

APPENDIX .

Appendix A

USCA11 Case: 23-12413 Doc. 172-1, 12/23/25

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

Nos. 23-12413, 23-13392
Non-Argument Calendar

CARLOS A. ALONSO CANO,
as next friend of his minor daughters
Katy Alonso Morejon and Jany Leidy Alonso
Morejon,

FE MOREJON FERNANDEZ,

Plaintiffs-Appellants,

JANY L. ALONSO,

Interested Party-Appellant,

versus

245 C&C, LLC, CFH GROUP, LLC,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-21826-JAL

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Before LUCK, LAGOA, and WILSON, Circuit Judges.

PER CURIAM:

In this consolidated appeal, Plaintiffs-Appellants Carlos Alonso Cano (Cano); his wife, Fe Morejon Fernandez; and their daughter, Jany Alonso Morejon (collectively, Appellants),¹ appeal:

(1) various discovery, pretrial, and posttrial orders; (2) the district court's partial grant of summary judgment in favor of Defendants-Appellees 245 C&C, LLC and CFH Group, LLC (collectively, Appellees) on Appellants' Fair Housing Act (FHA) discrimination and retaliation claims, 42 U.S.C. § 3601 et seq., and state law claim for the breach of the covenant of quiet enjoyment; and (3) the district court's verdict in favor of Appellees on Appellants' remaining FHA discrimination claims following a bench trial. After careful review, we affirm in part and dismiss in part this appeal.

I.

Appellants first argue that the magistrate judge and the district judge abused their discretion in imposing a \$3,000 sanction against Cano for a discovery violation.

We review a district court's discovery order imposing sanctions for an abuse of discretion. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir. 1997). A district court abuses its discretion when it "applies an incorrect legal standard, fails to follow the appropriate procedures

¹ Angie Morejon and Katy Morejon, while plaintiffs below, are not parties in the present appeal.

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when making the relevant determination, or makes findings of fact that are clearly erroneous.” *Consumer Fin. Prot. Bureau v. Brown*, 69 F.4th 1321, 1329 (11th Cir. 2023). We will not reverse the imposition of sanctions unless we are left with a “definite and firm conviction” that the district court made a “clear error of judgment.” *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1313 (11th Cir. 2011). We afford “wide discretion” to district courts when they impose sanctions because the imposition of sanctions is “heavily dependent on the court’s firsthand knowledge, experience, and observation.” *Brown*, 69 F.4th at 1329.

Pro se briefs are liberally construed. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam). Importantly, “[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.” Fed. R. App. P. 10(b)(2). The burden is on the appellant to ensure the appellate record is complete, and we “must affirm the district court when an appellant fails to provide all the evidence that the trial court had before it when making various contested . . . rulings.” *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir. 2002) (per curiam). Under 28 U.S.C. § 1927, any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who unreasonably and vexatiously multiplies proceedings may be required to pay the attorney’s fees and costs incurred by his conduct.

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Under Rule 37(a), a party may move for an order compelling disclosure or discovery, and if the motion is granted, "the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(1), (5)(A) (emphasis added). However, the court must not order payment of sanctions if the movant filed the motion before attempting in good faith to obtain the discovery sought, the opposing party's nondisclosure was substantially justified, or other circumstances would make the payment of sanctions unjust. Fed. R. Civ. P. 37(a)(5)(A)(i)-(iii).

Here, neither the magistrate judge nor the district judge abused their discussion in imposing the sanction against Cano. Although Cano argued that the sanction should have been imposed against his attorney Michael Lutfy under § 1927, the magistrate judge appropriately relied on Federal Rule 37, which allows for the sanction to be imposed upon a party. The record reveals that the district court allowed Cano an opportunity to respond and appropriately determined that it was not left with a definite and firm conviction that the magistrate judge made a clear error of judgment. *Josendis*, 662 F.3d at 1313. Further, Appellants failed to ensure the record was complete. As the party with the burden of proof, Appellants failed to provide the relevant discovery hearing transcripts to both the district court and this court. Their failure to

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provide these transcripts supports the conclusion that this court should affirm the imposition of sanctions.

Because Cano failed to demonstrate that his delay in disclosing discovery was substantially justified, we affirm the impositions of sanctions against Cano.

II.

Appellants next challenge the magistrate judge's orders granting Appellees' motion to strike their jury demand and denying Appellants' motion to amend their second amended complaint. Appellees contend that this court lacks jurisdiction to consider the issue because Appellants failed to timely object to the magistrate judge's orders under Federal Rule of Civil Procedure 72(a). We review our subject-matter jurisdiction de novo. *Sloan v. Drummond Co., Inc.*, 102 F.4th 1169, 1173 (11th Cir. 2024). Generally, our jurisdiction is limited to "final decisions of the district courts." 28 U.S.C. § 1291. A federal magistrate judge may be assigned to hear and determine non-dispositive pretrial matters and are subject to reconsideration by the district court if there are timely objections or an order is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a)–(b). A magistrate judge's order denying a plaintiffs' motion to amend their complaint is a non-dispositive pretrial motion. *Smith v. Marcus & Millichap, Inc.*, 106 F.4th 1091, 1099 (11th Cir. 2024). Pro se parties are required to follow procedural rules. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007) (per curiam).

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When a non-dispositive pretrial matter is referred to a magistrate judge, “[a] party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to.” Fed. R. Civ. P. 72(a). As such, Rule 72(a) applies to instances where a party fails to object to the magistrate judge’s order. See *Smith*, 106 F.4th at 1099–1100.

Pursuant to 28 U.S.C. § 636(b)(1)(A), when a magistrate judge rules on a pretrial matter, the “[a]ppeals from the magistrate’s ruling must be to the district court,” so we lack jurisdiction to hear appeals “directly from federal magistrates.” *United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980).² We have applied *Renfro* in cases where a magistrate judge issues a non-dispositive order, a party failed to object to the order, and the same party subsequently appealed from a final judgment. *United States v. Schultz*, 565 F.3d 1353, 1359–62 (11th Cir. 2009) (per curiam).

Here, we lack jurisdiction to consider Appellants’ challenge to the magistrate judge’s order granting Appellees’ motion to strike their jury demand and the order denying their motion to amend their second amended complaint because they failed to timely

² We are bound by decisions of the United States Court of Appeals for the Fifth Circuit issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

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object to the magistrate judge's order under Rule 72.³ Thus, we dismiss this issue.

III.

Next, Appellants challenge the district court's partial grant of summary judgment in favor of Appellees on their second amended complaint's Counts 4, 5, 9, 10, 11, 12, and 14. Count 4 addressed Appellants' requested accommodation for Appellees to paint their guest bathtub. Count 5 focused on Appellants' noise complaints coming from tree trimming and pressure washing equipment. Count 9 alleged retaliatory actions by Appellees because of Appellants' failure to remove tape from their windows. Those retaliatory actions include Appellees threatening to fine Appellants \$150, providing a seven-day notice to cure, and later giving a lease termination notice. Count 10 claimed that Appellants suffered harassment from On Call Patrol. Count 11 asserted that there was a causal connection between Appellants filing their second Housing and Urban Development Department (HUD) complaint and Appellees initiating eviction proceedings. Count 12 asserted that Appellees appealing the state court's decision regarding the state eviction proceedings was frivolous. Count 14 alleged that Appellees breached the covenant of quiet enjoyment.

We review a district court's grant of summary judgment de novo. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1291 (11th Cir. 2012).

³ Appellants also challenge the magistrate judge's authority to rule on the motion to strike. But we need not consider the merits of Appellants' contentions as a result. *Weber v. Finker*, 554 F.3d 1379, 1385 (11th Cir. 2009).

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Summary judgment is proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). We construe all facts and draw all reasonable inferences in favor of the nonmoving party. *Jones*, 683 F.3d at 1291–92.

A party abandons claims on appeal when they fail to plainly and prominently raise the issue in their brief. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Parties must do more than make passing references or raise the issue in a perfunctory manner to adequately preserve an issue for appellate review. *Id.* Thus, to properly preserve an argument for appellate review, a party must advance arguments or cite authority to establish the district court’s error. *Id.* This rule applies to pro se parties because although we liberally construe pro se briefings, issues not briefed on appeal by pro se litigants are deemed abandoned. *Timson*, 518 F.3d at 874.

The FHA prohibits landlords from discriminating against individuals on the basis of their disability by refusing to make necessary reasonable accommodations or modifications to afford that person an equal opportunity to use and enjoy their dwelling or the premises. *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014). An FHA failure to accommodate claim has four elements: (1) the plaintiff is disabled; (2) the plaintiff requested

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a reasonable accommodation; (3) the requested accommodation was necessary to give the plaintiff an opportunity to use and enjoy his dwelling; and (4) the defendants refused to make the accommodation. *Id.*

As to the first element, defendants must know of the complained of handicap and the necessity of the accommodation, as they cannot be held liable for refusing to grant an accommodation that they did not know was necessary. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1219 (11th Cir. 2008). If a landlord is skeptical about a tenant's alleged disability, the landlord must request documentation or open a dialogue with the tenant regarding the disability. *Bhogaita*, 765 F.3d at 1287. As to the third element, the requested accommodation "must (1) actually alleviate the effects of the plaintiff's disability and (2) address the needs created by the plaintiff's disability." *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, 46 F.4th 1268, 1280 (11th Cir. 2022). We take a more expansive view of the term necessary, asking if the effect of the handicap, not the handicap per se, would be alleviated by the requested accommodation. *Schaw v. Habitat for Human. of Citrus Cnty., Inc.*, 938 F.3d 1259, 1270 (11th Cir. 2019). Additionally, the FHA makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" the FHA. 42 U.S.C. § 3617.

Unlawful conduct under this

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statute includes “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of [their] handicap,” “[r]etaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act,” and “[r]etaliating against any person because that person reported a discriminatory housing practice to a housing provider or other authority.” 24 C.F.R. § 100.400(c)(2), (5), (6).

To establish a prima facie case of retaliation, a plaintiff must demonstrate that he engaged in a protected activity, he suffered an adverse action, and there was a causal connection between the protected activity and the adverse action. *Frazier-White v. Gee*, 818 F.3d 1249, 1258 (11th Cir. 2016). The protected activity element may be met by the plaintiff making a reasonable accommodation request. *Id.* A plaintiff must also demonstrate that they had a reasonable, good faith belief that the defendant was engaging in unlawful activity. *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1311 (11th Cir. 2002). Good faith belief requires the belief itself to be objectively reasonable in light of the facts. *Id.* A lack of statutory support or case law demonstrating defendants’ activities were unlawful supports the finding that a plaintiff’s belief is not objectively reasonable. See *Dixon v. The Hallmark Co., Inc.*, 627 F.3d 849, 857 (11th Cir. 2010).

The third element also requires a showing of but-for causation. *Frazier-White*, 818 F.3d at 1258. To establish causation, the plaintiff

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must demonstrate that the decisionmaker was aware of the plaintiff engaging in protected conduct and that the protected conduct and the adverse action were not wholly unrelated. *Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1211 (11th Cir. 2013).

Where express covenants in a lease provision are inconsistent with the implied covenant of quiet enjoyment, a court is free to give effect to both the express and implied covenants. *Stinson, Lyons, Gerlin & Bustamante, P.A. v. Brickell Bldg. 1 Holding Co., Inc.*, 923 F.2d 810, 815 (11th Cir. 1991).

As an initial matter, Appellants abandoned any challenges as to Counts 4 and 10 because they failed to plainly and prominently argue those issues in their brief. *Sapuppo*, 739 F.3d at 681.

To Count 5, in which Appellants complained of the noisy equipment from the tree trimmers and pressure washing, the district court properly determined that there was no dispute of material fact showing that Appellees knew the reasonable accommodations requested were necessary nor did they have prior knowledge of Angie's disability.

First, the record does not support that the effects of Angie's disability would have been alleviated by accommodations. A review of medical evidence in the record reveals that Angie was diagnosed with hearing loss, with one doctor noting that he had no startle response to sounds as loud as 100 decibels. Appellants' submitted videos reflect almost inaudible sound when their sliding glass door is closed, the

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volume only increasing when the door was open or when there was a short burst of sound from a chainsaw or woodchipper. Second, Cano's complaints never expressed how Angie's disabilities made him sensitive to loud noises nor why the requested accommodation was necessary. Cano referred to Angie as his disabled son, but did not explicitly share that Angie had a sensitivity to noise nor provided documentation that would support his accommodation requests. Rather, Cano merely stated that his disabled son was inconvenienced or that Angie's sleep was disrupted by noise.

Also, Appellants were unable to establish that the district judge failed to consider all relevant evidence in making this determination, including evidence from Appellants' self-titled PSUSB. We find the district court properly considered all relevant evidence, including citing to evidence submitted on the PSUSB.⁴

As such, the district court did not err in granting summary judgment in favor of Appellees on Count 5 because there is no genuine dispute of material fact as to whether the requested accommodation was necessary or if Appellees even knew the requested accommodation could have been necessary.

We affirm the district court's ruling on Count 9 because Appellants were unable to establish that Appellees engaged in retaliation after Appellants did not

⁴ The PSUSB is a USB that contained both evidence included in the previous USB as well as evidence not submitted within the first USB.

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remove tape from their windows. Appellees threatened to fine Appellants \$150 for failing to remove tape from their windows, provided Appellants a seven-day notice to cure, and then gave Appellants a notice of termination of their lease. Appellants did not demonstrate that they had a reasonable good faith belief that Appellee's actions were unlawful. *Weeks*, 291 F.3d at 1311. There is neither statutory support nor case law that would support an objective belief that Appellees violated the law by telling their tenants they needed to remove tape from their windows or face a fine. There is similarly no statute nor case that prohibits landlords from giving noncompliant tenants a notice to cure or a non-renewal letter. Thus, Appellant's belief was not objectively reasonable. As such, there is no genuine dispute of material fact and the district court properly granted summary judgment as to Count 9.

We affirm the district court's determination that there was no genuine issue of material fact in Count 11 regarding the causal connection between Appellees initiating eviction proceedings and Appellants filing their second HUD complaint. Appellants filed their second HUD complaint one day after being served with the notice of nonrenewal. Appellants then refused to vacate the apartment in accordance with the nonrenewal, at which time Appellees initiated eviction proceedings. Further, once Appellees had notice of the HUD complaint, they came to a mutual agreement to extend Appellants' move out date by five months to accommodate the investigation. The record provides no evidence that Appellees had

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knowledge of the HUD complaint when they initiated eviction processes, therefore Appellants' HUD complaint could not have been the but-for cause of their eviction. Thus, there is no genuine dispute of material fact and the district court appropriately granted summary judgment as to Count 11.

We affirm the district court's determination on Count 12 because Appellants failed to demonstrate that Appellees acted in retaliation through their appeal in the state eviction proceedings. Record evidence supports that Appellees appealed the decision from the state court eviction proceedings in Florida state court because they had a reasonable belief they were entitled to judgment in their favor, not, as Appellants claim, as an abuse of process to threaten, coerce, intimidate, or retaliate against Appellants. Thus, we find that Appellants failed to show a genuine issue of material fact and the district court properly granted summary judgment to Appellees as to Count 12.

We affirm the district court's determination on Count 14. Appellants failed to establish a genuine dispute of material fact by demonstrating that Appellees violated the covenant of quiet enjoyment because their claims are either waived by the lease agreement and good conduct addendum or not supported by record evidence. Appellants' allegations as to maintenance workers and fumigators entering their apartment without prior notice is waived by the express covenant in the lease that allows maintenance and pest control to enter Appellants' apartment "at any reasonable time, without notice for inspection." Appellants' complaints

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about their noisy neighbors are waived by the good conduct addendum, in which Appellants agreed to tell management of any noise problems and allow staff to handle it in an appropriate manner. Appellants' allegations regarding the water shut off are waived by the lease agreement and good conduct addendum because Appellants acknowledged in the good conduct addendum that it was possible water could be turned off temporarily without notification during an emergency. And when the water shut off happened outside of an emergency, Appellees gave Appellants advanced notice. Finally, as to Appellants' complaint about the laundry equipment making noise, the record demonstrates that the laundry equipment's noise was not audible in Appellants' apartment. Thus, the district court appropriately determined that Appellants did not establish a genuine dispute of material fact showing that Appellees violated the covenant of quiet enjoyment. In sum, we dismiss Appellants' challenges regarding Counts 4 and 10 because they abandoned any potential argument. We affirm the district court's granting of summary judgment to Appellees on Appellants' Counts 5, 9, 11, 12, and 14 because no genuine issue of material fact exists regarding each issue.

IV.

Appellants next challenge the district court's bifurcation of the trial as well as its verdict following a bench trial, where the court determined that Count 1 was barred by the FHA's two-year statute of limitations and that Count 3 was meritless. In

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Count 1, Appellants asserted that Appellees violated the FHA by failing to provide a reasonable accommodation when they refused to give Angie a specific handicap parking spot. In Count 3, Appellants alleged Appellees violated the FHA by refusing to permit reasonable modifications of the premises by declining to permit the modification of Angie's bathroom.

We review the district court's order bifurcating trial for an abuse of discretion. *Allstate Ins. Co. v. Vizcay*, 826 F.3d 1326, 1333 (11th Cir. 2016). District courts are allowed to bifurcate issues for separate trials for "convenience . . . or to expedite and economize." Fed. R. Civ. P. 42(b). Moreover, "each party is deemed bound by the acts of his lawyer-agent," and a party cannot "avoid the consequences of the acts or omissions of [their] freely selected agent." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962).

A district court's interpretation and application of a statute of limitations is reviewed de novo. *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006) (per curiam). After a bench trial, we review a district court's conclusions of law de novo and its findings of fact for clear error. *U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1322 (11th Cir. 2018). Regarding findings of fact, we will not find clear error unless we are left with a "definite and firm conviction" that a mistake was made. *Sidman v. Travelers Cas. & Sur.*, 841 F.3d 1197, 1201 (11th Cir. 2016) (quotation marks omitted). Thus, a district court's factual findings will stand so long as they are supported by

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substantial evidence. *Id.* To bring an FHA failure to accommodate claim, a plaintiff must show that they actually made a request and that the request was refused. *Schwarz*, 544 F.3d at 1219. The FHA has a two-year statute of limitations. 42 U.S.C. § 3613(a)(1)(A).

We ordinarily will not review the district court's credibility findings because witness credibility is within the court's province. *Sidman*, 841 F.3d at 1201. We give "great deference" to the district court's credibility determinations because the district court is the only one who could assess variations in demeanor and the witness's tone of voice. *OHI Asset (VA) Martinsville SNF, LLC v. Wagner*, 115 F.4th 1296, 1303 (11th Cir. 2024). We cannot set aside a finding of fact based on the district court's decision to credit one witness's testimony over another where that witness's testimony was coherent and facially plausible and was not contradicted by extrinsic evidence. *Id.*

Here, Appellants did not provide arguments or citations to authority demonstrating how the district court abused its discretion in bifurcating the trial. Thus, Appellants abandoned their challenge against the district court's bifurcation because they failed to plainly and prominently raise that issue in their brief. See *Timson*, 518 F.3d at 874.

As to Count 1, the district court correctly determined that Appellants' claim was barred by FHA's two-year statute of limitations. Both parties agreed that Appellants requested a reserved handicapped parking space in late 2012 or early

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2013. Appellants point to Cano's testimony to show Appellants requested a reserved handicapped parking space at various times in 2013, 2015, 2016, and 2017. The 2017 alleged requests are the only ones which may have fallen within the statute of limitations because this suit was filed on May 6, 2019. But there is no evidence beyond Cano's testimony that supports a handicapped parking space request in 2017 (or any other time besides the late 2012 or early 2013 request). The district court did not find Cano's testimony credible due to its observations of Cano throughout the trial and that his testimony was not supported by any extraneous evidence. Appellants did not provide evidence such as eyewitnesses or documentation responding to the alleged requests, and other testimonies contradicted Cano's claim. Accordingly, substantial evidence supports the district court's finding that Appellants only requested a reserved handicapped parking space once in either 2012 or 2013. And even if the request happened in 2013, the denial is clearly outside the two-year statute of limitations for an FHA failure to accommodate claim. Thus, we affirm the district court's determination that Appellants are barred by the statute of limitations as to Count 1.

As to Count 3, the district court properly determined that Appellees did not refuse to accommodate Appellants' request for a bathroom modification. The court appropriately found that Appellants failed to demonstrate their request was denied, an essential element of a failure to accommodate claim. The court's determination is

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supported by substantial record evidence, which shows that Appellants made one official request for a bathroom modification on August 26, 2018, which was approved the next day and confirmed a few days later. Thus, we affirm the district court's conclusion that Appellants failed to establish a prima facie failure to accommodate claim for Count 3.

V.

Finally, Appellants ask this court to vacate a Florida appellate court decision that was rendered against them. Appellees contend we lack jurisdiction to consider this issue under 28 U.S.C. §§ 1291–1296 and the *Rooker-Feldman*⁵ doctrine.

