* showing that after complainant was rejected, the apartment remained available to rent). It may also be met by any other kind of evidence suggesting discriminatory intent, such as suspicious timing, derogatory statements about members of the protected class, or generally unfavorable treatment of other potential applicants within the protected class. *See, e.g., LaCaria, 2015E002 at *8.*

If the complainant establishes the *prima facie* case, then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the adverse housing decision. If the respondent provides such an explanation, then the burden shifts back to the complainant. *Id.* To move forward to a hearing, the complainant must be able to point to substantial evidence that the respondent's proffered explanation is pretextual. *Id.*

Applying this test to the evidence adduced during the Commission's investigation of Daniels' complaint, there is support for a *prima facie* case of unlawful housing discrimination. Daniels meets the first element. The parties agree that Daniels is a member of a group protected by the Human Rights Ordinance: a person seeking to use a housing choice voucher as her source of income for renting a home in Cook County. *See* Compl. ¶ I.A; Amd. Verif. Resp. ¶ B.1. In addition, there is no doubt that Daniels shared this information with Waypoint when inquiring about the Property. *See* Compl. ¶ I.F; Gutierrez Stmt, p. 1 ("Ms. Daniels indicated that she participated in the housing choice voucher program."); Investig. Rep., Exh. E (Daniels' Lead Report), p. 11 (comments section notes that Daniels is a voucher holder).

The second element is also satisfied. Daniels alleges that when she called Waypoint about the Property on October 14, 2015, she was "ready, willing and able to pursue rental of it with the financial assistance provided by [her] voucher." Compl. ¶ I.D. While Daniels does not claim she submitted an application (or took any other concrete steps towards renting the Property), she explained the reason: on that phone call, Waypoint's agent "Serge" told her that the Property "was not available to rent using 'Section 8.'"¹⁸ *See id.* at ¶ I.F. Evidence from the investigation

¹⁸ Daniels' complaint goes further and alleges that because she would be using a voucher to pay rent, "Serge" refused to allow her to view the Property or complete an application or rent the Property. Compl. ¶ I.H. These

supports that this is what Daniels would have been told at the time, given that the Property's rent was higher than the HUD limit that Waypoint then believed applied. *See, e.g.*, Winship Interview (Mar. 11, 2016). Daniels' claim that she was ready to rent the Property is further supported by her financial ability to do so. *See* Compl. ¶ I.C (Property's rent was \$1,749/month); Amd. Verif. Resp. ¶ B.3 (same); Investig. Rep., Exh. B (2015 HACC Fair Market Rent Standards) (showing HACC voucher holders able to pay up to \$1,850/month for a 3-bedroom unit in South Holland).

Though contested, the third element of the *prima facie* case – that Respondent denied Daniels the opportunity to rent the Property – is also supported by some evidence. Daniels alleged in her complaint that Waypoint's agent refused to allow her to view the Property or complete an application or rent the Property, and she reasserted these claims during her interview with Commission staff. Compl. ¶ I.H; Daniels Interview (July 28, 2016). Waypoint produced witnesses who explained that, based on the process and policy that Waypoint had in effect in October 2015, Daniels would have been told that the Property was unavailable when she inquired about it. *See, e.g.*, Winship Interview (Mar. 11, 2016); Gutierrez Interview (Mar. 18, 2016). Respondent's new position – that Daniels was in fact allowed to view the Property but abandoned her interest – is also supported by some evidence. But that evidence is not so overwhelming that it would be unreasonable for an administrative law judge at a hearing to find one set of witnesses' testimony more plausible than Waypoint's belatedly discovered documents.

The fourth element is easily satisfied at this stage of the proceedings as well. Daniels' claim of housing discrimination meets the traditional test: the Property remained available to rent after Daniels' interest in the Property was allegedly rebuffed on October 14, 2015. *See* Investig. Rep., Exh. F (Leasing Activity Report for Property). That the Property was rented some five months later to an HCV Program participant (*see* Amd. Verif. Resp. ¶ B.7) does not alter this finding. Other types of strongly probative evidence also raise the inference of a discriminatory motive. For example, despite doing a sizeable business with HCV Program participants, Waypoint appears to have a dim view of entering into real estate transactions with members of this protected class. Waypoint's Legal Counsel informed Commission staff that Waypoint prefers not to rent to voucher holders because of what it perceives as additional administrative burdens. *See* Imrie Interview (Mar. 11, 2016). In sum, there is substantial evidence to show a *prima facie* case of housing discrimination.