Our jurisdiction is limited to “appeals from all final decisions of the district courts of the United States.” 28 U.S.C. § 1291. We also have jurisdiction to review certain interlocutory orders and specific issues of controlling questions of law on orders not otherwise appealable. 28 U.S.C. § 1291(a), (b).

The *Rooker-Feldman* doctrine bars federal district courts from reviewing or rejecting state court judgments rendered before the district court litigation began. *Behr v. Campbell*, 8 F.4th 1206, 1212 (11th Cir. 2021). It “eliminates federal court jurisdiction over those cases that are essentially an appeal by a state court loser seeking to relitigate a claim that has already been decided in a state court.” *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1281 (11th Cir. 2018). The

⁵ *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923); *Dist. Of Col. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983).

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doctrine is of a “limited scope” and “ensure[s] that the inferior federal courts do not impermissibly review decisions of the state courts—a role reserved to the United States Supreme Court.” *Id.* at 1281, 1285.

Here, we lack jurisdiction to consider this argument. This issue involves consideration of an order we are not permitted to review because it is not a final order of a United States District Court nor an interlocutory order or issue that solely involves a question of law. Appellants seek the reversal of a state court decision against them, which the *Rooker-Feldman* doctrine explicitly prohibits. Thus, we dismiss this claim.

AFFIRMED IN PART and DISMISSED IN PART.⁶

⁶ In their reply brief, Appellants contended that the district court erred in granting Appellees’ motion for taxable costs. We will not address arguments raised for the first time in the appellant’s reply brief. *Timson*, 518 F.3d at 874. Here, while Appellants indicated their intent to appeal the order imposing costs in their notice of appeal, they failed to raise this issue in their initial brief, meaning they have abandoned this issue on appeal. As such, we affirm.

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Appendix B

USCA11 Case: 23-12413 Doc. 178, 02/05/26

In the
United States Court of Appeals
For the Eleventh Circuit

Nos. 23-12413, 23-13392

CARLOS A. ALONSO CANO,
as next friend of his minor daughters
Katy Alonso Morejon and Jany Leidy Alonso
Morejon,

FE MOREJON FERNANDEZ,

Plaintiffs-Appellants,

JANY L. ALONSO,

Interested Party-Appellant,

versus

245 C&C, LLC, CFH GROUP, LLC,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-21826-JAL

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Order of the Court

23-12413

ORDER:

Appellants' motion for additional time to file and to use excess pages in their petition for rehearing is GRANTED IN PART and DENIED IN PART. Appellants have 14 days from the date of this order to file their petition. The petition may not exceed 15 pages. See Fed. R. App. P. 40(d)(3)(B); 11th Cir. R. 40-4.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

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USCA11 Case: 23-12413 Doc. 190-2, 03/25/26

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-12413

CARLOS A. ALONSO CANO,
as next friend of his minor daughters
Katy Alonso Morejon and Jany Leidy Alonso
Morejon,

FE MOREJON FERNANDEZ,

Plaintiffs-Appellants,

JANY L. ALONSO,

Interested Party-Appellant,

versus

245 C&C, LLC,
CFH GROUP, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-21826-JAL

No. 23-13392

Appendix C

Order of the Court

CARLOS A. ALONSO CANO,
as next friend of his minor daughters
Katy Alonso Morejon and Jany Leidy Alonso
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Plaintiffs-Appellants,

JANY L. ALONSO,

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versus

245 C&C, LLC,
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Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-21826-JA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
Before LUCK, LAGOA and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service
on the Court having requested that the Court be polled on rehearing en banc. FRAP
40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Appendix D

FLSD, Case 1:19-cv-21826-JAL, DE 88, 11/19/19

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/O'SULLIVAN**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, and as next of friend of his minor
daughters, KATY ALONSO MOREJON and JANY LEIDY ALONSO MOREJON

and FE MOREJON FERNANDEZ, individually,

Plaintiffs,

vs.

245 C & C, LLC and CFH GROUP, LLC.,

Defendants.

_____ /

ORDER

THIS MATTER is before the Court following an informal discovery conference held before the undersigned on November 19, 2019. Having heard from both parties and for the reasons stated on the record, it is

ORDERED AND ADJUDGED that on or before **5:00 PM on November 21, 2019**, the plaintiffs shall provide the defendants with deposition dates in January 2020 for the deposition of CARLOS A. ALONSO CANO. It is further

ORDERED AND ADJUDGED that on or before **December 16, 2019**, unless otherwise noted in this Order, all discovery responses ordered herein shall be provided. It is

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further

ORDERED AND ADJUDGED that the plaintiffs shall respond to Interrogatory 1 and indicate why the requested accommodations were reasonable and necessary and would afford Angie an equal opportunity to access the facilities or its services. It is further

ORDERED AND ADJUDGED that in response to Interrogatory 5, the plaintiffs shall provide a summary of each person's knowledge regarding the lawsuit. It is further

ORDERED AND ADJUDGED that in response to Interrogatory 7(b), the plaintiffs shall provide the responsive emails. It is further

ORDERED AND ADJUDGED that the plaintiffs shall respond again to Interrogatory 8. If there are differences from year to year, the plaintiffs shall provide the specific information for those years. It is further

ORDERED AND ADJUDGED that in response to Interrogatory 11, the plaintiffs shall indicate which plaintiff each of the doctors are for, provide the names of the doctors for all plaintiffs, and provide HIPAA forms for all doctors or specific information regarding doctor visits for all doctors. It is further

ORDERED AND ADJUDGED that in response to Interrogatory 12, the plaintiffs shall indicate if CARLOS A. ALONSO CANO was employed in 2016. The

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plaintiffs shall also provide the income and rate of pay for FE MOREJON FERNANDEZ and the years she worked. It is further

ORDERED AND ADJUDGED that the defendants shall give the plaintiffs the information the defendants have with respect to the lawsuits the defendants allege are not listed by the plaintiffs in response to Interrogatory 13. If necessary, the plaintiffs shall amend their response to Interrogatory 13 appropriately. It is further

ORDERED AND ADJUDGED that with respect to Request for Production 10, the plaintiffs' attorney shall inquire from the plaintiff if any additional schedules for the tax returns exist, and if they do, the plaintiffs shall provide those additional schedules. It is further

ORDERED AND ADJUDGED that in response to Request for Production 1, the plaintiffs shall provide the first HUD complaint to the defendants. If the plaintiffs do not have the first HUD complaint, the plaintiffs shall indicate so in writing. It is further

ORDERED AND ADJUDGED that in response to Request for Production 4, the plaintiff shall provide a response to each subsection and indicate if the documents were provided. It is further

ORDERED AND ADJUDGED that in response to Request for Production 11, the plaintiffs shall provide the responsive documents in their possession, custody,

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and control. If the plaintiffs do not have the responsive documents, the plaintiffs shall indicate so in writing. It is further

ORDERED AND ADJUDGED that in response to Request for Production 17, if the plaintiffs do not have the responsive documents, the plaintiffs shall indicate so in writing. It is further

ORDERED AND ADJUDGED that in response to Request for Production 18, if the plaintiffs have the responsive documents, the plaintiffs shall provide them. If the plaintiffs do not have the responsive documents, the plaintiffs shall indicate so in writing. It is further

ORDERED AND ADJUDGED that in response to Request for Productions 22, 25, and 30, the plaintiffs shall indicate in writing that they do not have any direct evidence responsive to the requests. It is further

ORDERED AND ADJUDGED that in response to Request for Productions 33, 34, 36, 39, and 44, the plaintiffs shall identify what documents were provided and if there are no further documents, the plaintiffs shall indicate so. It is further

ORDERED AND ADJUDGED that the failure to properly provide discovery was not substantially justified. Fed. R. Civ. P. 37 provides

(5) Payment of Expenses; Protective Orders.

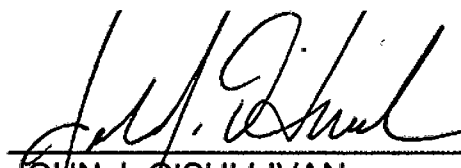
Appendix D

(A) *If the Motion is Granted (or Disclosure or Discovery is Provided After Filing)*. If the motion is granted-or the disclosure or requested discovery is provided after the motion was filed-the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movants reasonable expenses incurred in making the motion, including attorney's fees.

Fed. R. Civ. P. 37

Accordingly, the defendants are awarded attorney's fees for 7.5 hours at a rate of \$ 400.00 per hour for a total of \$ 3000.00 to be paid by the plaintiffs, to the defendants' attorney within 30 days of the day of this Order.

DONE AND ORDERED, in Chambers, at Miami, Florida, this 19th day of
November 2019



JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE

Appendix E

FLSD, Case 1:19-cv-21826-JAL DE 98, 12/12/19

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/O'SULLIVAN**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, and as next of friend of his minor
daughters, KATY ALONSO MOREJON and
JANY LEIDY ALONSO MOREJON and
FE MOREJON FERNANDEZ, individually,

Plaintiffs,

vs.

245 C & C, LLC and CFH GROUP, LLC.,

Defendants.

_____ /

ORDER

THIS MATTER is before the Court following an informal discovery
conference held before the undersigned on December 12, 2019. Having heard from
the parties and for the reasons stated on the record, it is

ORDERED AND ADJUDGED that the last paragraph of the Order entered
by the undersigned at DE # 88 on November 19, 2019, is hereby amended to read:

Accordingly, the defendants are awarded attorney's fees for 7.50 hours at a
rate of \$400.00 per hour for a total of \$3,000.00 to be paid by the plaintiff, CARLOS

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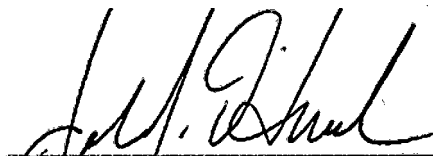
A. ALONSO CANO, individually, to the defendants' attorney within 30 days of the date of this Order.

It is further

ORDERED AND ADJUDGED that CARLOS A. ALONSO CANO, individually, is not required to pay the aforementioned \$3,000.00 attorney's fees until Judge Lenard rules on the objection to the fees. It is further

ORDERED AND ADJUDGED that CARLOS A. ALONSO CANO, individually shall pay the attorney's fees within seven (7) days of Judge Lenard's Order on the objection, or provide a filing to the Court within seven (7) days of Judge Lenard's Order on the objection explaining why CARLOS A. ALONSO CANO, individually is unable to pay the entire fees amount at one time. Thereafter, the undersigned may consider a payment plan for CARLOS A. ALONSO CANO, individually to pay the required attorney's fees.

DONE AND ORDERED, in Chambers, at Miami, Florida, this 12th day of December 2019.



JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE

Appendix F

FLSD, Case 1:19-cv-21826-JAL DE 160, 02/19/20

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/O'SULLIVAN

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, and as next friend of his minor
daughters, KATY ALONSO MOREJON and
JANY LEIDY ALONSO MOREJON, and
FE MOREJON FERNANDEZ individually,

Plaintiffs,

v.

245 C & C, LLC and CFH GROUP, LLC,

Defendants.

**ORDER OVERRULING OBJECTIONS TO DISCOVERY ORDER IMPOSING
FEE AWARD AGAINST PLAINTIFF CARLOS A. ALONSO CANO
(D.E. 150, 153)**

THIS CAUSE is before the Court on pro se Plaintiff Carlos A. Alonso Cano's ("Carlos") Objection to Magistrate Judge John J. Sullivan's Order awarding Defendants 245 C & C, LLC and CFH Group, LLC \$3,000.00 in attorneys' fees for certain discovery violations, ("Objections," D.E. 150), and Supplement thereto, ("Supplement," D.E. 153), filed January 24, 2020.

*Appendix F***I. Relevant background**

On May 6, 2019, Plaintiffs, through attorney Michael Lufty, instituted this lawsuit asserting various violations of the Fair Housing Act and Florida state law. (D.E. 1.)

On June 25, 2019, the Court entered an omnibus Order which, *inter alia*, referred all pretrial discovery disputes to Judge O'Sullivan pursuant to 28 U.S.C. § 636. ("Beginning Order," D.E. 21.) Attached to the Court's Beginning Order were Judge O'Sullivan's Discovery Procedures. (*Id.* at 7.) Pursuant to Judge O'Sullivan's Discovery Procedures, all discovery disputes that require Court intervention are set for a hearing. (*Id.*) Written discovery motions are not permitted unless the Court is unable to resolve the disputes during the hearing. (*Id.*) Judge O'Sullivan's Discovery Procedures explicitly state: "The Court may impose sanctions, monetary or otherwise, if the Court determines discovery is being improperly sought or is not being provided in good faith." (*Id.*)

On October 30, 2019, the Parties appeared before Judge O'Sullivan for a hearing on a discovery dispute. (See D.E. 76, 80.) Carlos has not provided the Court with a transcript of this hearing, but on November 5, 2019, Judge O'Sullivan issued a post-hearing Order providing Plaintiffs until November 12, 2019 to "further respond to (a) the Requests for Production that were discussed on the record and (b) the Interrogatories that were discussed on the record." (D.E. 83 ¶ 1.) Judge O'Sullivan further

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ordered the Parties to “engage in further conferral efforts regarding all remaining discovery requests[,]” and scheduled another hearing for November 19, 2019 to address all outstanding discovery disputes. (Id. ¶¶ 2-3.)

On November 18, 2019, Mr. Lufty filed an “Unopposed Motion to Withdraw as Counsel of Record.” (D.E. 85.) The Motion states that “Attorney Michael C. Lufty wishes to withdraw as counsel after communicating with Carlos Alonso on November 18, 2019, and being told that his client wishes to proceed pro se.” (Id. ¶ 1.) The Motion said nothing about withdrawing as attorney for the other Plaintiffs, Fe, Angie, Katy and Jany. (See id.)

On November 19, 2019, Judge O’Sullivan held an informal discovery conference. (See D.E. 86.) Carlos has not provided the Court with a transcript of this hearing, but on November 19, 2019, Judge O’Sullivan issued a post-hearing Order instructing Plaintiffs to supplement some of their Interrogatory responses and responses to Requests for Production. (D.E. 88 at 1-4.) The Order concludes:

ORDERED AND ADJUDGED that the plaintiffs’ failure to properly provide discovery was not substantially justified. Fed. R. Civ. P. 37[(a)] provides

(5) Payment of Expenses; Protective

Orders.

(A) If the Motion is Granted (or Disclosure or Discovery is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an

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opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Fed. R. Civ. P. 37.

Accordingly, the defendants are awarded attorney's fees for 7.50 hours at a rate of \$400.00 per hour for a total of \$3,000.00 to be paid by the plaintiffs, to the defendants' attorney within 30 days of the date of this Order.

(Id. at 4.)

On November 22, 2019, the Court entered an Order granting in part Mr. Lufty's Motion to Withdraw. (D.E. 89.) Specifically, the Court granted the Motion as it pertained to withdrawing as Carlos's attorney, but denied it as to the remaining Plaintiffs (because the Motion did not specifically move to withdraw from representing the remaining Plaintiffs). (Id.)

On December 3, 2019, Mr. Lufty filed Objections on behalf of Fe, Angie, Katy, and Jany, seeking to vacate the portion of Judge O'Sullivan's Order that awarded Defendants' attorney \$3,000.00. (See D.E. 93.) Relevant here, Mr. Lufty argued that "the Court should vacate the award against all Plaintiffs on the grounds that the discovery sought was only addressed to 'Carlos A. Alonso Cano.'" (Id. ¶ 11.) "An

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award against all Plaintiffs is clearly erroneous and contrary to law, because it was not the responsibility of the other Plaintiffs to respond to the discovery.” (Id. ¶ 12.)

On December 4, 2019, Carlos filed a Motion for Reconsideration of the Court’s Order permitting Mr. Lufty to withdraw as his attorney. (D.E. 94.)

On December 12, 2019, Judge O’Sullivan entered an Order amending the November 19, 2019 Order to clarify that only Carlos is responsible for paying the attorneys’ fees:

ORDERED AND ADJUDGED that the last paragraph of the Order entered by the undersigned at DE # 88 on November 19, 2019, is hereby amended to read:

Accordingly, the defendants are awarded attorney’s fees for 7.50 hours at a rate of \$400.00 per hour for a total of \$3,000.00 to be paid by the plaintiff, CARLOS A. ALONSO CANO, individually, to the defendants’ attorney within 30 days of the date of this Order.

It is further

ORDERED AND ADJUDGED that CARLOS A. ALONSO CANO, individually, is not required to pay the aforementioned \$3,000.00 attorney’s fees until Judge Lenard rules on the objection to the fees. It is further

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ORDERED AND ADJUDGED that CARLOS A. ALONSO CANO, individually shall pay the attorney's fees within seven (7) days of Judge Lenard's Order on the objection, or provide a filing to the Court within seven (7) days of Judge Lenard's Order on the objection explaining why CARLOS A. ALONSO CANO, individually is unable to pay the entire fees amount at one time. Thereafter, the undersigned may consider a payment plan for CARLOS A. ALONSO CANO, individually to pay the required attorney's fees.

(D.E. 98 at 1-2, and together with D.E. 88, "Fee Award Order.")

On December 23, 2019, the Court issued an Order granting Carlos's Motion for Reconsideration of the Court's Order permitting Mr. Lufty to withdraw as his attorney, and vacated the Court's prior Order permitting Mr. Lufty to withdraw. (D.E. 119.) However, on December 27, 2019, the Court entered an Order permitting Mr. Lufty to withdraw as counsel of record for all Plaintiffs. (D.E. 126.)

Carlos never filed Objections to Judge O'Sullivan's order imposing the fee award against him under Rule 37(a)(5)(A). On December 27, 2019, after permitting Mr. Lufty to withdraw as counsel, the Court issued an Order Providing Carlos an Opportunity to Object to the Fee Award. (D.E. 128.)

On January 24, 2020, Carlos filed the instant Objections. (D.E. 150.) The same day, he filed a

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separate document "to Support the 'Objection'" to Judge O'Sullivan's Order.
("Supplement," D.E. 153.)

Upon review of the Objections, Supplement, and the record, the Court finds as follows.

II. Legal Standard

Subject to certain exceptions not relevant here, the Court may designate a magistrate judge to hear and determine any nondispositive pretrial matter pending before the court. 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a). Additionally, pursuant to Local Magistrate Judge Rule 1(c): "A Magistrate Judge may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in subsection 1(d), *infra*, of these rules." (Emphasis added.) The Court may reconsider a magistrate judge's order "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); see also Fed. R. Civ. P. 72(a) ("The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."); S.D. Fla. L. Mag. R. 4(a)(1) (providing that the Court shall set aside any part of a magistrate judge's order on a nondispositive pretrial matter "found to be clearly erroneous or contrary to law"); *Merritt v. Int'l Bhd. of Boilermakers*, 649 F.2d 1013, 1017 (5th Cir. 1981) (holding that a magistrate judge possesses the authority under 28 U.S.C. § 636(b)(1)(A) to issue an order awarding attorneys'

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fees pursuant to Rule 37(a)(4) where a party's conduct necessitates a motion to compel discovery, "reviewable under the clearly erroneous and contrary to law' standard").¹

The "clearly erroneous or contrary to law" standard is "extremely deferential." *Melech v. Life Ins. Co. of N.A.*, 857 F. Supp. 2d 1281, 1283 (S.D. Ala. 2012) (citation omitted). A "factual finding is clearly erroneous when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Univ. of Ga. Athletic Ass'n v. Laite*, 756 F.2d 1535, 1543 (11th Cir. 1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Matter of Application of O'Keefe*, 184 F. Supp. 3d 1362, 1366 (S.D. Fla. 2016) (citation omitted).

III. Discussion

Although Carlos's pro se filings are difficult to decipher, the Court has fully and carefully considered all of the arguments and evidence contained in Carlos's Objections, (D.E. 149), and Supplement thereto, (D.E. 153), and finds that Carlos has not established that Judge O'Sullivan's

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981. *Merritt* was decided June 2, 1981.

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Orders of November 19, 2019, (D.E. 88), and December 12, 2019, (D.E. 98), imposing a fee award against Carlos under Rule 37 is clearly erroneous or contrary to law.

To begin with, as the objecting party, Carlos bears the burden of proving that Judge O'Sullivan's Fee Award Order was clearly erroneous or contrary to law. See *Howard v. Hartford Life & Accident Ins. Co.*, 769 F. Supp. 2d 1366, 1372 (M.D. Fla. 2011) (observing that the objecting party "must establish that the order is clearly erroneous or contrary to law"). Carlos failed to file a Transcript of the discovery hearings before Judge O'Sullivan, so the Court can only review the findings and conclusions as stated in his Orders of November 19, 2019, (D.E. 88), and December 12, 2019, (D.E. 98).

Rule 37 provides that if the Court grants a motion for an order compelling disclosure or discovery, it "must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). However, the Court "must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." *Id.*

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On November 19, 2019, Judge O'Sullivan's issued an Order following an informal discovery conference instructing Plaintiffs to respond to certain Interrogatories and Requests for Production. (D.E. 88 at 1-4.) Judge O'Sullivan further found that "plaintiffs' failure to properly provide discovery was not substantially justified[.]" and "awarded attorney's fees for 7.50 hours at a rate of \$400.00 per hour for a total of \$3,000.00 to be paid by the plaintiffs, to the defendants' attorney" (Id. at 4.) On December 12, 2019, Judge O'Sullivan issued a post-hearing Order clarifying that the \$3,000.00 fee award is "to be paid by plaintiff, Carlos A. Alonso Cano, individually[.]" (D.E. 98.)

The Court begins by noting that the document containing Carlos's Objections also serves as (1) a Notice Striking his Motion in Opposition to Ms. Langbein's Declaration (D.E. 120), (2) a Reply to Ms. Langbein's Declaration, and (3) and a Reply to Defendants' Verified Response to Carlos's Motion in Opposition to Ms. Langbein's Declaration. (See D.E. 149 at 1.) Thus, many of the arguments contained in the document are, or appear to be, irrelevant to the issue before the Court. (See, e.g., Obj. at 1-4 (arguing that Ms. Langbein has been uncooperative during these proceedings, for example, by refusing to waive service of process); id. at 6 (arguing that Mr. Lufty instructed him not to provide addresses and telephone numbers in response to one interrogatory, which is irrelevant because Judge O'Sullivan did not find that to be a discovery violation); id. at 10-13 (replying to Defendants' Response to Carlos's Motion

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in Opposition to Ms. Langbein's Declaration).) It further appears that all of the statements contained in the Supplement to the Objections are irrelevant, or they are so confusing that their relevance is indeterminable. (See D.E. 153 at 1-8 (documenting telephone and email exchanges between Carlos and Ms. Langbein regarding discovery production in December 2019, even though the Fee Award was imposed for discovery violations prior to December 2019).)

Some of the statements asserted in the Objections appear to be relevant but are unpersuasive. (See, e.g., *id.* at 5 (arguing that Carlos was only responsible for thirty-three days of the three-month delay in responding to interrogatories, where Rule 33 requires responses to be made within thirty days); *id.* at 7 ("At, the end, the delay caused by Defendants' lawyer asking for some 'Better Initial Disclosures and Documents', will be demonstrated that it was no so important for this case.").)

Other statements may be relevant to whether Plaintiff's non-compliance with interrogatories and requests for production was substantially justified (or otherwise excusable), but are insufficient for the Court to conclude that Judge O'Sullivan erred, much less clearly so, or that his fee award was contrary to law. For example, he argues that he did not intend to delay discovery, but that it "was almost impossible for" him to timely comply with the discovery requests in this case and a companion case before Judge Scola. (*Id.*) He also appears to argue that Mr. Lufty is responsible for at least some of the delay in

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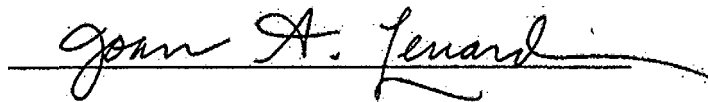
the discovery responses and, as such, Carlos should not be required to pay the entire fee award. (See *id.* at 9.) However, the evidence to which Carlos cites—on these issues or any other issue—does not leave the Court “with the definite and firm conviction that a mistake has been committed.” *Laite*, 756 F.2d at 1543 (quoting *U.S. Gypsum Co.*, 333 U.S. at 395). And because Rule 37(a)(5)(A) permits the Court to order either the party or the attorney or both to pay the fee award, the Court cannot conclude that Judge O’Sullivan “fail[ed] to apply or misapplie[d] relevant statutes, case law or rules of procedure.” *Matter of Application of O’Keefe*, 184 F. Supp. 3d 1362, 1366 (S.D. Fla. 2016) (citation omitted).

Finally, to the extent that Defendants request additional attorneys’ fees incurred in briefing these issues and responding to Carlos’s various filings, (see D.E. 107 at 5-6, D.E. 134 at 4), the request is denied.

IV. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Plaintiff Carlos A. Alonso Cano’s Objections to Judge O’Sullivan’s Orders of November 19, 2019, (D.E. 88), and December 12, 2019, (D.E. 98), are **OVERRULED**.

DONE AND ORDERED in Chambers at Miami, Florida this 19th day of February, 2020.

A handwritten signature in cursive script, reading "Joan A. Lenard", written over a horizontal line.

Joan A. Lenard. United States District Judge

Appendix G

FLSD, Case 1:19-cv-21826-JAL DE 180, 03/19/2020

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/O'SULLIVAN**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, and as next of friend of his minor
daughters, KATY ALONSO MOREJON and JANY LEIDY
ALONSO MOREJON and FE MOREJON FERNANDEZ,
individually,

Plaintiffs,

vs.

245 C & C, LLC and CFH GROUP, LLC.,

Defendants.

ORDER

THIS MATTER is before the Court on the defendants' Motion to Strike Jury Trial Demand Only (DE # 106, 12/17/19). Having reviewed the applicable filings and law, it is

ORDERED AND ADJUDGED that the defendants' Motion to Strike Jury Trial Demand Only (DE # 106, 12/17/19) is GRANTED in accordance with the following Order.

*Appendix G***FACTS**

The plaintiffs sued their landlord, under the Fair Housing Act (“FHA”) on the grounds that the defendants failed to accommodate a disabled plaintiff. (DE # 145, at p. 2). The plaintiffs initially entered into a lease agreement with the defendants on October 29, 2011. The plaintiffs subsequently entered into another lease on November 1, 2013. The plaintiffs entered into renewals of the lease thereafter. (DE # 106, 12/17/2019). Paragraph 29 of the lease provided that “[t]he [r]esident hereby waives [r]esident’s right to demand a jury trial in any cause of action arising between [l]andlord and [r]esident concerning this contract.” (DE # 106-1, at p. 9, 12/17/2019). On December 17, 2019, the defendants filed a Motion to Strike Jury Trial Demand (DE # 106) (the “Motion”). The defendants address various issues alleged in the Second Amended Complaint that are not determinative of their Motion. (Id. at pp. 2-4). The defendants argue that the plaintiff is not entitled to a jury trial due to the waiver clause in the lease agreement, and that their complaint arising under the FHA does not defeat the waiver of jury trial provision in the lease agreement. (Id. at p. 5). Further, the defendants argue the lease agreement meets the test for a knowing and voluntary waiver of rights, and that a jury waiver provision can validly require the substitution of one neutral decision-maker for another trier of fact. (Id.).

The plaintiffs filed their response to the defendants’ Motion (the “Response”) on January 24, 2020. (DE 145). Throughout the

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plaintiffs' response they reincorporate the allegations stated in their Corrected Amended Complaint and Second Amended Complaint that the defendants committed violations under the FHA. (Id.). The plaintiffs argue they are entitled to a trial by jury pursuant to Fed. R. Civ. P. Rule 38 and the 7th Amendment of the United States Constitution. (Id. at pp. 1, 6). The plaintiffs also argue that their waiver of a jury trial pursuant to paragraph 29 of the lease agreement was not voluntary or informed. (Id. at p. 13). Additionally, the plaintiffs refer to various cases that are not cited. (Id. at p. 10-11). Nevertheless the plaintiffs argument with respect to the cases that are not cited are not of consequence to the legal issues of a waiver of jury trial. The plaintiff further incorporates a lengthy nutshell of the history of the FHA and the Federal Rules of Civil Procedure that are immaterial to the Motion. (DE # 145, 1/24/2020).

LEGAL ANALYSIS**I. Jury Trial Waiver Clause**

The Seventh Amendment of the United States Constitution "provides that 'in [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.'" *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (quoting U.S. Const. amend. VII). Fed. R. Civ. P. Rule 38 states the parties rights in an action preserve the right to a jury trial as prescribed in the 7th Amendment or a federal statute. The Rule

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further states a party must demand a jury trial and state the issues to be heard and decided by a jury. *Id.* Here, the plaintiffs timely and properly demand a jury trial in their Second Amended Complaint. (DE # 92, p. 53, 12/2/2019). However, the plaintiffs waived their right to a jury trial against the defendants when they executed the lease agreement and continued to renew the lease because the lease contained a jury trial waiver clause.

“Contractual waivers of a person's right to a jury trial are routinely deemed enforceable, provided that they are knowing and voluntary.” *Ackner v. PNC Bank*, 2017 U.S. Dist. LEXIS 222813 at *10 (S.D. Fla. Dec. 22, 2017). The court weighs the following factors when determining if a right to jury trial has been waived via a contractual provision: “(1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel.” *Head v. Cornerstone Residential Mgmt.*, 2006 U.S. Dist. LEXIS 102218 at *6 (S.D. Fla. Mar. 31, 2006). The factors are not determinative, and the court weighs the circumstances, considering whether the waiver was unconscionable, contrary to public policy, or unfair. *Ackner*, 2017 U.S. Dist. LEXIS 222813 at *11.

Here, the jury waiver language in the lease agreement was conspicuous. The clause title was bold and capitalized. Moreover, the language in the

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clause was the only clause which contained an italicized font on the subject page. The plaintiffs initialed the page containing the jury waiver clause, the initial was located about an inch away from the jury waiver clause, and the language of the clause was clear and easy to read. See Pearson v. Countrywide Home Loans, Inc., 2015 U.S. Dist. LEXIS 14541 at *6 (M.D. Fla. Feb. 6, 2015) (finding a jury waiver clause enforceable when the clause was in bold type faced, the plaintiff signed the page where the jury waiver clause was located, and the signature was one inch away from the clause); see also Oglesbee v. IndyMac Fin. Servs., 675 F. Supp. 2d 1155, 1158 (S.D. Fla. 2009) (finding a jury waiver clause is valid even when the title of the clause was "Jury Trial Waiver," the clause was the same font as the remainder of the document, and the language in the clause was clear and easy to read).

Second, the plaintiffs level of sophistication and experience must be weighed. Special education is not required to understand the terms of a jury waiver clause when it is written in plain language. See Correa v. BAC Home Loans Servicing LP, 2012 U.S. Dist. LEXIS 159089 at *49-50 (S.D. Fla. Apr. 9, 2012). Here, the language in the jury trial waiver clause stated: "[t]he [r]esident hereby waives [r]esident's right to demand a jury trial in any cause of action arising between [l]andlord and [r]esident concerning this contract." (DE # 106-1, at p. 9, 12/17/2019). Moreover, the resume of plaintiff Carlos A. Alonso Cano, who signed the lease agreement, indicates he was formerly a licensed insurance agent

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who read and explained insurance policies to customers. (DE # 156-1, at p. 3, 1/31/2020). Thus, Mr. Alonso Cano was sophisticated enough to understand the meaning of a waiver of jury trial clause if he had the ability understand and explain insurance policies. See Ackner, 2017 U.S. Dist. LEXIS 222813 at *11 (finding a waiver of jury trial clause valid where the plaintiffs were credit card applicants).¹ Furthermore, Mr. Alonso Cano does not provide any evidence that he was unable to understand the meaning of the jury trial waiver clause. See Oglesbee, 675 F. Supp. 2d at 1158 (finding a party was sophisticated enough to understand the meaning of a jury trial when said party did not offer any evidence to the contrary).

Mr. Alonso Cano argues that his wife Fe Morejon Fernandez, who is also a plaintiff that signed the lease, could not understand the jury trial waiver clause in the lease agreement because she does not speak English. This argument fails because “[i]t is axiomatic that a person who signs a contract is presumed to know[] its contents.” Larach v. Std. Chtd. Bank Int’l (Americas) Ltd., 2011 U.S. Dist. LEXIS 163670 at *30 (S.D. Fla. Jun. 7, 2011). Additionally, “it is generally the duty of a party to a contract to learn and understand its contents before he signs it.” *Id.* (quoting Addison v. Carballosa, 48 So. 3d 951, 954 (3d DCA 2010)). A party cannot

¹ In Ackner, the plaintiffs conceded they had the sophistication to understand what the jury waiver meant. See Ackner, 2017 U.S. Dist. LEXIS 222813 at *11.

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defend against a provision of a contract simply because they did not or could not read it. *Id.* Moreover, Mrs. Morejon Fernandez signed all the renewals and the Response to defendants Motion which is written in English. (DE # 106-1, 12/17/2019, at pp. 13-15); (DE # 145, 1/24/2020).

With respect to the plaintiffs ability to negotiate the contract, the plaintiffs do not offer any evidence that they could not negotiate the lease agreement or walk away from signing the lease agreement. The plaintiffs had the ability to negotiate or not sign the lease agreement. See Correa, 2012 U.S. Dist. LEXIS 159089 at *50 (finding a plaintiff failed to establish the third factor when the plaintiff did not offer any evidence that the plaintiff could not negotiate the contract or have the ability to not sign). With respect to the plaintiffs' bargaining power, the plaintiffs do not offer any evidence that the defendants had superior bargaining power. The plaintiffs had sufficient bargaining power in negotiating the lease. See Pearson, 2015 U.S. Dist. LEXIS 14541 at *7 (dismissing plaintiffs argument that they had little bargaining power because they did not provide sufficient evidence). Lastly, the plaintiffs were not represented by counsel when negotiating the lease, however, if Mr. Alonso Cano was sophisticated enough to understand the jury trial waiver clause, he was sophisticated enough to know he could retain counsel to negotiate the lease. See Ackner, 2017 U.S. Dist. LEXIS 222813 at *13 (stating that "as [p]laintiffs are 'sufficiently sophisticated to understand what the waiver

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means', [p]laintiffs would appear to be sufficiently sophisticated to know that they could obtain advice of counsel") (citations omitted)).

Because the totality of the circumstances weigh heavily in favor of the defendants, the jury trial waiver clause in the lease agreement is enforceable and was consented to voluntarily. As such the jury trial waiver clause is not unconscionable, contrary to public policy, or unfair.

II. FHA Does Not Invalidate A Jury Trial Waiver Clause

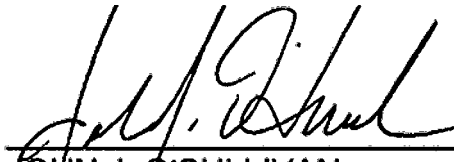
The FHA does not invalidate a jury trial waiver clause in a contract. See *Milsap v. Cornerstone Residential Mgmt.*, 2007 U.S. Dist. LEXIS 22252 at *16-17 (S.D. Fla. Mar. 27, 2007) (stating that an FHA claim for the occupancy limits prescribed by the landlord allegedly discriminating the tenant arises out of the contract and allows a jury trial waiver clause to be enforceable). Here, the jury trial waiver clause states "[t]he [r]esident hereby waives [r]esident's right to demand a jury trial in any cause of action arising between [l]andlord and [r]esident concerning this contract." (DE # 106-1, 12/17/2019 p. 9). Here, the jury trial waiver clause states "[t]he [r]esident hereby waives [r]esident's right to demand a jury trial in any cause of action arising between [l]andlord and [r]esident concerning this contract." (DE # 106-1, 12/17/2019 p. 9). Here, the plaintiffs' claim arising from the FHA is considered an action arising between the parties in connection with the lease agreement because the plaintiffs allegations of defendants' violations of the FHA relate to provisions that the lease agreement governs. Thus, the jury trial waiver

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clause applies. See Milsap, 2007 U.S. Dist. LEXIS 22252 at *16-17 (citing Head, 2006 U.S. Dist. LEXIS 102218 at *11 (S.D. Fla. Apr. 3, 2006)) (finding that the jury trial waiver clause arose out of or related to the agreement because FHA claim derived from the occupancy limits that the parties agreed to in the agreement).

Accordingly, the defendants' Motion to Strike Jury Demand Only (DE # 106, 12/17/20) is GRANTED.

DONE AND ORDERED, in Chambers, at Miami, Florida, this 19th day of March 2020.



JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies mailed by Chambers to:
Carlos A. Alonso Cano
2500 West 56th Street
Apt. 1301
Hialeah, FL 33016-4769

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FLSD, Case 1:19-cv-21826-JAL DE 678, 07/20/2023

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/DAMIAN**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, KATY ALONSO MOREJON,
JANY LEIDY ALONSO MOREJON, and
FE MOREJON FERNANDEZ individually,

Plaintiffs,

v.

245 C & C, LLC and CFH GROUP, LLC,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for a bench trial held from June 5 through June 27, 2023. The Court has carefully considered the credibility of the witnesses presented and the evidence admitted during the trial. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law.

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For context, the Court will first provide a brief background and recitation of the relevant procedural history.

I. BRIEF BACKGROUND

1. Plaintiff Angie Alonso Morejon (“Angie”) is a permanently disabled individual who suffers from, among other things, mental retardation, severe cerebral palsy, and spasticity. (Second Am. Compl. (D.E. 92) ¶ 4.) Plaintiff Carlos A. Alonso Cano (“Carlos”) is Angie’s father and Plenary Guardian; Plaintiff Fe Morejon Fernandez (“Fe”) is Angie’s mother; and Plaintiffs Katy Alonso Morejon (“Katy”) and Jany Leidy Alonso Morejon (“Jany”) are Angie’s sisters. (Id. ¶¶ 14-17.)
2. From October 2011 to January 2021, Plaintiffs resided in a rental apartment in the Villas of Hialeah apartment complex (“VOH”) located in Hialeah, Florida.¹ (Id. ¶¶ 2, 36.)

¹ On February 1, 2018, Defendants instituted eviction proceedings against Plaintiffs. The eviction case was tried in the Miami-Dade County Court on November 15, 16, and 19, 2018. The trial judge retired before issuing a ruling. A successor judge was appointed and issued a final judgment on June 20, 2019, finding in favor of Carlos and Fe. 245 C & C, LLC appealed the adverse final judgment, and on September 3, 2020, the Appellate Division of the Miami-Dade Circuit Court reversed the final judgment and remanded the case with instructions to enter judgment for 245 C & C, LLC and to calculate an award of attorney’s fees for 245 C & C, LLC. It appears that Plaintiffs finally vacated the apartment on January 12, 2021. (See D.E. 427 ¶ 1.)

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Defendant 245 C & C, LLC and/or Defendant CFH Group, LLC owns VOH, (id. ¶ 22), while Defendant CFH Group, LLC operates VOH, (id. ¶ 25).

II. BRIEF PROCEDURAL HISTORY

1. On May 6, 2019, Carlos, through counsel, initiated this federal lawsuit alleging that Defendants violated (1) various provisions of the Fair Housing Act (“FHA”), (2) the implied covenant of quiet enjoyment under Florida state law, and (3) Section 83.67(1), Florida Statutes, by unlawfully turning off the water to Plaintiffs’ home without warning. (D.E. 1.)² On July 19, 2019, the Court entered an Order Granting in Part Defendants’ Corrected Combined Motion to Dismiss Complaint and/or for More Definite Statement. (D.E. 43.) The Court found

² This is Plaintiffs’ third attempt at suing Defendants in federal court. On February 12, 2018, Carlos, proceeding pro se, sued Defendants in this District alleging violations of his civil rights, the Americans with Disabilities Act (“ADA”), and the FHA. See *Cano v. 245 C&C, LLC, et al.*, Case No. 18-20537-Civ-Ungaro (“Cano I”), D.E. 1. Judge Ungaro dismissed the pro se Complaint without prejudice for failure to state a claim, and provided Plaintiff leave to amend. *Cano I*, D.E. 6. Carlos filed an Amended Complaint, id., D.E. 9 & 10, which Judge Ungaro dismissed as “unintelligible,” id., D.E. 38. Thereafter, Carlos, through newly-acquired counsel, filed a Second Amended Complaint. Id., D.E. 42. Carlos’s counsel subsequently withdrew, id., D.E. 50, and Carlos moved pro se to amend his complaint a third time, id., D.E. 62. Judge Ungaro granted the motion to amend but stated that she would not grant any further opportunities to amend. Id., D.E. 67. Carlos filed a Third Amended Complaint, id., D.E. 73, which Defendants moved to dismiss, id., D.E. 81. On January 28, 2019, Judge Ungaro granted the motion to dismiss, finding that the Third Amended Complaint was a “shotgun pleading” and, nevertheless, failed to state a claim. Id., D.E. 84. Because Carlos had been given numerous opportunities to file a complaint that stated a claim upon which relief could be granted and otherwise complied with the Federal Rules of Civil Procedure, but had failed to do so, Judge Ungaro dismissed the case without prejudice. Id.

On March 19, 2019, Carlos, proceeding pro se, filed a second federal lawsuit against Defendants. See *Cano v. 245 C&C, LLC, et al.*, 19-21045-Civ-Altonaga (“Cano II”). Judge Altonaga sua sponte dismissed the complaint without prejudice for failure to state a claim upon which relief can be granted and because it was an improper “shotgun pleading.” Id., D.E. 5. Judge Altonaga denied leave to amend because: “(1) this is Plaintiff’s fourth pleading directed to these two Defendants; (2) Plaintiff has already been instructed on federal pleading standards and is aware shotgun pleadings are subject to dismissal; and (3) Plaintiff was previously warned additional pleadings would not be allowed[.]” Id. at 5. Carlos moved to reopen the case and amend the complaint, id., D.E. 11, but Judge Altonaga denied the motion, id., D.E. 12.