Next, Respondent has met its burden of articulating a legitimate, non-discriminatory reason for denying Daniels the opportunity to rent the Property: she failed to submit a rental application after speaking with a Waypoint Leasing Specialist and viewing the Property. Miller Stmt. Respondent now claims that its business records, generated by its CRM Database, accurately document all contacts that Daniels had with Waypoint representatives about the Property, and that there is nothing in its records to verify that Daniels had a phone conversation with "Serge" on or about October 14, 2015. Instead, Respondent asserts, Waypoint records show only the following: Daniels' first phone call about the Property was answered by a Tom Gilbert on October 3, 2015 and on that date Gilbert referred this "lead" to a local Chicago office Leasing Specialist, LaTisha Lopez. Amd. Verif. Resp. ¶ B.5. These records further show that: on or about

allegations illustrate the "futile gesture" rationale for not making the rental application an inflexible element of the *prima facie* case.

October 12, 2015, Lopez scheduled a tour of the Property for Daniels; Daniels was shown the home by Lopez on or about October 14, 2015; and Daniels never followed through with the expected next step, submission of a rental application. *Id.* See also Lopez Interview (July 28, 2016) (clarifying that alternatively, Daniels may have viewed the Property remotely by prior arrangement with Lopez).

The Commission will send this matter for a hearing on the merits because although not dispositive, there is substantial evidence that Respondent's asserted non-discriminatory reason for not renting Daniels the Property is a pretext for discrimination. "To meet this burden, a complainant must 'identify such weaknesses, implausibilities, inconsistencies, or contradictions' in the [respondent]'s asserted justification 'that a reasonable person could find [it] unworthy of credence.'" *LaCaria*, 2015E002 at *10 (citations omitted).

In this case, the first red flag is the inconsistent nature of the statements that Waypoint has made to the Commission to explain its conduct with respect to Daniels. The Commission recognizes that Respondent intended its Amended Verified Response to withdraw all reference to its initial admission that Daniels was told the Property was unavailable and was denied the opportunity to submit a rental application. The Commission, however, has no procedure that allows a respondent to change its response to a complaint that has not been amended or to retract its original statements.¹⁹ It is certainly not unusual for parties to change or revise their stories during the course of an investigation; nonetheless, the Commission still considers all relevant information provided by parties.

The impact of inconsistencies in parties' stories over the course of an investigation depends on all the circumstances. Here, Respondent has presented the Commission with two stories that are so inconsistent that it is unlikely that they can both be true. If Waypoint had designed screening software around benign ignorance of the HCV Program rules applicable in Cook County, it is unlikely that a Waypoint representative would have arranged for Daniels to view the Property. If Daniels viewed the Property, it calls into question the accuracy of the testimony offered by Waypoint representatives like Winship and Gutierrez who explained to Commission investigators why Daniels would have been told that the Property was unavailable when she called to inquire.

As to the business records on which Respondent now bases its defense that Daniels was shown the Property and given an opportunity to submit a rental application, the Commission will not, at this stage, foreclose an administrative law judge's opportunity to test the reliability and even authenticity of the documents. The documents are printouts of several reports in Waypoint's formerly-used database. As such, they are modifiable and, in fact, were modified after the investigation into Daniels' complaint had begun.²⁰ See Investig. Rep., Exh. E (Daniels

¹⁹ Cf. CCHR Pro. R. 420.140 (B), (J) (allowing amendment of complaint prior to evidence determination and requiring new verified response).

²⁰ In addition, one of the three documents provided by Respondent, a Leasing Activity Report for the Property (Investig. Rep., Exh. F) appears to be missing important information. While it purports to list all persons submitting applications to rent the Property, it omits the person whose application was pending when Daniels tried again to see the Property in December 2015. See *id.*; Investig. Rep., Exh. D (Powell Lead Report).

Lead Report). And, as readily admitted by the Waypoint witness charged with explaining these documents to Commission staff, nowhere in the Daniels Lead Report (or any document) does it clearly state the key fact: that Daniels (allegedly) viewed the Property on or about October 14, 2015. Lopez Interview (July 28, 2016). Lopez herself did not recall showing Daniels the Property. Thus, Waypoint's entire defense rests on her recollection that in Waypoint's formerly-used database, the phrase "needs application" would not have been written or appeared in a lead report unless someone had invited the lead to a showing and then, even if the lead had viewed the Property alone, someone somehow knew it had occurred. *Id.* (noting that Daniels could have viewed the Property alone because sometimes leasing agents simply provided leads with the lockbox access code).

All this is not to say that an administrative law judge examining this same evidence and any additional evidence the parties produce at a hearing could not reasonably find for Waypoint. It is only to say that at this point, based on the totality of the evidence from the Commission's investigation, it would not be unreasonable for an administrative law judge to conclude that Respondent's new claim about its contacts with Daniels is a pretext for source of income discrimination.

CONCLUSION

For the foregoing reasons, the Commission finds SUBSTANTIAL EVIDENCE to support the unlawful discrimination claim based on source of income in Complaint No. 2015H003 pending before the Commission. The Commission will issue a notice of the date and time of an Initial Status for a dispositive Administrative Hearing on this claim.

September 27, 2016

By delegation:



Ranjit Hakim
Executive Director of the
Cook County Commission on Human Rights