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that the Complaint constituted a “shotgun pleading” that violated federal pleading standards because four of the five Counts alleged multiple claims;³ as such, the Court required Carlos to file an Amended Complaint. (Id. at 9-12.) Although the Court provided Carlos leave to file an Amended Complaint, it warned “that it may be the final amendment the Court permits him to make[.]” (id. (citing *Brown v. Hillsborough Cnty. Sheriff’s Office*, 342 F. App’x 552, 554 (11th Cir. 2009))), and instructed that “Plaintiff should endeavor to remedy all deficiencies, whether discussed in this Order or not[.]” (id. at 15).

2. On August 9, 2019, Plaintiffs filed an Amended Complaint which contained nineteen causes of action. (D.E. 52.) Defendants filed a Motion to Dismiss the Amended Complaint, (D.E. 61), which the Court granted in part, dismissing Counts Two, Six, Seven, Eight, Seventeen, Eighteen, and Nineteen with prejudice for failure to state claims upon which relief can be granted, (D.E. 90). Although the Court had previously warned Plaintiffs that it may not permit any further

³ The Court found that Plaintiffs’ claim for breach of the implied covenant of quiet enjoyment did not constitute a “shotgun pleading” because, although it alleged various ways in which Defendants breached the implied covenant of quiet enjoyment, “it appears that under Florida law a landowner can breach the covenant of quiet enjoyment through a course of conduct.” (D.E. 43 at 10-11 (citing *Misha Enters. v. GAR Enters., LLC*, 117 So. 3d 850, 554 (Fla. Dist. Ct. App. 2013) (finding genuine issues of material fact precluded summary judgment in favor of landowner on claim for breach of covenant of quiet enjoyment where complaint alleged, inter alia, that defendant harassed plaintiff and its customers for several months, towed vehicles belonging to plaintiff’s customers, and “needlessly caus[ed] numerous agencies to inspect [plaintiff’s] operation and property”); *Carner v. Shapiro*, 106 So. 2d 87, 89 (Fla. Dist. Ct. App. 1958) (affirming damages award for breach of covenant of quiet enjoyment where building-owner remodeled building over four-month period).)

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amendments, the Court provided Plaintiffs leave to amend their complaint to add language to one paragraph. (Id. at 64.)

3. On December 2, 2019, Plaintiffs filed the operative Second Amended Complaint asserting claims under the Fair Housing Act and Florida state law (D.E. 92.) The Second Amended Complaint contained a jury trial demand. (Id. at 1.)

4. On December 17, 2019, Defendants filed a Motion to Strike Jury Trial Demand Only.⁴ (D.E. 106.)

5. On March 19, 2020, Magistrate Judge John J. O'Sullivan issued an Order granting Defendants' Motion to Strike Jury Demand Only, finding that Plaintiffs had contractually waived their right to a jury trial.⁵ (D.E. 180.)

6. Defendants filed a Motion for Judgment on the Pleadings as to Counts Thirteen, Fifteen, and Sixteen. (D.E. 368.) The Court entered an Order granting the Motion for Judgment on the Pleadings as to Counts Thirteen and Fifteen, and dismissing Count Sixteen with prejudice as an impermissible shotgun pleading. (D.E. 438.)

7. On December 16, 2019, Defendants filed an Answer and Affirmative Defenses to the remaining claims. (D.E. 101.) Relevant here, Defendants' Ninth Affirmative

⁴ On December 27, 2019, Plaintiffs' original attorney was permitted to withdraw. (D.E. 126.) Plaintiffs then proceeded pro se until February 10, 2023, when attorney Michael D. Dunlavy filed a Supplemental Notice of Permanent Appearance of Counsel on behalf of all Plaintiffs. (D.E. 581.)

⁵ Plaintiffs did not object to, seek reconsideration of, or otherwise challenge Judge O'Sullivan's Order for almost three years. Then, beginning on March 14, 2023, on the eve of trial, Plaintiffs filed a series of motions seeking to undo Judge O'Sullivan's Order. (See D.E. 588, 599, 601.) The Court denied each of those motions. (See D.E. 598, 603, 604.)

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Defense asserts that any claim under the FHA which arose more than two years before the filing of this lawsuit is barred by the FHA's statute of limitations. (Id. ¶ 282.)

8. On November 16, 2020, Defendants filed a Motion for Summary Judgment, (D.E. 364), and a Statement of Material Undisputed Facts in support thereof, (D.E. 366). They also filed a Request for Judicial Notice. (D.E. 372.)

9. On January 11, 2021—after providing Plaintiffs two extensions of time to respond, (D.E. 390, 411)—Plaintiffs filed a Response in Opposition to Defendants' Motion for Summary Judgment, (D.E. 413), to which they attached 245 pages of exhibits, (D.E. 413-1). Plaintiffs did not file a Response to Defendants' Statement of Material Undisputed Facts, nor did it file a Response to Defendants' Request for Judicial Notice.

10. On February 5, 2021, Defendants filed a Motion to Strike Plaintiffs' Response in its Entirety and to Deem Defendants' Statement of Material Facts Admitted, or to Strike Particular Statements from the Response. (D.E. 435.)

11. On March 15, 2021—after providing Plaintiffs two extensions of time to respond to the Motion to Strike, (D.E. 437, 446)—Plaintiffs filed a document titled "Response" which did not respond to Defendants' Motion to Strike but was instead an entirely new response to Defendants' Motion for Summary Judgment. (D.E. 447.) However, like its predecessor, it did not contain a Response to Defendants'

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Statement of Material Undisputed Facts. Thereafter, Defendants filed a Reply in support of their Motion to Strike. (D.E. 456.)

12. On May 18, 2021, the Court entered an Omnibus Order Granting Defendants' Motion to Strike Plaintiffs' Response in its Entirety and to Deem Defendants' Statement of Material Undisputed Facts Admitted, Granting Defendants' Request for Judicial Notice, Granting Defendants' Motion for Summary Judgment, and Closing Case. ("First Order on Summary Judgment," D.E. 468.)

a) First, the Court granted the Motion to Strike by default because "Plaintiffs failed to respond to any of the arguments raised in Defendants' Motion to Strike[.]" (Id. at 9.) Alternatively, the Court granted the Motion to Strike on the merits because Plaintiffs failed to comply with Local Rule 56.1. (Id. at 10-13.) The Court explained that because Plaintiffs failed to respond to Defendants' Statement of Material Facts, by operation of Local Rule 56.1, Defendants' facts were deemed admitted to the extent that they were supported by record evidence. (Id. at 12-13.)

b) Second, the Court granted the Request for Judicial Notice by default because Plaintiffs failed to respond to the Request. (Id. at 15.) Alternatively, the Court granted the Request for Judicial Notice on the merits, finding "that the materials listed in Defendants' requests are subject to judicial notice." (Id. at 15-16 (citations omitted).)

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c) Third, the Court granted Defendants' Motion for Summary Judgment. (Id. at 17-87.) Initially, the Court found that all of the facts recited in the Omnibus Order's "Facts" section were supported by record evidence and therefore deemed admitted by operation of Rule 56.1. (Id. at 17 n.12.) The Court then found that the admitted facts and record evidence established that Defendants were entitled to summary judgment as to each remaining Count. (Id. at 39-86.) The Court subsequently entered Final Judgment by separate entry and closed the case. (D.E. 469.)

13. On June 1, 2021, Plaintiffs filed a Motion to Reopen pursuant to Rule 60(b)(3) and (6). (D.E. 470.) They argued that the Court relied upon false statements by Defendants' witnesses when concluding that Defendants' were entitled to summary judgment, and that there is record evidence supporting their claims. (See id. at 2-20.) On the last page of the Motion to Reopen, under the "Legal Standard" heading, Plaintiffs appeared to argue that the Court erred by granting Defendants' Motion for Summary Judgment without first providing Plaintiffs notice of the rules and requirements governing motions for summary judgment. (Id. at 20.) Defendants filed a Response, (D.E. 474), to which Plaintiffs filed a Reply, (D.E. 477).

14. On June 25, 2021, the Court entered an Order granting the Motion to Reopen. (D.E. 483.) Briefly, the Court found that the Motion was properly construed as one under Rule 59(e), (id. at 9), and found that the Court committed reversible error by granting Defendants' Motion for Summary Judgment without first providing notice to Plaintiffs of (1) the rules governing summary judgment, (2) their

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right to file affidavits or other material in opposition to the motion, and (3) the consequences of default, (*id.* at 9-15 (citing *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985)). Accordingly, the Court vacated in part the Court's First Order on Summary Judgment,⁶ and reinstated the Motion for Summary Judgment. (*Id.* at 17.) The Court further provided the Parties notice of (1) the rules governing summary judgment, (2) their right to file affidavits or other material in opposition to the motion, and (3) the consequences of default, pursuant to Rule 56(c) and (f), *Griffith, Couch v. Clark*, 725 F. App'x 808, 811-12 (11th Cir. 2018), "and/or otherwise." (*Id.* at 18-22.)

15. On August 2, 2021, Plaintiffs filed a Request for Judicial Notice. (D.E. 493.) Defendants filed a Response, (D.E. 517), to which Plaintiffs filed a Reply, (D.E. 534).

16. Also on August 2, 2021, Plaintiffs filed their Responses to the Motion for Summary Judgment (D.E. 491) and Statement of Material Facts in Dispute (D.E. 492), which contained a section that included five "New Facts." (*Id.* ¶¶ 138-42). The same day, Plaintiffs filed a Notice of Conventional Filing of Plaintiffs' USB as Appendixes to Summary Judgment. ("Notice of Conventional Filing," D.E. 495.) Plaintiffs attached to the Notice of Conventional Filing "Appendix A" which contained 115 pages of documents supporting their Statement of Material Facts in

⁶ Specifically, the Court vacated the First Order on Summary Judgment to the extent that it granted Defendants' Motion for Summary Judgment, but not to the extent that it granted Defendants' Request for Judicial Notice. (D.E. 483 at 17 n.10.) The Court did not find that failure to provide notice under *Griffith* required the Court to vacate the part of the First Order on Summary Judgment granting Defendants' Request for Judicial Notice. (*Id.* at 15 n.9.)

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Dispute. (D.E. 495-1.) However, on August 4, 2021, Plaintiffs filed a Notice of Striking the Notice of Conventional Filing. (D.E. 501.) By operation of the Notice of Striking, both the Notice of Conventional Filing (D.E. 495) and Appendix A attached thereto (D.E. 495-1) have been stricken from the record. Plaintiffs did not refile Appendix A with the Court.

17. On August 4, 2021, Plaintiffs filed a Motion (1) requesting leave to file a new USB drive with evidence that was specifically prepared to support Plaintiffs' responses to Defendants' Motion for Summary Judgment and Statement of Material Undisputed Facts, and (2) striking the USB drive Plaintiffs had previously filed in support of their opposition to Defendants' Motion for Summary Judgment and Statement of Material Undisputed Facts. (D.E. 499.) On August 9, 2021, the Court granted Plaintiffs' Motion for leave to file a new USB drive and stated that "[t]his will be the final USB the Court permits Plaintiffs to file in support of their opposition to Defendants' Motion for Summary Judgment and Statement of Material Facts." (D.E. 505.) The Court also granted the Motion to strike the previously-filed USB drive. (Id.) The new USB did not contain "Appendix A," nor does it appear anywhere else in the record.

18. On September 3, 2021, Defendants filed their Reply in support of their Motion for Summary Judgment (D.E. 514), their Reply and Objections to Plaintiffs' Statement of New Undisputed Facts (D.E. 520), and a separate Reply "Memorandum" to Plaintiffs' Statement of New Undisputed Facts (D.E. 521).

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19. Also on September 3, 2021, Defendants filed a Motion to Strike Previously Unasserted Claims and New Facts to Support these Claims in Plaintiffs' Response to Motion for Summary Judgment, its Accompanying Statement of Opposing Material Facts and Supporting Affidavits. (D.E. 516.) Plaintiffs filed a Response on September 30, 2021, (D.E. 535), to which Defendants filed a Reply on November 29, 2021, (D.E. 548).

20. Also on September 3, 2021, Defendants filed Objections to Plaintiffs' Opposing Materials and Declarations Supporting Response to Summary Judgment and Motion to Strike Declarations as Shams. (D.E. 518.) Plaintiffs filed a Response on September 30, 2021, (D.E. 536), to which Defendants filed a Reply on November 29, 2021, (D.E. 549).

21. Also on September 3, 2021, Defendants filed Objections to and Motion to Strike Plaintiffs' Disputes of Defendants' Statement of Material Undisputed Facts, (D.E. 519). Plaintiffs filed a Response on September 30, 2021, (D.E. 537), to which Defendants filed a Reply on November 29, 2021, (D.E. 550).

22. On August 17, 2022, the Court entered an Omnibus Order: (1) denying Plaintiffs' Request for Judicial Notice, (D.E. 493); (2) granting in part and denying in part Defendants' Motion to Strike Previously Unasserted Claims and New Facts to Support these Claims in Plaintiffs' Response to Motion for Summary Judgment, its Accompanying Statement of Opposing Material Facts and Supporting Affidavits, (D.E. 516); denying Defendants' Motion to Strike Plaintiffs' Declarations as Shams

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and deferring consideration of Defendants' Objections to Plaintiffs' Opposing Materials and Declarations Supporting Response to Summary Judgment (D.E. 518); and denying Defendants' Objections to and Motion to Strike Plaintiffs' Dispute of Defendants Statement of Material Facts, (D.E. 519). (D.E. 553.)

23. Also on August 17, 2022, the Court entered an Amended Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment. (D.E. 555.) Relevant here, the Court granted the Motion for Summary Judgment as to Counts Four, Five, Nine, Ten, Eleven, Twelve, and Fourteen, and denied the Motion as to Counts One and Three.

a) In Count One, Plaintiffs allege that Defendants violated the FHA by failing to provide a reasonable accommodation—specifically, an assigned handicapped parking spot with an access aisle on the driver's side reserved exclusively for Angie. (Second Am. Compl. ¶¶ 39, 128-43.) In this regard, the Second Amended Complaint alleges that “[f]rom March 2017 to June 2017, Carlos made various requests to Vilma for a disabled parking spot reserved exclusively for Angie[.]” (id. ¶ 39), but “Vilma repeatedly refused to provide the reserved parking spot for Angie...,” (id. ¶ 43).

b) In Count Three, Carlos, Fe, and Angie allege that Defendants violated the FHA by refusing to permit a reasonable modification to the existing premises—specifically, a modification to Angie's bathroom. (Id. ¶¶ 150-56.) The Second Amended Complaint alleges that “from March 2017 to August 2018, Carlos

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requested that they be allowed to modify the bathroom of Angie, but Vilma in more than one occasion refused the modification, saying they never allowed it in ‘Villas.’” (Id. ¶ 59.)

24. On May 31, 2023, the Court held a Pretrial Conference during which counsel for both Parties agreed to bifurcate trial into two phases:

- a) Phase 1 would be limited to whether Plaintiffs made requests for the accommodation and modification alleged in Counts One and Three, respectively, within the FHA’s limitations period, and whether those requests were denied;
- b) Phase 2, if necessary, would address the reasonableness and necessity of the accommodation and/or modification

25. Between June 5 and June 27, 2023, the Court heard Phase 1 of the trial. (See D.E. 647, 668.)

26. On June 30, 2023, the Court entered a Paperless Interim Order of Completion of Trial finding, “based upon the evidence presented at trial, that: (1) a request for a modification to the bathroom did not occur until August 26, 2018, and that request was granted the next day; and (2) a request for an assigned, dedicated handicapped parking space was made only once, and that request occurred around October 2012.” (D.E. 672.) Because no request for an accommodation or modification was made and denied within the limitations period, the Court stated that Phase 2 of

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trial would not be necessary and ordered the Parties to file Proposed Findings of Fact and Conclusions of Law. (Id.)

27. On July 12, 2023, Plaintiffs filed their Proposed Findings of Fact and Conclusions of Law, (D.E. 676), and Defendants filed their Proposed Findings of Fact and Conclusions of Law, (D.E. 677).

III. FINDINGS OF FACT

1. Plaintiff Angie Alonso Morejon (“Angie”) suffers from severe physical and intellectual disabilities. It is undisputed that Angie is disabled for purposes of the Fair Housing Act.⁷ (Pretrial Stip. (D.E. 595) at 3.)

2. Beginning in October 2011, and throughout the period alleged in the Second Amended Complaint, Plaintiffs rented Apartment #1301 at the Villas of Hialeah (“VOH”) in Hialeah, Florida.⁸ (See Def. Ex. A; Trial Tr. 6/9/2023 (Lowenhaupt) at 16:20-21.)⁹

⁷ As the Eleventh Circuit has explained: The FHA refers to discrimination based on “handicap” rather than disability. 42 U.S.C. § 3604(f). Disability scholars, however, generally prefer the term “disability” to handicap, and the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213) (“ADA”), reflects that preference. For this reason, we treat the terms interchangeably and elect to use “disability” and the preferred possessive construction. *Bhogaita v. Altamonte Heights Condo. Ass’n, Inc.*, 765 F.3d 1277, 1285 n.2 (11th Cir. 2014).

⁸ Although the trial record does not reflect exactly when Plaintiffs vacated Apartment #1301 following the conclusion of the state court eviction proceedings, on January 21, 2021, Plaintiffs filed an “Emergency Motion” stating that “they were evicted from their apartment by the Miami Dade Police Department” on January 12, 2021. (D.E. 427 ¶ 1.)

⁹ It appears that the Parties only ordered official trial transcripts for some of the testimony. Where the official trial transcripts are divided by witness, the Court will include the witness’s name in parentheses. For testimony with no official transcript, the Court will cite to a rough draft of the transcript provided by the Court Reporter.

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3. Defendant CFH Group, LLC is the property management company that controls VOH. (Trial Tr. 6/9/2023 (Cabrerizo) at 5:12-24.)
4. Tom Cabrerizo is CFH Group's CEO. (Id. at 4:12.)
5. Vilma Hernandez ("Hernandez") is the Property Manager at VOH. (Trial Tr. 6/23/2023 at 88:7-14.)
6. Marleyn Garcia was CFH Group's Regional Property Manager (and Hernandez's direct supervisor) during the relevant period. (Trial Tr. 6/7/2023 (rough) at 33:2-5, 33:22 – 34:1.) Ms. Garcia now lives in Knoxville, Tennessee and no longer works for CFH Group. (Id. at 32:21-24.)
7. Paul Gallner was CFH Group's Manager of Safety and Compliance during the relevant period. (Trial Tr. 6/7/2023 (Gallner) at 3:7.) He is currently CFH Group's Director of Safety and Compliance. (Id. at 3:3.)
8. Amanda Ortiz ("Ortiz") is a social worker who has been working with Angie since 2012 as a Consultant and Waiver Support Coordinator. (Trial Tr. 6/5/2023 at 6:15-17.) As Angie's Waiver Support Coordinator, Ortiz's "main function is to coordinate all services" for Angie, which includes submitting requests to Florida's Agency for Persons with Disabilities ("APD") to secure funds for Angie's care. (Trial Tr. 6/9/2023 (Ferguson) at 14:22 – 15:5; 26:23 – 27:9; 44:12 – 50:25.)

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a. **Count One: Request for accommodation - assigned handicapped parking space**

9. The only time Plaintiffs requested an assigned handicapped parking space was in late 2012 or early 2013. (Trial Tr. 6/23/2023 at 98:9-16; 106:8-9.)

10. Carlos testified that he orally requested an assigned handicapped parking space on seven occasions during his tenancy at VOH: first, on February 3, 2013, from Hernandez, (Trial Tr. 6/7/2023 (rough) at 130:3-14); second, in October 2015 from Hernandez, (id. at 131:10-16); third, on August 4, 2016, from CFH Group CEO Tom Cabrerizo, (id. at 133:23 - 134:21); fourth, on September 9, 2016, from Hernandez and Marleyn Garcia, (Trial Tr. 6/6/2023 (Carlos) at 7:8-11; Trial Tr. 6/20/2023 at 4:17 – 5:8; Trial Tr. 6/22/2023 at 3:12-23); fifth, in October 2016 from Hernandez, (Trial Tr. 6/7/2023 (rough) at 137:15 – 138:3); sixth, on March 29, 2017, from Hernandez, (Trial Tr. 6/6/2023 (Carlos) at 10:16-19); and seventh, on April 7, 2017, from Hernandez, (id. at 10:20-25). (See also Trial Tr. 6/6/2023 (Carlos) at 6:16-19.)

11. Only March 29, 2017, and April 7, 2017, fall within the period alleged in the Second Amended Complaint—i.e., March 2017 to June 2017. (D.E. 92 ¶ 39.)

12. The Court finds that Carlos's testimony on this issue was not credible or reliable, based on observations of him as he testified at trial, his embellishment of the underlying facts, and his inconsistent testimony.

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- a) Furthermore, there were no other eyewitnesses to his alleged requests on March 29 and April 7, 2017, (see Trial Tr. 6/6/2023 (Carlos) at 8:20-22; Trial Tr. 6/6/2023 (Fe) at 16:3-9), and there were no contemporaneous notes, emails, letters, or doctor's notes corroborating Carlos's testimony.
- b) Additionally, his testimony conflicted with other credible witnesses, including Marleyn Garcia who had no interest in the outcome of the case. For example, Carlos testified that he also requested an assigned handicapped parking space during a meeting with Ms. Garcia and Vilma Hernandez on September 9, 2016. (Trial Tr. 6/6/2023 (Carlos) at 7:8-11; Trial Tr. 6/20/2023 at 4:17 – 5:8; Trial Tr. 6/22/2023 at 3:12-23.) Ms. Garcia testified that she never met with Carlos in September of 2016. (Trial Tr. 6/7/2023 (Garcia) at 6:3-14.) Ms. Garcia testified that she met with Carlos and Fe in August of 2016, but neither Carlos nor Fe made a request for an assigned handicapped parking space at that meeting. (Trial Tr. 6/7/2023 (rough) at 38:2-4; 39:8-23.) Rather, they only discussed the "good conduct" addendum to their lease because neither Carlos nor Fe wanted to sign it. (Id. at 37:11 – 38:17.) Based on the consistency of Ms. Garcia's testimony with other credible and reliable evidence, the fact that she no longer works for CFH Group and therefore has no interest in the outcome of this case, and the Court's

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observation of the witness during her testimony at trial, the Court finds Ms. Garcia to be credible and reliable.

- c) Similarly, Carlos testified that on August 4, 2016, the entire family met with CFH Group CEO Tom Cabrerizo, and during the meeting Carlos requested an assigned handicapped parking space and permission to modify Angie's bathroom. (Trial Tr. 6/20/2023 (Carlos) at 3:25 – 4:11.) Mr. Cabrerizo testified that he met with the Plaintiffs after they appeared at his office unannounced wanting to discuss the nonrenewal of their lease. (Trial Tr. 6/9/2023 (Cabrerizo) at 7:1 – 8:18.) Mr. Cabrerizo testified that he had no recollection of Carlos discussing a handicapped parking space or a bathroom modification,

[a]nd . . . if he would have, at the time, it certainly would have been something that I would have discussed with my VP at the time, when I went over this meeting with her regarding the nonrenewal, as at the time, I was on the board of the Woody Foundation, which dealt with disability, and I was on that board for four years, and I spent a lot of time on that board.

(Id. at 9:7-13.) Mr. Cabrerizo explained that the Woody Foundation "dealt with disability, primarily spinal cord injuries," and that he "was instrumental in bringing in the Woody Pack, which essentially was assistive devices to help

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these kids with these spinal cord injuries to be able to take care of themselves; feed themselves, you know, be able to wash, to wash their teeth, comb their hair in some cases, just all, all devices.” (Id. at 10:1-6.) When asked: “[I]f [Carlos] had made a comment about needing an accommodation, would that have drawn your attention?” Mr. Cabrerizo responded: “100 percent. This is something that I would have brought up in my conversation with Gliset Perez, as this is something that was dear to me at the time – and still is.” (Id. at 10:9-11.) Based on the consistency of Mr. Cabrerizo’s testimony with other credible and reliable evidence, and the Court’s observation of the witness during his testimony at trial, the Court finds Mr. Cabrerizo to be credible and reliable.

13. Vilma Hernandez testified that Carlos requested an assigned handicapped parking space only once, either in 2012 or early 2013, (Trial Tr. 6/23/2023 at 98:11, 106:8-10), “and that was the only time that he requested it[,]” (id. at 98:11-12; see also id. at 99:6-7; 106:8).

- a) When asked whether Plaintiffs requested an assigned handicapped parking space between March 2017 and June 2017, as alleged Second Amended Complaint, Hernandez replied: “No. They did not request anything from me in that period of time.” (Id. at 102:17-18.)

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- b) When asked whether Carlos made a request for an assigned handicapped parking space specifically on March 29, 2017, as Carlos claimed during his testimony, Hernandez replied: "No. He did not make any request that day." (Id. at 103:10.)
- c) Hernandez testified that Carlos never emailed her any photographs or videos purporting to show Plaintiffs having difficulty loading Angie into their vehicle, and never emailed her regarding problems finding a parking space for Angie. (Id. at 104:11-15.)

14. The Court finds Hernandez to be credible and reliable. She testified that she remembered the 2012 or 2013 encounter with Carlos as follows:

He came to the door. He stood at the door. He said, "Vilma, I need you to give me parking spot number 2, which is in front of Building 2500 because that one has the ramp on the side of the driver."

And I answered, "Carlos, unfortunately, according to the laws in Florida, but according to statutes, parking cannot be assigned to disabled, not designated. It has to be available for all people, any person who has the disable park tag." And that was the only time he asked, and that was my answer. (Id. at 98:24-7.). She further testified that during the March 29, 2017 encounter,

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Carlos only complained about receiving a parking violation warning from third-party On-Call Parking ("On-Call"):

I remember he came into the office. He asked to speak with me. He told me, "Vilma, I got a warning."

I told him, "Don Carlos, I want you to do me a favor, call On-Call because they are the company in charge of the parking administration." I continued working. It was the end of the month, and there's a lot of reports to be made. And he left.

(Id. at 103:1-6.) Based on Hernandez's memory of the relevant encounters with Carlos, the consistency of her testimony with other credible and reliable evidence, and the Court's observation of the witness during her testimony at trial, the Court finds Hernandez credible and reliable.

15. Amanda Ortiz speaks with Carlos on the phone at least twice a month and visits Angie at his home twice a year. (Trial Tr. 6/5/2023 at 6:6-9, 33:25 – 34:1.)

- a) As a Consultant and Waiver Support Coordinator, Ortiz is required to keep accurate notes of all contacts she has with Angie and Carlos. (Id. at 5:21-24.)
- b) Ortiz has taken contemporaneous notes of all contacts with Angie and Carlos since her initial visit with Angie on August 6, 2012. (See id. at 11:25 – 12:2.)

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- c) Ortiz initials all of her notes. (See id. at 11:22 – 12:2; id. at 25:19-21.)
- d) If Ortiz has a health or safety concern, she is required to record it in her notes. (Id. at 10:20-25.)
- e) None of Ortiz's notes from March and April 2017 reflect any discussions with Carlos regarding a handicapped parking space.
- f) Ortiz's notes from March 2, 2017 state, in their entirety:

As a consultant, I contacted Angie at home and spoke to him in regards to his health and services. As a consultant, I also spoke to his father and manager and told me all services and support is all in place with the approved cost plan. As a consultant, I informed them about a pen house and Summer Camp hosted by Great Heights Academy, if they needed any more information I will fax it over. As a consultant, I asked Angie what he likes to do for community involvement and he says he likes to watch movies, eat, and spend time with family and friends. As a consultant, I asked them to call whenever they had any questions or concerns.

(Def. Ex. 2F (emphasis added).) Ortiz's handwritten initials appear next to this note.

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- g) Ortiz's notes from March 20, 2017 state, in their entirety:

As a consultant I contacted Angie at his home and spoke to Angie's father in regard to Angie to see how he was doing and if there was anything that he needed. He tells me Angie is doing great and he is happy and stable. As a consultant, I asked about his health and goals. He continues to tell me how much Angie improves with his goals and will like to continue working on those same goals. As a consultant, I discussed the Support Plan and monthly budget/ statements to ensure proper management.

There have been no changes in medication. Angie's father informs me about his concerns of the letter he received from APD about the EZ budget and AIM, as a consultant, I informed him that this was nothing to worry about for the moment, it was just standard procedure and that if anything changed WSC will inform him of the changes.

Angie's father tells me that Angie continues to be active by going to the beach, library, and family reunions. I will continue to monitor and review Angie's health and services for the month of April.

(Id. (emphasis added).) Ortiz's handwritten initials appear next to this note.

- h) Ortiz's notes from April 4, 2017 state, in their entirety:

As a consultant, I contacted Angie at home and spoke to him in regards to his health and services. As a consultant, I also spoke to his father,

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he stated that all services and support are in place with the approved cost plan. As a consultant, I informed them about the Family Health Forum on April 22, 2017 in Miami Gardens, if they needed any more information I will fax it over. As a consultant, I asked Angie what he likes to do for community involvement and he says he likes to watch movies, eat, and spend time with family and friends. As a consultant, I asked them to call whenever they had any questions or concerns.

(Id. (emphasis added).) Ortiz's handwritten initials appear next to this note.

i) Ortiz's notes from April 18, 2017 state, in their entirety:

As a consultant, I contacted Angie at his home and spoke to Angie's father in regard to Angie, to see how he was doing and if there was anything he needed. He tells me Angie is doing great and he is happy and stable. As a consultant, I asked about his health and goals. He continues to tell me how much Angie improves with his goals and will like to continue working on those same goals. As a consultant, I discussed the Support Plan and monthly budget/ statements to ensure proper management. Angie's father tells me that Angie continues to be active by going to the beach, library, and family reunions. I will continue to monitor and review Angie's health and services for the month of May.

(Id. (emphasis added).) Ortiz's handwritten initials appear next to this note.

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- j) At trial, Ortiz testified that her notes do not reflect any discussions with Plaintiffs about handicapped parking. (Trial Tr. 6/5/2023 at 30:14-17.)
- k) The Court accords great weight to Ortiz's notes because they were made at the time of the conversations and initialed by Ortiz. The fact that the notes do not reflect any issues with parking at VOH is highly significant. It establishes that there were no issues with the disabled parking that hampered Angie's ability to participate in activities in the community and travel to and from VOH.

Thus, Ortiz's notes support an inference that Carlos did not request an assigned handicapped parking space during the relevant period, because there was no need to do so.

b. Count Three: Request for modification Angie's bathroom

16. The first and only time Plaintiffs requested permission to modify Angie's bathroom was August 26, 2018, and that request was granted the next day.

17. In 2012, Carlos asked Amanda Ortiz whether Angie's bathroom should be remodeled due to his disabilities. (Trial Tr. 6/5/2023 at 28:8 – 29:13.) Ortiz told Carlos that APD would not approve a request for funds to remodel Angie's bathroom because Plaintiffs did not own the apartment. (Id. at 28:4 – 29:13.)

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18. Carlos testified that he orally requested permission to modify Angie's bathroom on six occasions during his tenancy at VOH: first, on February 3, 2013, from Hernandez, (Trial Tr. 6/7/2023 (rough) at 130:3-14); second, on August 4, 2016, from CFH Group CEO Tom Cabrerizo, (id. at 133:23 - 134:21; Trial Tr. 6/20/2023 at 3:25 - 4:11); third, on September 9, 2016, from Hernandez and Marley Garcia, (Trial Tr. 6/20/2023 at 4:17 - 5:8; Trial Tr. 6/22/2023 at 3:12-23); fourth, in October 2016 from Hernandez, (Trial Tr. 6/20/2023 at 6:8-9); fifth, in early March 2017 from Hernandez, (Trial Tr. 6/7/2023 (rough) at 138:4-6); and sixth, on March 29, 2017, from Hernandez, (Trial Tr. 6/6/2023 (Carlos) at 10:16-19).

- a) Although Carlos also testified that he told a HUD investigator that he asked for permission to modify Angie's bathroom "from August 4, 2016 up until April 7, 2017[.]" (Trial Tr. 6/22/2023 at 40:12), there is no other testimony that he requested a bathroom modification on April 7, 2017, and he appeared to testify on cross-examination that he only requested an assigned handicapped parking space on April 7, 2017.¹⁰ (Trial Tr. 6/20/2023 at 7:24 - 8:8.)

19. Only early March 2017 and March 29, 2017 fall within the period alleged in the Second Amended Complaint—i.e., March 2017 to August 2018. (D.E. 92 ¶ 39.)

¹⁰ Furthermore, in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, they list April 7, 2017 as a date on which they requested an assigned handicapped parking space, but do not list it as a date on which they requested permission to modify Angie's bathroom. (D.E. 676 at 10-11.)

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20. The Court finds that Carlos's testimony on this issue was not credible or reliable, based on observations of him as he testified at trial, his embellishment of the underlying facts, and his inconsistent testimony.

- a) Furthermore, there were no other eyewitnesses to his alleged requests in March 2017, (see Trial Tr. 6/6/2023 (Carlos) at 8:20-22; Trial Tr. 6/6/2023 (Fe) at 16:3-9), and there were no contemporaneous notes, emails, letters, or doctor's notes corroborating Carlos's testimony.
- b) Additionally, his testimony conflicted with other credible witnesses, including Marleyn Garcia who had no interest in the outcome of the case. Carlos testified that he requested a bathroom modification during a meeting with Marleyn Garcia and Vilma Hernandez on September 9, 2016. (Trial Tr. 6/6/2023 (Carlos) at 7:8-11; Trial Tr. 6/20/2023 at 4:17 – 5:8; Trial Tr. 6/22/2023 at 3:12-23.) Ms. Garcia testified that she never met with Carlos in September of 2016. (Trial Tr. 6/7/2023 (Garcia) at 6:3-14.) Ms. Garcia testified that she met with Carlos and Fe in August of 2016, but neither Carlos nor Fe requested a bathroom modification at that meeting. (Trial Tr. 6/7/2023 (rough) at 38:2-4; 39:24 – 40:2.) Rather, they only discussed the "good conduct" addendum to their lease because neither Carlos nor Fe wanted to sign it. (Id. at 37:11 – 38:17.) Based on the consistency of Ms. Garcia's testimony with other credible and reliable evidence, the fact that she

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no longer works for CFH Group and therefore has no interest in the outcome of this case, and the Court's observation of the witness during her testimony at trial, the Court finds Ms. Garcia to be credible and reliable.

- c) Similarly, Carlos testified that on August 4, 2016, the entire family met with CFH Group CEO Tom Cabrerizo, and during the meeting Carlos requested an assigned handicapped parking space and permission to modify Angie's bathroom. (Trial Tr. 6/20/2023 (Carlos) at 3:25 – 4:11.) Mr. Cabrerizo testified that he met with the Plaintiffs after they appeared at his office unannounced wanting to discuss the nonrenewal of their lease. (Trial Tr. 6/9/2023 (Cabrerizo) at 7:1 – 8:18.) Mr. Cabrerizo testified that he had no recollection of Carlos discussing a handicapped parking space or a bathroom modification,

[a]nd . . . if he would have, at the time, it certainly would have been something that I would have discussed with my VP at the time, when I went over this meeting with her regarding the nonrenewal, as at the time, I was on the board of the Woody Foundation, which dealt with disability, and I was on that board for four years, and I spent a lot of time on that board.

(Id. at 9:7-13.) Mr. Cabrerizo explained that the Woody Foundation “dealt with disability, primarily spinal cord injuries,” and that he “was instrumental in bringing in the Woody Pack, which essentially was assistive devices to help these kids with these spinal cord injuries to be

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able to take care of themselves; feed themselves, you know, be able to wash, to wash their teeth, comb their hair in some cases, just all, all devices.” (Id. at 10:1-6.) When asked: “[I]f [Carlos] had made a comment about needing an accommodation, would that have drawn your attention?” Mr. Cabrerizo responded: “100 percent. This is something that I would have brought up in my conversation with Gliset Perez, as this is something that was dear to me at the time -- and still is.” (Id. at 10:9-11.)

Based on the consistency of Mr. Cabrerizo’s testimony with other credible and reliable evidence, and the Court’s observation of the witness during his testimony at trial, the Court finds Mr. Cabrerizo to be credible and reliable.

21. On February 27, 2017, Dr. Reynold Duarte Martinez wrote Angie a prescription for a shower chair, (Pl. Ex. 9), and on February 28, 2017, Dr. Martinez wrote a Medical Necessity Letter in support of a customized shower chair, (Pl. Ex. 10).

- a) Carlos presented the documentation supporting a shower chair to his insurance carrier, but the insurance carrier did not cover the type of shower chair Angie needed. (Trial Tr. 6/7/2023 (rough) at 119:11-17.)

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- b) Carlos did not request from APD funds to purchase a shower chair, but instead requested from APD funds to modify Angie's bathroom in 2018. (Id. at 119:21 – 120:2.)

22. As a Consultant and Waiver Support Coordinator, Amanda Ortiz is required to keep accurate notes of all contacts she has with Angie and Carlos. (Trial Tr. 6/5/2023 at 5:21-24.)

- a) Ortiz has been keeping contemporaneous notes of all contacts she has with Angie and Carlos since her initial visit with Angie on August 6, 2012. (See id. at 11:25 – 12:2.)
- b) Ortiz initials all of her notes. (See id. at 11:22 – 12:2; id. at 25:19-21.)
- c) Ortiz testified that if she has a health or safety concern, she is required to record it in her notes. (Id. at 10:20-25.)
- d) None of Ortiz's notes from March 2017 reflect that Carlos discussed a bathroom modification with Ortiz.
- e) Ortiz's notes from March 2, 2017 state, in their entirety:

As a consultant, I contacted Angie at home and spoke to him in regards to his health and services. As a consultant, I also spoke to his father and manager and told me all services and support is all in place with the approved cost plan. As a consultant, I informed them about a pen house and Summer Camp hosted by Great Heights Academy, if they needed any more information I will fax it over. As a consultant, I asked Angie what he likes to do for community involvement and he says he likes to watch movies, eat, and spend time with family and friends. As a consultant, I asked them to call whenever they had any questions or concerns.

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(Def. Ex. 2F (emphasis added).) Ortiz's handwritten initials appear next to this note.

f) Ortiz's notes from March 20, 2017 state, in their entirety:

As a consultant I contacted Angie at his home and spoke to Angie's father in regard to Angie to see how he was doing and if there was anything that he needed. He tells me Angie is doing great and he is happy and stable. As a consultant, I asked about his health and goals. He continues to tell me how much Angie improves with his goals and will like to continue working on those same goals. As a consultant, I discussed the Support Plan and monthly budget/ statements to ensure proper management. There have been no changes in medication. Angie's father informs me about his concerns of the letter he received from APD about the EZ budget and AIM, as a consultant, I informed him that this was nothing to worry about for the moment, it was just standard procedure and that if anything changed WSC will inform him of the changes. Angie's father tells me that Angie continues to be active by going to the beach, library, and family reunions. I will continue to monitor and review Angie's health and services for the month of April.

(Id. (emphasis added).) Ortiz's handwritten initials appear next to this note.

g) At trial, Ortiz reviewed her notes from 2016 and 2017 and testified that they contain no references to a "bathtub modification." (Trial Tr. 6/5/2023 at 24:2-8.)

h) The Court accords great weight to Ortiz's notes because they were made at the time of the conversations and initialed by Ortiz. The fact that the notes do not reflect any discussions regarding a bathroom modification in March 2017 is highly significant and supports the conclusion that Carlos did not request a bathroom modification in early March 2017 or on March 29, 2017.

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23. Ortiz testified that she told Carlos in 2012 that APD would not approve a request for funds to modify Angie's bathroom because Plaintiffs did not own the apartment. (Trial Tr. 6/5/2023 at 28:8 – 29:15.) She later learned that she was incorrect. (Id. at 28:18 - 29:15.)

- a) “[A]t the end” of 2017, she and Carlos began planning to request funds from APD for an environmental assessment evaluation,¹¹ (Trial Tr. 6/5/2023 at 58:2 – 59:14), which is the first step in receiving approval for funds to make a bathroom modification, (Trial Tr. 6/9/2023 (Ferguson) at 9:21 – 10:2).
- b) On August 4, 2018, Ortiz prepared the paperwork requesting funds from APD for an environmental assessment evaluation. (Trial Tr. 6/5/2023 at 66:5; Def. Ex. 2C)

24. On August 26, 2018, Carlos submitted a written request to VOH for permission to modify Angie's bathroom. (See Trial Tr. 6/23/2023 at 73:1-13; Pl. Ex. 117.)¹² Carlos testified that this was the only written request that he made, and that the request was approved the next day. (Id. at 62:6-8; see also id. at 72:17-19.)

¹¹ An environmental assessment involves hiring a contractor to visit the site of the proposed modification, to “draw up a plan, show pictures, and basically tell [APD] the cost of that modification.” (Trial Tr. 6/9/2023 (Ferguson) at 11:9-11.)

¹² The August 26, 2018, written request was admitted into evidence as Plaintiffs' Exhibit 117 on June 23, 2023. (Trial Tr. 6/23/2023 at 73:10-13.) However, on June 26, 2023, Plaintiffs' counsel represented at trial that it had been introduced as Plaintiffs' Exhibit 118, (Trial Tr. 6/26/2023 at 24:7-10), and when the Parties submitted their evidence to the Court at the close of Phase 1 of the trial, the August 26, 2018 written request was marked “P-118.”

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- a) On August 27, 2018, Defendants' corporate attorney, Kenneth J. Lowenhaupt, Esq., sent Carlos a letter approving the written request for permission to modify Angie's bathroom. (Pl. Ex. 3E; see also Trial Tr. 6/23/2023 at 62:6-8, see also *id.* at 72:17-19.)
- b) On August 31, 2018, Vilma Hernandez emailed Carlos to confirm that his written request was granted. (Pl. Ex. 3G.)

25. Hernandez testified that the first and only time Carlos requested a bathroom modification was August 26, 2018, "and he received the authorization immediately." (Trial Tr. at 6/23/2023 at 105:15-17; see also Trial Tr. 6/26/2023 at 12:8-11; see also *id.* at 17:23.)

26. The Court finds Vilma to be credible and reliable based on her memory of the relevant encounters with Carlos, the consistency of her testimony with other credible and reliable evidence, and the Court's observation of the witness during her testimony at trial.

27. On August 23, 2018, Doctor Annette Fornos wrote a letter in support of "a home bathtub that is suited for someone with [Angie's] medical condition." (Def. Ex. K.) Dr. Fornos testified that this "was the first time that anyone has asked [her] to write a letter in support of a bathroom modification[.]" (Trial Tr. 6/7/2023 (Fornos-cross) at 15:3-7.) Based on the Court's observation of the witness during her testimony at trial, the Court finds Dr. Fornos to be credible and reliable.

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28. Marleyn Garcia testified that the first time Carlos requested a bathtub modification was in August 2018, and the request was granted. (Trial Tr. (rough) 6/7/2023 at 40:13-22.) As previously stated, the Court finds Ms. Garcia to be credible and reliable.

29. Paul Gallner testified that in the fall of 2018 he learned that Carlos requested permission to modify the bathroom. (Trial Tr. (Gallner) 6/7/2023 at 5:6-9.) To his knowledge, this was Carlos's first such request. (Id. at 5:18-25.) Gallner discussed the request with Hernandez and told her that any modification would require a licensed contractor and that the bathroom would have to be returned to its original condition when Plaintiffs moved. (Id. at 6:6-13.) Based on the consistency of Mr. Gallner's testimony with other credible and reliable evidence, and the Court's observation of the witness during his testimony at trial, the Court finds Mr. Gallner to be credible and reliable.

*Appendix H***IV. CONCLUSIONS OF LAW**

1. The Fair Housing Act makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of (A) that person; or (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that person.” 42 U.S.C. § 3604(f)(2).
2. “Discrimination” includes both:
 - a) “a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises . . . [.]” 42 U.S.C. § 3604(f)(3)(A); and
 - b) “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]” 42 U.S.C. § 3604(f)(3)(B).

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3. “A successful failure-to-accommodate claim has four elements. To prevail, one must prove that (1) he is disabled within the meaning of the FHA, (2) he requested a reasonable accommodation, (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation.” *Bhogaita v. Altamonte Heights Condo. Ass’n Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014) (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1218-19 (11th Cir. 2008)).
4. “A reasonable-modification plaintiff must prove ‘[1] that she suffers from a disability, [2] that she requested an accommodation or modification, [3] that the defendant housing provider refused to make the accommodation or to permit the modification [the denial element], and [4] that the defendant knew or should have known of the disability at the time of the refusal.’” *Johnson v. Jennings*, 772 F. App’x 822, 825 (11th Cir. 2019) (quoting *Hollis v. Chestnut Bend Homeowners Ass’n*, 760 F.3d 531, 541 (6th Cir. 2014)). “The claim also requires proof of ‘both [5] the reasonableness and [6] necessity of the requested modification.’” *Id.* (quoting *Hollis*, 760 F.3d at 541). “The failure to make a timely determination after meaningful review amounts to

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constructive denial of a requested accommodation [or modification], ‘as an indeterminate delay has the same effect as an outright denial.’”

Bhogaita, 765 F.3d at 1286.

5. The FHA has a two-year statute of limitations. 42 U.S.C. § 3613(a)(1)(A). Specifically, an “aggrieved person” who has been “injured by a discriminatory housing practice” is entitled to file a civil action “not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice,” 42 U.S.C. §§ 3602(i)(1), 3613(a)(1)(A). The FHA’s “statute of limitations begins to run when ‘facts supportive of the cause of action are or should be apparent to a reasonably prudent person similarly situated.’” *Wood v. Briarwinds Condo. Ass’n Bd. of Dirs.*, 369 F. App’x 1, 4 (11th Cir. 2010) (quoting *Hipp v. Liberty Nat’l Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001)). For example, the FHA’s statute of limitations begins to run when a request for a reasonable accommodation, or for permission to make a reasonable modification, is denied. See *Oliver v. Fox Wood at Trinity Cmty. Ass’n, Inc.*, Case No: 8:17-cv-585-T-30AAS, 2018 WL 4608325, at *7-8 & n.5 (M.D. Fla. July 30, 2018) (finding that the FHA’s statute of limitations began to run when a reasonably prudent

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person would have become aware that a requested accommodation or permission to modify was denied, and that an injury is not a “continuing injury” simply because a request was denied) (citing *Telesca v. Vill. of Kings Creek Condo. Ass’n, Inc.*, 390 F. App’x 877, 882 (11th Cir. 2010)).

However, “[t]he computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice.”¹³ 42 U.S.C. § 3613(a)(1)(B). The FHA’s statute of limitations is not tolled by a request for administrative review of a no-cause determination. See *Allen v. Hous. Auth. of City of Auburn, Ala.*, 638 F. App’x 825, 831 (11th Cir. 2015) (observing that “nothing in the statutory scheme of the FHA expressly contemplates such review” and that “the FHA’s implementing regulations do not provide for administrative review of determinations of no reasonable cause”).

¹³ On September 27, 2017, Plaintiffs’ filed a Housing Discrimination Complaint with the U.S. Department of Housing and Urban Development. (See Def. Ex. 3W.) HUD conducted an investigation and issued a final decision ninety days later on December 26, 2017. (See Second Am. Compl. ¶ 94.) Although HUD’s “no cause” letter was not introduced into evidence at trial, counsel for both Parties agreed that the HUD investigation lasted 90 days, and therefore that the limitations period would be statutorily tolled for 90 days. (Trial Tr. 6/22/2023 at 47:14-24.)

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6. In a civil trial, the plaintiff must prove every element of his case by a preponderance of the evidence. See *Johnson v. Florida*, 348 F.3d 1334, 1347 (11th Cir. 2003); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999). “The burden of showing something by a ‘preponderance of the evidence,’ . . . ‘simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72 (1970)).
7. **As to Count One**, the Court finds that Carlos requested an assigned handicapped parking space only once, and that request was made and denied in late 2012 or early 2013. Plaintiffs commenced this lawsuit on May 6, 2019, more than six years after Carlos’s request for an assigned handicapped parking space was denied.¹⁴

¹⁴ The Court need not decide whether the initial Complaint filed in this action relates back to the complaints filed in Cano I or Cano II, (see *supra* Note 3), because even assuming arguendo that the relation back doctrine of Federal Rule of Civil Procedure 15(c) does apply, Carlos filed his complaint in Cano I approximately five years after his request for an assigned handicapped parking space was denied in 2012 or early 2013.

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Accordingly, Defendants are entitled to judgment as to Count One because:

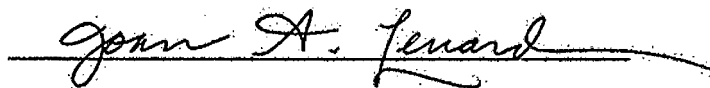
- a) Plaintiffs failed to prove by a preponderance of the evidence that they requested an assigned handicapped parking space between March 2017 to June 2017, as alleged in the Second Amended Complaint;
 - b) Plaintiffs failed to prove by a preponderance of the evidence that they otherwise requested an assigned handicapped parking space within the limitations period;
 - c) Plaintiffs failed to prove by a preponderance of the evidence that Defendants denied any such request; and
 - d) Any claim predicated on Plaintiffs' late 2012 or early 2013 request for an assigned handicapped parking space is barred by the FHA's statute of limitations.
8. As to Count Three, the Court finds that the first and only time Carlos requested permission to modify Angie's bathroom was August 26, 2018, and that request was granted the next day. Accordingly, Defendants are entitled to judgment as to Count Three because Plaintiffs failed to prove by a preponderance of the evidence that Defendants denied a request for permission to make a reasonable modification to the premises.

*Appendix H***V. CONCLUSION**

The Court has carefully considered all of the evidence, the Parties' arguments, the testimony of all of the witnesses, applicable law, and the pertinent portions of the record. Accordingly, based on the foregoing findings of fact and conclusions of law, and consistent with the Court's prior rulings:

1. Defendants 245 C & C, LLC and CFH Group, LLC are entitled to judgment in their favor as to Counts One and Three of Plaintiffs' Second Amended Complaint; and
2. Judgment shall be set out in a separate document, pursuant to Rule 52(a)(1) and 58(a) of the Federal Rules of Civil Procedure.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of July, 2023.

A handwritten signature in cursive script, reading "Joan A. Lenard", is written over a horizontal line.

Joan A. Lenard. United States District Judge

Appendix I

FLSD, Case 1:19-cv-21826-JAL, **DE 679**, 07/20/23

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 19-21826-CIV-LENARD/DAMIAN**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, KATY ALONSO MOREJON,
JANY LEIDY ALONSO MOREJON, and
FE MOREJON FERNANDEZ individually,

Plaintiffs,

v.

245 C & C, LLC and CFH GROUP, LLC,

Defendants.

FINAL JUDGMENT

THIS CAUSE is before the Court following a bench trial on Counts One and Three of the Second Amended Complaint, and entry of the Court's Findings of Fact and Conclusions of Law as to those Counts.¹ Pursuant to Rules 52(a)(1) and 58(a) of the Federal Rules of Civil Procedure, it is **ORDERED AND ADJUDGED** that:

1. **FINAL JUDGMENT** is hereby entered in favor of Defendants 245 C & C, LLC and CFH Group, LLC and against Plaintiffs Carlos A. Alonso Cano,

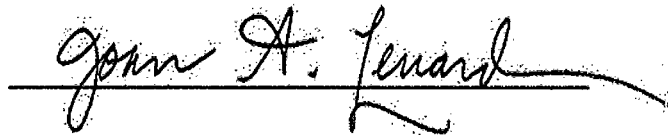
¹ The Second Amended Complaint contained nineteen Counts. (D.E. 92.) The Court previously dismissed Counts Two, Six, Seven, Eight, Seventeen, Eighteen, and Nineteen with prejudice for failure to state claims upon which relief can be granted, (D.E. 90); dismissed Count Sixteen with prejudice as an impermissible shotgun pleading, (D.E. 438); granted Defendants' Motion for Judgment on the Pleadings as to Counts Thirteen and Fifteen, (id.); and granted Defendants' Motion for Summary Judgment as to Counts Four, Five, Nine, Ten, Eleven, Twelve, and Fourteen, (D.E. 555).

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Angie Alonso Morejon, Katy Alonso Morejon, Jany Leidy Alonso Morejon,
and Fe Morejon Fernandez on all Counts contained in the Second Amended
Complaint; and

2. This case is now **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of July,
2023.

A handwritten signature in cursive script, reading "Joan A. Lenard", is written over a horizontal line. The signature is fluid and extends slightly to the right of the line.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

CARLOS A. ALONSO CANO, et al.

Petitioners

v.

245 C&C, LLC, &
CFH GROUP, LLC,

Respondents

On petition for Writ of Certiorari
to the United States Court of Appeals
for the 11th Circuit, Atlanta, Georgia

SUPPLEMENTAL APPENDIX

Carlos A. Alonso Cano,
Fé Morejón Fernández,
Jany L. Alonso Morejón,

Pro Se Petitioners

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Hialeah, FL. 33015
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**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

1. **28 U.S.C. § 1254(1)**. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. **The 7th Amendment**. The Seventh Amendment of the U.S. Constitution guarantees the right to a jury trial in federal civil cases and protects juries' factual findings from being overturned by judges. Ratified in 1791 as part of the Bill of Rights, it ensures citizens can resolve disputes between private parties before a jury of their peers. The amendment reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

3. **Rule 38. Right to a Jury Trial; Demand**

(a) **Right Preserved**. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—**is preserved to the parties inviolate**.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

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(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

4. Rule 39. Trial by Jury or by the Court

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded **must be by jury** unless:

(1) the parties or their attorneys **file a stipulation to a nonjury trial** or **so stipulate on the record**.

5. **42 U.S. C. § 3604(f)(1)**- Discrimination in the sale or rental of housing and other prohibited practices. It shall be unlawful—(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because

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of a handicap of—

(A) that buyer or renter,[1]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

6. 42 U.S.C. § 3604(f)(3)- For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.[2]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling

7. 42 U.S.C. § 3613. Enforcement by private persons

(a) Civil action

(1) (A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice,

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or the breach of a conciliation agreement entered into under this subchapter, **whichever occurs last**, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(1) (B) The computation of such 2-year period **shall not include** any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

8. **42 U.S.C. § 3613 (a)(2)**. An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title **and without regard to the status of any such complaint**.

9. **42 U.S.C. § 3613 (b)(1)**. Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may appoint an attorney for such person (**EA**).

10. **42 U.S.C. § 3613 (c)(1)**. In a civil action under subsection (a), if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d), may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, **or other** **order** (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

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11. 42 U.S.C. § 3617. It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

12. 24 C.F.R. § 100.400.

(a) This subpart provides the Department's interpretation of the conduct that is unlawful under section 818 of the Fair Housing Act.

(b) It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this part.

(c) Conduct made unlawful under this section includes, but is not limited to, the following:

(5) **Retaliating** against any person **because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under the Fair Housing Act.**

(6) **Retaliating** against any person because that person **reported a discriminatory housing practice to a housing provider or other authority.**

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13. **Fla. Stat. 83.56(2)(b)**. If the tenant materially fails to comply with s. 83.52 or material provisions of the rental agreement, other than a failure to pay rent, or reasonable rules or regulations, if such noncompliance is of a nature that **the tenant should be given an opportunity to cure it**, deliver a written notice to the tenant specifying the noncompliance, including a notice that, if the noncompliance is not corrected **within 7 days from the date that the written notice is delivered**, the landlord shall terminate the rental agreement by reason thereof.

14. **Rule 37. Failure to Make Disclosures** or to Cooperate in Discovery;

Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(5) Payment of Expenses; Protective Orders.

(A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party **or attorney advising that conduct**, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court **must not order this payment if:**

(ii) the opposing party's nondisclosure, response, or objection **was substantially justified**; or (iii) **other circumstances make an award of expenses unjust.**

*Appendix J***15. Rule 72. Magistrate Judges:** Pretrial Order

(a) Nondispositive Matters. When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

(b) Dispositive Motions and Prisoner Petitions.

(1) Findings and Recommendations. A magistrate judge must promptly conduct the required proceedings when assigned, without the parties' consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement. A record must be made of all evidentiary proceedings and may, at the magistrate judge's discretion, be made of any other proceedings. The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must immediately serve a copy on each party as provided in Rule 5(b).

(2) Objections. Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may respond to another party's objections

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within 14 days after being served with a copy. Unless the district judge orders otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient.

(3) Resolving Objections. The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

16. **24 CFR § 103.310. Conciliation agreement.**

(a) The terms of a settlement of a complaint will be reduced to a written conciliation agreement. The conciliation agreement **shall seek to protect the interests of the aggrieved person, other persons similarly situated, and the public interest.**

The types of relief that may be sought for the aggrieved person are described in § 103.315. The provisions that may be sought for the vindication of the public interest are described in § 103.320.

(b)

(1) The agreement must be executed by the respondent and the complainant. The agreement is subject to the approval of the Assistant Secretary, who will indicate approval by signing the agreement. The Assistant Secretary will approve an agreement and, if the Assistant Secretary is the complainant, will execute the agreement, only if:

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(i) The complainant and the respondent agree to the relief accorded the aggrieved person;

(ii) The provisions of the agreement will adequately vindicate the public interest; and

(iii) If the Assistant Secretary is the complainant, all aggrieved persons named in the complaint are satisfied with the relief provided to protect their interests.

17. 24 CFR § 103.315- Relief sought for aggrieved persons.

(a) The following types of relief may be sought for aggrieved persons in conciliation:

(1) Monetary relief in the form of damages, including damages caused by humiliation or embarrassment, and attorney fees;

(2) Other equitable relief including, but not limited to, access to the dwelling at issue, or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief; or

(3) Injunctive relief appropriate to the elimination of discriminatory housing practices **affecting the aggrieved person or other persons.**

18. 24 CFR § 103.320- Provisions sought for the public interest.

The following are types of provisions may be sought for the vindication of the public interest:

(a) Elimination of discriminatory housing practices.

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- (b) Prevention of future discriminatory housing practices.
- (c) Remedial affirmative activities to overcome discriminatory housing practices.
- (d) Reporting requirements.
- (e) Monitoring and enforcement activities.

19. 28 U.S.C. § 636(c)(1). Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

20. 28 U.S.C. § 636(c)(2). If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

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21. 28 U.S.C. § 636(c)(4). The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

TABLE OF SUPPLEMENTAL APPENDICES

APPENDIX K

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FLSD, Case 1:19-cv-21826-JAL, DE 555, 8/17/22

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CARLOS A. ALONSO CANO, individually
and as guardian for his son, ANGIE ALONSO
MOREJON, and as next friend of his minor
daughters, KATY ALONSO MOREJON and
JANY LEIDY ALONSO MOREJON, and
FE MOREJON FERNANDEZ individually,

Plaintiffs,

v.

245 C & C, LLC and CFH GROUP, LLC,

Defendants.

**AMENDED ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (D.E. 364)**

THIS CAUSE is before the Court on Defendants 245 C & C, LLC and CFH Group, LLC's Motion for Summary Judgment, ("Motion," D.E. 364), filed November 16, 2020. Plaintiffs filed a Response on August 3, 2021, ("Response," D.E. 491), to which Defendants filed a Reply on September 3, 2021, ("Reply," D.E. 514). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Background

Plaintiff Angie Alonso Morejon ("Angie") is a permanently disabled individual who suffers from, among other things, mental retardation, severe cerebral palsy, and spasticity. (Second Am. Compl. (D.E. 92) ¶ 4.) Plaintiff Carlos A. Alonso Cano

("Alonso") is Angie's father and Plenary Guardian; Plaintiff Fe Morejon Fernandez ("Morejon") is Angie's mother; and Plaintiffs Katy Alonso Morejon and Jany Leidy Alonso Morejon are Angie's sisters. (Id. ¶¶ 14-17.)

During the relevant period, Plaintiffs resided in a rental apartment in the Villas of Hialeah apartment complex ("VOH") located in Hialeah, Florida. (Id. ¶ 2.) Defendant 245 C & C, LLC and/or Defendant CFH Group, LLC owns VOH, (id. ¶ 22), while Defendant CFH Group, LLC operates VOH, (id. ¶ 25). Vilma Hernandez ("Vilma") is the Property Manager at VOH.¹ (Id. ¶ 27.)

II. Brief procedural history

On May 6, 2019, Alonso, through counsel,² initiated this federal lawsuit alleging that Defendants violated (1) various provisions of the Fair Housing Act ("FHA"), (2) the implied covenant of quiet enjoyment under Florida state law, and (3) Section 83.67(1), Florida Statutes, by unlawfully turning off the water to Plaintiffs' home without warning. (D.E. 1.)³ On July 19, 2019, the Court entered an

¹ On February 1, 2018, Defendants instituted eviction proceedings against Plaintiffs. The eviction case was tried in the Miami-Dade County Court on November 15, 16, and 19, 2018. The trial judge retired before issuing a ruling. A successor judge was appointed and issued a final judgment on June 20, 2019, finding in favor of Alonso and Morejon. 245 C & C, LLC appealed the adverse final judgment, and on September 3, 2020, the Appellate Division of the Miami-Dade Circuit Court reversed the final judgment and remanded the case with instructions to enter judgment for 245 C & C, LLC and to calculate an award of attorney's fees for 245 C & C, LLC.

² Plaintiffs' counsel was permitted to withdraw on December 27, 2019. (D.E. 126.)

³ This is Plaintiffs' third attempt at suing Defendants in federal court. On February 12, 2018, Alonso, proceeding *pro se*, sued Defendants in this District alleging violations of his civil rights, the Americans with Disabilities Act ("ADA"), and the Fair Housing Act ("FHA"). See *Cano v. 245 C&C, LLC, et al.*, Case No. 18-20537-Civ-Ungaro ("*Cano I*"), D.E. 1. Judge Ungaro dismissed the *pro se* Complaint without prejudice for failure to state a claim, and provided Plaintiff leave to amend. *Cano I*, D.E. 6. Alonso filed an Amended Complaint, *id.*, D.E. 9 & 10, which Judge Ungaro dismissed as "unintelligible," *id.*, D.E. 38. Thereafter, Alonso, through newly-acquired counsel, filed a Second Amended Complaint. *Id.*, D.E. 42. Alonso's counsel subsequently withdrew, *id.*, D.E. 50, and

Order Granting in Part Defendants' Corrected Combined Motion to Dismiss Complaint and/or for More Definite Statement. (D.E. 43.) The Court found that the Complaint constituted a "shotgun pleading" that violated federal pleading standards because four of the five Counts alleged multiple claims;⁴ as such, the Court required Alonso to file an Amended Complaint. (Id. at 9-12.) Although the Court provided Alonso leave to file an Amended Complaint, it warned "that it may be the final amendment the Court permits him to make[.]" (id. (citing *Brown v. Hillsborough Cnty. Sheriff's Office*, 342 F. App'x 552, 554 (11th Cir. 2009))), and

Alonso moved pro se to amend his complaint a third time, id., D.E. 62. Judge Ungaro granted the motion to amend but stated that she would not grant any further opportunities to amend. Id., D.E. 67. Alonso filed a Third Amended Complaint, id., D.E. 73, which Defendants moved to dismiss, id., D.E. 81. On January 28, 2019, Judge Ungaro granted the motion to dismiss, finding that the Third Amended Complaint was a "shotgun pleading" and, nevertheless, failed to state a claim. Id., D.E. 84. Because Alonso had been given numerous opportunities to file a complaint that stated a claim upon which relief could be granted and otherwise complied with the Federal Rules of Civil Procedure, but had failed to do so, Judge Ungaro dismissed the case without prejudice. Id.

On March 19, 2019, Alonso, proceeding pro se, filed a second federal lawsuit against Defendants. See *Cano v. 245 C&C, LLC, et al.*, 19-21045-Civ-Altonaga ("Cano II"). Judge Altonaga sua sponte dismissed the complaint without prejudice for failure to state a claim upon which relief can be granted and because it was an improper "shotgun pleading." Id., D.E. 5. Judge Altonaga denied leave to amend because: "(1) this is Plaintiff's fourth pleading directed to these two Defendants; (2) Plaintiff has already been instructed on federal pleading standards and is aware shotgun pleadings are subject to dismissal; and (3) Plaintiff was previously warned additional pleadings would not be allowed[.]" Id. at 5. Alonso moved to reopen the case and amend the complaint, id., D.E. 11, but Judge Altonaga denied the motion, id., D.E. 12.

⁴ The Court found that Plaintiffs' claim for breach of the implied covenant of quiet enjoyment did not constitute a "shotgun pleading" because, although it alleged various ways in which Defendants breached the implied covenant of quiet enjoyment, "it appears that under Florida law a landowner can breach the covenant of quiet enjoyment through a course of conduct." (D.E. 43 at 10-11 (citing *Misha Enters. v. GAR Enters, LLC*, 117 So. 3d 850, 554 (Fla. Dist. Ct. App. 2013) (finding genuine issues of material fact precluded summary judgment in favor of landowner on claim for breach of covenant of quiet enjoyment where complaint alleged, inter alia, that defendant harassed plaintiff and its customers for several months, towed vehicles belonging to plaintiff's customers, and "needlessly caus[ed] numerous agencies to inspect [plaintiff's] operation and property"); *Carner v. Shapiro*, 106 So. 2d 87, 89 (Fla. Dist. Ct. App. 1958) (affirming damages award for breach of covenant of quiet enjoyment where building-owner remodeled building over four-month period).)

instructed that “Plaintiff should endeavor to remedy all deficiencies, whether discussed in this Order or not[.]” (id. at 15).

On August 9, 2019, Plaintiffs filed an Amended Complaint which contained nineteen causes of action. (D.E. 52.) Defendants filed a Motion to Dismiss the Amended Complaint, (D.E. 61), which the Court granted in part, dismissing Counts Two, Six, Seven, Eight, Seventeen, Eighteen, and Nineteen with prejudice for failure to state claims upon which relief can be granted, (D.E. 90). Although the Court had previously warned Plaintiffs that it may not permit any further amendments, the Court provided Plaintiffs leave to amend their complaint to add language to one paragraph. (Id. at 64.)

On December 2, 2019, Plaintiffs filed the operative Second Amended Complaint asserting claims under the Fair Housing Act and Florida state law. (D.E. 92.)

Defendants filed a Motion for Judgment on the Pleadings as to Counts Thirteen, Fifteen, and Sixteen. (D.E. 368.)

The Court entered an Order granting the Motion for Judgment on the Pleadings as to Counts Thirteen and Fifteen, and dismissing Count Sixteen with prejudice as an impermissible shotgun pleading. (D.E. 438.) The following claims remain:

- In Count One, Plaintiffs allege that Defendants violated the FHA by failing to provide a reasonable accommodation—specifically, a handicapped parking spot with an access aisle on the driver’s side reserved exclusively for Angie, (Second Am. Compl. ¶¶ 39, 128-43);
- In Count Three, Alonso, Morejon, and Angie allege that Defendants violated the FHA by refusing to permit a reasonable modification to the existing premises—specifically, a modification to Angie’s bathroom, (id. ¶¶ 150-56);

- In Count Four, Plaintiffs allege that Defendants violated the FHA by failing to provide a reasonable accommodation—specifically, painting the bathtub in the guest bathroom without using toxic substances, (id. ¶¶ 157-62);
- In Count Five, Alonso, Morejon, and Angie allege that Defendants violated the FHA by
- failing to provide a reasonable accommodation—specifically, removing the operation of noisy equipment near Plaintiffs’ apartment, (id. ¶¶ 163-68);
- In Count Nine, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA where, “[a]fter many events that [are] detailed in other portions of the [Second] Amended Complaint,” Defendants threatened a \$150.00 fine if tape was not removed from Plaintiffs’ windows, issued a “SEVEN DAY NOTICE TO CURE,” issued a Notice of Termination of Plaintiffs’ month-to-month tenancy, and finally issued an eviction notice (id. ¶¶ 187-207);
- In Count Ten, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA where, in retaliation for requesting reasonable accommodations and modifications, the company that controlled VOH’s parking areas “used intimidation tactics against Plaintiffs, causing fear, loss of sleep and affecting Angie and his family[.]” (id. ¶¶ 208-16);
- In Count Eleven, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA by instituting eviction proceedings in retaliation for filing a complaint with HUD, (id. ¶¶ 217-27);
- In Count Twelve, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA by appealing the state court’s judgment of retaliatory eviction, (id. ¶¶ 228-38);
- In Count Fourteen, Plaintiffs allege that Defendants breached the implied covenant of quiet enjoyment and various provisions of Chapter 83, Florida Statutes, (id. ¶¶ 249-57).

(See Second Am. Compl., D.E. 92.)

On December 16, 2019, Defendants filed an Answer and Affirmative

Defenses. (D.E. 101.) Defendants’ Sixth Affirmative Defense asserts that “Plaintiffs

have waived their rights to legal and equitable relief as a consequence of signing the Month-to-Month Lease which contained a Good Conduct Addendum.” (Id. ¶ 279.) Defendants’ Ninth Affirmative Defense asserts that any claim under the FHA which arose more than two years before the filing of this lawsuit is barred by the FHA’s statute of limitations. (Id. ¶ 282.).

On November 16, 2020, Defendants filed the instant Motion for Summary Judgment, (D.E. 364), and a Statement of Material Undisputed Facts in support thereof, (D.E. 366). They also filed a Request for Judicial Notice.⁵ (D.E. 372.)

On January 11, 2021—after providing Plaintiffs two extensions of time to respond, (D.E. 390, 411)—Plaintiffs filed a Response in Opposition to Defendants’ Motion for Summary Judgment, (D.E. 413), to which it attached 245 pages of exhibits, (D.E. 413-1). Plaintiffs did not file a Response to Defendants’ Statement of

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- ⁵ Defendants requested that the Court take judicial notice of the following:
1. Records of the Miami-Dade Property Appraiser’s Office related to Folio # 04-203-4160-0010, Villa Hialeah Subdivision, 2500 W. 56th Street, Hialeah, FL.
 2. Excerpt from the Florida Fire Prevention Code, Section 11.7.2.
 3. Excerpts from Florida Agency for Persons with Disabilities, “CDC+ Program Handbook.”
 4. Excerpts from Florida Agency for Healthcare Administration, “Disabilities Individual Budgeting Waiver Services and Limitations Handbook.”
 5. Florida Statutes §§ 83.51(1)(a), 83.53(2)(a), 83.53(3), 83.55, 83.64, 83.67, 95.11(2)(b), 95.11(3)(f), 316.1955(1), 320.0848 and 553.504.
 6. Miami-Dade County Ordinances 30-442, 30-443 and 30-447.
 7. Excerpt from Chapter 5, OSHA Field Handbook.
 8. Docket in Miami Dade County Court Case No. 18-000236 CC 21.
 9. Final Judgment in Miami-Dade County Court Case No. 18-00236 CC 21.
 10. Opinion and Mandate from Appellate Division, Miami-Dade Circuit Court Case No. 19-00208 AP 01.
 11. Hurricane Irma striking South Florida on 9/10/17. National Weather Service, Hurricane Irma Local Report/Summary (available at <https://www.weather.gov/mfl/hurricaneirma>).

(D.E. 372.)

Material Undisputed Facts, nor did it file a Response to Defendants' Request for Judicial Notice.

On February 5, 2021, Defendants filed a Motion to Strike Plaintiffs' Response in its Entirety and to Deem Defendants' Statement of Material Facts Admitted, or to Strike Particular Statements from the Response. (D.E. 435.)

On March 15, 2021—after providing Plaintiffs two extensions of time to respond to the Motion to Strike, (D.E. 437, 446)—Plaintiffs filed a document titled "Response" which did not respond to Defendants' Motion to Strike but was instead an entirely new response to Defendants' Motion for Summary Judgment. (D.E. 447.) However, like its predecessor, it did not contain a Response to Defendants' Statement of Material Undisputed Facts. Thereafter, Defendants filed a Reply in support of their Motion to Strike. (D.E. 456.)

On May 18, 2021, the Court entered an Omnibus Order Granting Defendants' Motion to Strike Plaintiffs' Response in its Entirety and to Deem Defendants' Statement of Material Undisputed Facts Admitted, Granting Defendants' Request for Judicial Notice, Granting Defendants' Motion for Summary Judgment, and Closing Case. ("First Order on Summary Judgment," D.E. 468.) First, the Court granted the Motion to Strike by default because "Plaintiffs failed to respond to any of the arguments raised in Defendants' Motion To Strike[.]" (Id. at 9.) Alternatively, the Court granted the Motion to Strike on the merits because Plaintiffs failed to comply with Local Rule 56.1. (Id. at 10-13.) The Court explained that because

Plaintiffs failed to respond to Defendants' Statement of Material Facts, by operation of Local Rule 56.1, Defendants' facts were deemed admitted to the extent that they were supported by record evidence. (Id. at 12-13.)

Second, the Court granted the Request for Judicial Notice by default because Plaintiffs failed to respond to the Request. (Id. at 15.) Alternatively, the Court granted the Request for Judicial Notice on the merits, finding "that the materials listed in Defendants' request are subject to judicial notice." (Id. at 15-16 (citations omitted).)

Third, the Court granted Defendants' Motion for Summary Judgment. (Id. at 17-87.) Initially, the Court found that all of the facts recited in the Omnibus Order's "Facts" section were supported by record evidence and therefore deemed admitted by operation of Rule 56.1. (Id. at 17 n.12.) The Court then found that the admitted facts and record evidence established that Defendants were entitled to summary judgment as to each remaining Count. (Id. at 39-86.) The Court subsequently entered Final Judgment by separate entry and closed the case. (D.E. 469.)

On June 1, 2021, Plaintiffs filed a Motion to Reopen pursuant to Rule 60(b)(3) and (6). (D.E. 470.) They argued that the Court relied upon false statements by Defendants' witnesses when concluding that Defendants' were entitled to summary judgment, and that there is record evidence supporting their claims. (See id. at 2-20.) On the last page of the Motion to Reopen, under the "Legal Standard" heading, Plaintiffs appeared to argue that the Court erred by granting Defendants' Motion

for Summary Judgment without first providing Plaintiffs notice of the rules and requirements governing motions for summary judgment. (Id. at 20.) Defendants filed a Response, (D.E. 474), to which Plaintiffs filed a Reply, (D.E. 477).

On June 25, 2021, the Court entered an Order granting the Motion to Reopen. (D.E. 483.) Briefly, the Court found that the Motion was properly construed as one under Rule 59(e), (id. at 9), and found that the Court committed reversible error by granting Defendants' Motion for Summary Judgment without first providing notice to Plaintiffs of (1) the rules governing summary judgment, (2) their right to file affidavits or other material in opposition to the motion, and (3) the consequences of default, (id. at 9-15 (citing *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985))). Accordingly, the Court Vacated in part the Court's Omnibus Order on Summary Judgment,⁶ and reinstated the Motion for Summary Judgment. (Id. at 17.) The Court further provided the Parties notice of (1) the rules governing summary judgment, (2) their right to file affidavits or other material in opposition to the motion, and (3) the consequences of default, pursuant to Rule 56(c) and (f), *Griffith, Couch v. Clark*, 725 F. App'x 808, 811-12 (11th Cir. 2018), "and/or otherwise." (Id. at 18-22.)

⁶ Specifically, the Court vacated the Omnibus Order to the extent that it granted Defendants' Motion for Summary Judgment, but not to the extent that it granted Defendants' Request for Judicial Notice. (D.E. 483 at 17 n.10.) The court did not find that failure to provide notice under *Griffith* required the Court to vacate the part of the Omnibus Order granting Defendants' Request for Judicial Notice. (Id. at 15 n.9.)

On August 2, 2021, Plaintiffs filed a Request for Judicial Notice. (D.E. 493.) Defendants filed a Response, (D.E. 517), to which Plaintiffs filed a Reply, (D.E. 534).

Also on August 2, 2021, Plaintiffs filed their Responses to the Motion for Summary Judgment (D.E. 491) and Statement of Material Facts in Dispute (D.E. 492), which contains a section that includes five "New Facts." (Id. ¶¶ 138-42). The same day, Plaintiffs filed a Notice of Conventional Filing of Plaintiffs' USB as Appendixes to Summary Judgment. ("Notice of Conventional Filing," D.E. 495.) Plaintiffs attached to the Notice "Appendix A" which contained 115 pages of documents supporting their Statement of Material Facts in Dispute. (D.E. 495-1.) However, on August 4, 2021, Plaintiffs filed a Notice of Striking the Notice of Conventional Filing. (D.E. 501.) By operation of the Notice of Striking, both the Notice of Conventional Filing (D.E. 495) and Appendix A attached thereto (D.E. 495-1) have been stricken from the record. Plaintiffs have not refiled Appendix A with the Court.

On August 4, 2021, Plaintiffs filed a Motion (1) requesting leave to file a new USB drive with evidence that was specifically prepared to support Plaintiffs' responses to Defendants' Motion for Summary Judgment and Statement of Material Undisputed Facts, and (2) striking the USB drive Plaintiffs had previously filed in support of their opposition to Defendants' Motion for Summary Judgment and Statement of Material Undisputed Facts. (D.E. 499.) On August 9, 2021, the Court granted Plaintiffs' Motion for leave to file a new USB drive and stated that "[t]his

will be the final USB the Court permits Plaintiffs to file in support of their opposition to Defendants' Motion for Summary Judgment and Statement of Material Facts." (D.E. 505.) The Court also granted the Motion to strike the previously-filed USB drive. (Id.) The new USB does not contain "Appendix A," nor does it appear anywhere else in the record.

On September 3, 2021, Defendants filed their Reply in support of their Motion for Summary Judgment (D.E. 514), their Reply and Objections to Plaintiffs' Statement of New Undisputed Facts (D.E. 520), and a separate Reply "Memorandum" to Plaintiffs' Statement of New Undisputed Facts (D.E. 521).

Also on September 3, 2021, Defendants filed a Motion to Strike Previously Unasserted Claims and New Facts to Support these Claims in Plaintiffs' Response to Motion for Summary Judgment, its Accompanying Statement of Opposing Material Facts and Supporting Affidavits. (D.E. 516.) Plaintiffs filed a Response on September 30, 2021, (D.E. 535), to which Defendants filed a Reply on November 29, 2021, (D.E. 548).

Also on September 3, 2021, Defendants filed Objections to Plaintiffs' Opposing Materials and Declarations Supporting Response to Summary Judgment and Motion to Strike Declarations as Shams. (D.E. 518.) Plaintiffs filed a Response on September 30, 2021, (D.E. 536), to which Defendants filed a Reply on November 29, 2021, (D.E. 549).

Also on September 3, 2021, Defendants filed Objections to and Motion to Strike Plaintiffs' Disputes of Defendants' Statement of Material Undisputed Facts, (D.E. 519). Plaintiffs filed a Response on September 30, 2021, (D.E. 537), to which Defendants filed a Reply on November 29, 2021, (D.E. 550).

On August 17, 2022, the Court entered an Omnibus Order: (1) denying Plaintiffs' Request for Judicial Notice, (D.E. 493); (2) granting in part and denying in part Defendants' Motion to Strike Previously Unasserted Claims and New Facts to Support these Claims in Plaintiffs' Response to Motion for Summary Judgment, its Accompanying Statement of Opposing Material Facts and Supporting Affidavits, (D.E. 516);⁷ denied Defendants' Motion to Strike Plaintiffs' Declarations as Shams and deferred consideration of Defendants' Objections to Plaintiffs' Opposing Materials and Declarations Supporting Response to Summary Judgment (D.E. 518); and denied Defendants' Objections to and Motion to Strike Plaintiffs' Dispute of Defendants Statement of Material Facts, (D.E. 519).⁸ (D.E. 553.) The Court hereby adopts the Omnibus Order as if fully set forth herein.

⁷ Relevant here, the Court granted the Motion to strike: (1) Plaintiffs' new FHA failure to accommodate claim based upon Plaintiffs' request not to be evicted from their apartment; (2) Plaintiffs' new allegation that Alonso told Vilma on September 18, 2017 that he was going to file a HUD complaint if she did not waive the \$150 fine and allow him to keep tape on the windows; (3) Plaintiffs' new state law claims; and (4) new assertions of fact contained in Plaintiffs' Response, its supporting materials, and Statement of New Facts.

⁸ Specifically, the Court found that the Objections and Motion to Strike were unnecessary because the Court "understands its responsibilities at the summary judgment stage and is capable of determining whether Plaintiffs' purported disputes of Defendants' Statement of Material Undisputed Facts are properly supported and/or otherwise comply with Federal Rule of Civil Procedure 56 and Local Rule 56.1." (citing Nash-Utterback v. Sch. Bd. of Palm Beach Cnty., Case No. 11-cv-80513-JMH, 2012 WL 12865848, at *2 (S.D. Fla. June 8, 2012) (denying motion to strike plaintiff's verified response to defendant's statement of material facts to the extent it argued

III. Legal standards

On a motion for summary judgment, the Court is to construe the evidence and factual inferences arising there from in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Supreme Court has explained the summary judgment standard as follows:

[T]he plain language of [Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (internal quotation omitted). The trial court’s function at this juncture is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). “An issue of fact is material if it ‘might affect the outcome of the suit under the governing law.’” W. Grp. Nurseries, Inc. v. Ergas, 167 F.3d 1354, 1360 (11th Cir. 1999) (quoting Anderson, 477 U.S. at 248). “An issue of fact is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Id. (quoting Anderson, 477 U.S. at 248).

that the defendant’s statement of material facts should be stricken on the grounds that “some of Plaintiff’s testimony is unsworn, that some or all of Plaintiff’s exhibits are not authenticated, that Plaintiff’s evidence represents inadmissible hearsay, and that Plaintiff lacks personal knowledge of the facts alleged in some instances” because “[t]he Court was cognizant of its obligation to rely only on appropriate evidence when considering whether a genuine issue of material fact exists and whether summary judgment is warranted, and only considered evidence that was appropriate at the summary judgment stage”).

The party moving for summary judgment “always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex, 477 U.S. at 323. Once the movant makes this initial demonstration, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Id. at 324; see also Fed. R. Civ. P. 56(c). In meeting this burden the nonmoving party “must do more than simply show that there is a metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). That party must demonstrate that there is a “genuine issue for trial.” Id. at 587. An action is void of a material issue for trial “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” Id.

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."

Fed. R. Civ. P. 56(c)(2). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

IV. Statements of Facts

Pursuant to the Local Rules, a party moving for summary judgment must separately file a Statement of Material Facts listing the facts that the movant contends are not genuinely disputed. S.D. Fla. L.R. 56.1(a)(1). The party opposing the motion for summary judgment must also file a Statement of Material Facts which "clearly challenge any purportedly material fact asserted by the movant that the opponent contends is genuinely in dispute." S.D. Fla. L.R. 56.1(a)(2). Both the movant and the opponent's Statements of Material Facts must "consist of separately numbered paragraphs, limited as far as practicable to a single material fact, with each fact supported by specific, pinpoint references to particular parts of record material, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, and interrogatory answers[.]" S.D. Fla. L.R. 56.1(b)(1)(B). "If an opponent's Statement of Material Facts disputes a fact in the movant's Statement of Material Facts, then the evidentiary citations supporting the opponent's position

must be limited to evidence specific to that particular dispute.” S.D. Fla. L.R.

56.1(b)(2)(C).

Any additional facts that an opponent contends are material to the motion for summary judgment shall be numbered and placed immediately after the opponent’s response to the movant’s Statement of Material Facts. The additional facts shall use separately numbered paragraphs beginning with the next number following the movant’s last numbered paragraph. The additional facts shall be separately titled as “Additional Facts”

S.D. Fla. L.R. 56.1(b)(2)(D). “All material facts in any party’s Statement of Material Facts may be deemed admitted unless controverted by the other party’s Statement of Material Facts, provided that: (i) the Court finds that the material fact at issue is supported by properly cited record evidence; and (ii) any exception under Fed. R. Civ. P. 56 does not apply.” S.D. Fla. R. 56.1(c); see also Fed. R. Civ. P. 56(e)(2) (“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion.”).

In its First Order on Summary Judgment, the Court clearly explained the applicability and importance of these rules, and the consequences of failing to follow them. (See D.E. 468 at 7-13.) Furthermore, in its Omnibus Order granting Plaintiffs’ Motion to Reopen, the Court clearly instructed Plaintiffs regarding the substance of these rules, and the consequences of failing to follow them. (See D.E. 483 at 18-22.) Specifically, the Court stated:

a) The Court will take Defendants’ Motion for Summary Judgment, all materials in support thereof, and all materials in opposition thereto under advisement no sooner than twenty-one (21) days from the date of this Order.

b) Plaintiffs shall have SEVENTEEN DAYS from the date of this Order to file an Amended Response in opposition to Defendants' Motion for Summary Judgment, (D.E. 364). Pursuant to the Court's Order of October 15, 2020, Plaintiffs' Response shall not exceed twenty-five (25) double-spaced pages. (D.E. 342.)

c) Defendants may file a reply brief within SEVEN DAYS of Plaintiffs' Response. Pursuant to the Court's Order of October 15, 2020, Defendants' Reply shall not exceed fifteen (15) double-spaced pages. (D.E. 342.)

d) Pursuant to Local Rule 56.1, Plaintiffs Response shall be accompanied by a separate and contemporaneously filed Statement of Material Facts that "clearly" challenges any purportedly material fact asserted by Defendants' Statement of Material Undisputed Facts (D.E. 366) that Plaintiffs contend is genuinely disputed. S.D. Fla. L.R. 56.1(a). Plaintiffs' Statement of Material Facts "also may thereafter assert additional material facts that [Plaintiffs] contend[] serve to defeat the motion for summary judgment." S.D. Fla. L.R. 56.1(a)(2). Plaintiffs' Statement of Material Facts shall not exceed twenty-five (25) pages double-spaced pages.

e) "All material facts in any party's Statement of Material Facts may be deemed admitted unless controverted by the other party's Statement of Material Facts, provided that: (i) the Court finds that the material fact at issue is supported by properly cited record evidence; and (ii) any exception under Fed. R. Civ. P. 56 does not apply." S.D. Fla. L.R. 56.1(c). Accordingly, in order to ensure the fair application of Local Rule 56.1 and to guarantee that no fact is deemed admitted without the opposing party's intention to do so, the Parties are hereby INSTRUCTED to file a Statement of Material Facts in Dispute that satisfies the following requirements:

- i. **First**, Plaintiffs' Statement of Material Facts in Dispute should correspond, on a paragraph by paragraph basis, with Defendants' Statement of Undisputed Material Facts. See S.D. Fla. L.R. 56.1(b)(2)(A). Specifically, Plaintiffs shall state, for each of Defendants' numbered paragraphs, whether the facts alleged therein are disputed or undisputed. The first word next to each number shall be "Disputed" or "Undisputed," thereby notifying the Court whether the fact alleged in each of Defendants' numbered paragraphs is disputed or undisputed. See S.D. Fla. L.R. 56.1(b)(2)(B).
- ii. **Second**, if a fact is identified as "disputed," Plaintiffs shall cite record evidence that demonstrates that the fact is disputed—for example, to specific depositions, interrogatory answers, admissions, affidavits, or other evidence on file with the Court. Citations to record evidence should be to specific page,

- paragraph, and/or line numbers, and otherwise comply with Local Rule 56.1(b)(1)(B). If the evidence is on the docket, Plaintiffs shall cite to the specific docket entry, page, and line or paragraph number, if applicable. If the evidence is on a USB drive previously filed with the Court, Plaintiffs shall indicate precisely where on the USB the relevant evidence is located. If the Court cannot locate the evidence, the Court may deem the purportedly disputed fact admitted.
- iii. **Third**, Plaintiffs shall concisely state—in three sentences or less—why the dispute is material. “A factual dispute is ‘material’ if it would affect the outcome of the suit under the governing law[.]” *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008).
 - iv. **Fourth**, if Plaintiffs wish to raise disputed facts not included in Defendants’ Statement of Undisputed Material Facts, those facts shall be stated in numbered paragraphs at the end of Plaintiffs’ Statement of Material Facts in Dispute and shall also be supported by specific citation to the record. The additional facts shall use separately numbered paragraphs beginning with the number 138, which is the number following the last numbered paragraph in Defendants’ Statement of Undisputed Material Facts. (See D.E. 366 at 25.)
 - v. Defendants shall respond to any additional facts asserted in Plaintiffs’ Statement of Material Facts, even if they do not serve a reply memorandum. S.D. Fla. L.R. 56.1(a)(3). Defendants’ Response to Plaintiffs’ statement of additional facts, if any, shall comply with Federal Rule of Civil Procedure 56, Local Rule 56.1, and the requirements set forth above.
 - vi. As previously stated, “[a]ll material facts in any party’s Statement of Material Facts may be deemed admitted unless controverted by the other party’s Statement of Material Facts, provided that: (i) the Court finds that the material fact at issue is supported by properly cited record evidence; and (ii) any exception under Fed. R. Civ. P. 56 does not apply.” S.D. Fla. L.R. 56.1(c).
 - f) If a summary judgment motion is properly supported, a Party may not rest on the allegations in its pleadings alone. To oppose a properly supported motion for summary judgment, a Party will likely need to rebut it with admissible evidence.
 - g) The Parties may file sworn affidavits or other admissible material in support of their positions.

h) Federal Rule of Civil Procedure 56 and Local Rule 56.1 govern motions for summary judgment. The Parties should consult these Rules and abide by them.

i) Plaintiffs failure to respond adequately to this Notice, to Defendants' Motion for Summary Judgment, and/or to Defendants' Statement of Material Undisputed Facts may result in final judgment adverse to Plaintiffs being entered without the benefit of trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

(Id.) Notwithstanding the Court's Orders, Plaintiffs filed a Statement of Material Facts in Dispute of Defendants' Concise Statement of Material Facts that is deficient and, in many instances, fails to comply with Local Rule 56.1 and the Court's Omnibus Order granting Plaintiffs' Motion to Reopen. (See D.E. 492.)

The Eleventh Circuit has recognized that local rules governing motions for summary judgment and statements of material facts in support of and in opposition thereto, like the Southern District of Florida's Local Rule 56.1, are designed to "protect[] judicial resources by 'mak[ing] the parties organize the evidence rather than leaving the burden upon the district judge.'" *Reese v. Herbert*, 527 F.3d 1253, 1268 (11th Cir. 2008) (quoting *Alsina-Ortiz v. Laboy*, 400 F.3d 77, 80 (1st Cir. 2005), and citing *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1032 (8th Cir. 2007) ("Courts have neither the duty nor the time to investigate the record in search of an unidentified genuine issue of material fact to support a claim or defense.")). They also "streamline[] the resolution of summary judgment motions by 'focus[ing] the district court's attention on what is, and what is not, genuinely controverted.'" *Id.* (quoting *Mariani-Colon v. Dep't of Homeland Sec.*, 511 F.3d 216, 219 (1st Cir. 2007)). Plaintiffs' Statement of Material Facts in Dispute of Defendants' Concise Statement of Material Facts has the opposite effect.

a. Defendants' Statement of Material Undisputed Facts (D.E. 366).

For the reasons that follow, the Court finds that Facts 1-9, 11-18, 20-26, 29-32, 34-36, 38-73, 75-82, 86-96, 98, 102-03, 105-24, 127-34, and parts of Facts 37 and 135 of Defendants' Statement of Material Undisputed Facts are undisputed and/or deemed admitted pursuant to Local Rule 56.1 and/or Federal Rule of Civil Procedure 56(e)(2).

First, Plaintiffs explicitly assert that they do not dispute Facts 1, 5, 6, 7, 9, 11, 13, 14, 18, 21, 29, 63, 86, 108, 109, 110, 120, 121, 122, and 123 of Defendants' Statement of Material Undisputed Facts. (D.E. 492 at 1.) Plaintiffs separately assert that Facts 26, 31, 32, 45, 47, 48, 49, 98, and 112 are undisputed. (Id. at 6-7.)

Similarly, Facts 17, and 51 are undisputed and/or deemed admitted to the extent that they are supported by properly cited record evidence because they are not controverted by Plaintiffs' opposing Statement of Material Facts.⁹ See Fed. R. Civ. P. 56(e)(2); Local Rule 56.1(b)(1)(B) and (c); Reese, 527 F.3d at 1267-69.

Facts 2, 15, 38, 50, 64, 82, 105, 124, 125, and 127 of Defendants' Statement of Material Undisputed Facts are undisputed and/or deemed admitted to the extent that they are supported by properly cited record evidence because Plaintiffs failed to cite any evidence in support of the purported dispute.^{10/11} See Fed. R. Civ. P.

⁹ Plaintiffs' response to Fact 17 states: "No response because Plaintiffs never measured the disabled parking spaces or Carlos's car." Plaintiffs' response to Fact 51 states: "Plaintiffs have not the information necessary to respond to this paragraph."

¹⁰ As to Fact 64, Plaintiffs mention "verifiable video" evidence, but they do not provide a pinpoint reference to where these videos are found in the record.

¹¹ Plaintiffs also fail to cite any evidence in support of the purported dispute of Fact 107, but they do cite evidence supporting the same purported dispute in opposition to Fact 100.

56(e)(2); Local Rule 56.1(b)(1)(B), (c), and (d); Reese, 527 F.3d at 1267-69 (upholding local rule providing that the movant's facts may be deemed admitted if (1) supported by record evidence and (2) the opponent's response fails to specifically cite evidence supporting a purported factual dispute) (citing Caban Hernandez v. Philip Morris USA, Inc., 486 F.3d 1, 7 (1st Cir. 2007) ("Given the vital purpose that such rules serve, litigants ignore them at their peril."); Smith v. Lamz, 321 F.3d 680, 683 (7th Cir. 2003) ("[J]udges are not like pigs, hunting for truffles buried in briefs.")); Tomasini v. Mt. Sinai Med. Ctr. of Fla., Inc., 315 F. Supp. 2d 1252, 1260 n.11 (S.D. Fla. 2004) ("[T]he Court is not required to scour the record to determine whether there exists a genuine issue of material fact to preclude summary judgment.") (internal quotation marks and citation omitted); BFI Waste Sys. of N.A. v. Dekalb Cnty., Ga., 303 F. Supp. 2d 1335, 1358 ("Numerous of BFI's citations to record evidence do not support the propositions for which they are cited. Although the Court has attempted to locate such evidence, it is not the Court's duty to comb the record to attempt to find reasons to deny a motion for summary judgment.").

Facts 3, 4, 16, 20, 35, 36, and 119, and the first sentence of Fact 12, are undisputed and/or deemed admitted to the extent that they are supported by properly cited record evidence because Plaintiffs' opposition to those Facts are not supported by citations to record evidence. See Fed. R. Civ. P. 56(e)(2); Local Rule 56.1(b)(1)(B), (c), and (d); Reese, 527 F.3d at 1267-69; Tomasini, 315 F.2 Supp. 2d at 1260 n.11; BFI Waste Sys., 303 F. Supp. 2d at 1358. Rather, the only evidence Plaintiffs cite in support of their purported disputes of these Facts is

contained in "App. A," (D.E. 495-1), which has been stricken from the record pursuant to Plaintiffs' Notice of Striking, (D.E. 501).¹²

Facts 8, 22, 23, 24, 25, 30, 34, 46, 65, 66, 67, 68, 75, 76, 77, 78, 79, 80, 81, 102, 103, 106, 111, 113, 114, 115, 116, 117, 118, 137; the second, third, fourth, and fifth sentences of Fact 12; the first sentence of Fact 37; most of Fact 104; and the second and third sentence of Fact 135 are undisputed and/or deemed admitted to the extent that they are supported by record evidence because the explanation Plaintiffs provide for the purported dispute, and/or the evidence cited in support of the purported dispute, do not "controvert," S.D. Fla. L.R. 56.1(c), or "clearly challenge," S.D. Fla. L.R. 56.1(a)(2)—and sometimes do not even address, "properly" or otherwise, Fed. R. Civ. P. 56(e)(2)—the corresponding Fact.¹³ See Fed. R. Civ. P. 56(e)(2);

¹² Plaintiffs cite evidence contained in App. A to support other purported disputes, but not exclusively. (See, e.g., Defs.' Resp. Facts ¶¶ 12(a), 12(b), 22-25, 30, 33-37, 113-14.)

¹³ Paragraph 8 of Defendants' Statement of Material Undisputed Facts states: "MOREJON was ANGIE's main caregiver. ANGIE was with MOREJON all day and every day." (D.E. 366 ¶ 8 (citations omitted).) Paragraph 8 of Plaintiffs' responsive Statement of Facts states: "Genuinely disputed, because when Angie's mother went to a doctor's appointment, stores to buy food or clothes, to visit parents or friends when they were invited for a party or for a dinner, to take Angie to a park for fun with all his family, Angie always went together with his mother and all his family, so it always was necessary a disable parking space reserved only for Angie, because he and his family always were worry about the time returning home to find a suitable disabled space to download Angie in safe conditions." (D.E. 492 ¶ 8 (citing *Alonso Aff.* ¶ 14(l) & (m); *Jany Aff.* ¶ 9; *Katy Aff.* ¶ 11).) The evidence to which Plaintiffs cite does not address whether Morejon was Angie's main caregiver or whether Angie was with Morejon all day and every day. The second sentence of Fact 12 states that after Plaintiffs' one-year lease expired on August 3, 2016, "[t]hey were given an option to vacate Apt. 1301 or agree to a month-to-month lease with additional terms called a 'Good Conduct Addendum' ('GCA') as a condition of remaining tenants." (Defs.' Facts ¶ 12.) Plaintiffs' response to the second sentence of Fact 12 states: "Genuinely Disputed, that 'They were given an option to vacate Apt. 1301 or agree to a month-to-month lease with additional terms called a 'Good Conduct Addendum' ('GCA') as a condition of remaining tenants', because plaintiffs received a non-renewal notice without good reasons, see (doc. # 19) at (App. "A"). [App. A has been stricken from the record. (See D.E. 495, 501.)] All members of plaintiffs' family, went to the office of

Tom Cabrerizo (Owner and CEO of 245 C & C, LLC and of CFH Group, LLC), on (8/4/16), complained against Vilma and Carlos requested to Tom Cabrerizo, various reasonable accommodations for Angie, but Tom Cabrerizo denied those requests because he did not answer to them on (8/4/16). One month later, on (9/9/16), Tom Cabrerizo, directed his managers Mrs. Marlein Garcia and Vilma, to tell plaintiffs that Tom did not want plaintiffs in any of his properties. (See (point # 78) in the (page # 53) at [ECF No. 470], showing that it was admitted by defendants that: (1) the meeting with Tom Cabrerizo occurred on (8/4/16); (2) Marlein Garcia and Vilma announced to Carlos and Fe on (9/9/16) that Tom Cabrerizo [sic] did not want the plaintiffs as tenants in VOHA, after Carlos complained against Vilma and requested the reasonable accommodations for Angie. Also, see the (page # 139), (ln. 17-25) of [ECF No. 470]. See the (pages # 278 & 279) at [ECF No. 470]; see also the (pages # 284 & 285) at [ECF No. 470]. See (points # 16-19) of (CAAFF) at (PSUSB).” (Pls.’ Resp. Facts ¶ 12(a).) Most of the record evidence to which Plaintiffs cite does not address whether Plaintiffs were given the option to vacate Apt. 1301 or agree to a month-to-month lease with additional terms called a “Good Conduct Addendum” as a condition of remaining tenants. The Affidavit of Fe Morejon that appears on pages 284-85 of Docket Entry 470 addresses, but does not “controvert,” and in fact confirms that after their one-year lease expired in August 2016, Defendants stated “that the only way to stay would be to sign a Month to Month Good Conduct Addendum . . .” (D.E. 470 at 285.)

The third sentence of Fact 12 states: “The Good Conduct Addendum had two purposes: one was to establish a quid pro quo waiver of certain rights in exchange for the privilege to remain tenants at VOH and the other was to place them on notice that any violation of the month to month lease or Good Conduct Addendum could result in the immediate termination of their lease.” Plaintiffs’ response to the third sentence of Fact 12 states: “Genuinely disputed, that ‘the Good Conduct Addendum had two purposes....’, because Vilma falsified three (3) lease addendums to illegally draft the provisions of the Month to Month Good Conduct Addendum hereinafter (MMGCA). See (page # 184) to page # 187) of [ECF No. 470], explaining it. Carlos and Fe did not want to sign the MMGCA for more than a month so defendants asked its lawyer Mr. Lowenhaupt to send a letter to pressure and coerce plaintiffs to sign the MMGCA. See (doc. # 20) at (App. “A”). [App. A has been stricken from the record. (See D.E. 495, 501.)] See (File # 33/Vilma Falsified the Lease Addendums) at (PSUSB).” None of the record evidence to which Plaintiffs cite addresses whether the GCA had two purposes and/or what those purposes were.

Plaintiffs do not address the fourth and fifth sentences of Fact 12.

Fact 22 asserts that “ALONSO and MOREJON never were late for or had to cancel a medical appointment for ANGIE because of their inability to load him into the Minivan. Plaintiffs’ response to Fact 22 states: “Genuinely disputed, Angie’s parents always had to ask for Angie’s medical appointments early to return home before (2:00 PM), and several times have refused to offered appointments after (1:00PM), because if they returned home late in the afternoon for sure will nor encounter a free disabled space. See (docs. # 26, 27, 28, 29, 30, 31, 32, 33, 34 & 35) at (App. “A”). [App. A has been stricken from the record. (See D.E. 495, 501.)] See the (3rd) folder (No Suitable Parking with Reduced Space) on (File # 4/ Disabled Parking Spaces) at (PSUSB), showing the difficulties to load or download Angie in a reduced space.” The record evidence to which Plaintiffs cite does not address whether Alonso or Morejon were ever late for or had to cancel a medical appointment for ANGIE because of their inability to load him into the minivan.

Plaintiffs assert that Facts 23 and 24 “are Genuinely disputed, with same arguments for paragraphs 20 & 22.” However, the arguments Plaintiffs assert in response to Facts 20 and 22 do not controvert Facts 23 and 24.

Although Plaintiffs purport to dispute Facts 25, 30, and 46, they tacitly admit those Facts and instead dispute the legal arguments to which the Facts are relevant.

Plaintiffs assert that Facts “33 & 34 are Genuinely disputed,” but the explanation they provide and the record evidence to which they cite only address Fact 33.

Plaintiffs assert that Facts "65 & 66 are Genuinely disputed[.]" However, neither the explanation Plaintiffs provide for the purported dispute, nor the evidence to which they cite, controverts Fact 65; rather, they appear to offer additional evidence on the subject that they believe should be considered. And although Plaintiffs argue that Fact 66 is "late, invalid and after the facts mere pretexts[.]" the evidence to which they cite does not support the purported dispute.

Plaintiffs assert that Facts 68 and 85 are "Genuinely disputed, with the same arguments [given for] paragraphs (65 & 66)[.]" However, neither the arguments Plaintiffs assert, nor the evidence to which they cite in response to Facts 65 and 66 controvert—or, for that matter, address—Facts 68 and 85. Fact 67 states: "Plaintiffs have not identified a non-handicapped comparator who was not similarly affected by the noise of the tree cutting machinery equipment." Plaintiffs' response to Fact 67 states: "Genuinely disputed: (1) It is obvious that Angie could be compared with all the disabled and non-disabled persons living at VOHA, because he could not walk by himself as any other tenant at VOHA, so under the FHA, the reasonable accommodations requests should be handled in a case by case basis, and 'treating disabled persons equally to non-disabled persons, sometimes discriminate against the disabled person.' (See (docs. # 1, 2, 24, & 25) of [ECF No. 470][.])" The evidence to which Plaintiffs cite does not address whether Plaintiffs have identified a non-handicapped comparator who was not similarly affected by the noise of the tree cutting machinery equipment; indeed, they appear to concede that they have not identified a non-handicapped comparator.

Similarly, Fact 75 states: "Plaintiffs have not identified a non-handicapped comparator who was not similarly affected by the noise of the pressure washing equipment." Plaintiffs' response to Fact 75 states: "Genuinely disputed, with the same arguments given for (ph. # 67)." However, the explanations provided and the evidence to which Plaintiffs cite in Paragraph 67 do not address whether Plaintiffs have identified a non-handicapped comparator who was not similarly affected by the noise of the pressure washing equipment; in fact, Paragraph 67 seems to concede that they have not identified a non-handicapped comparator.

Plaintiffs assert that Facts 76, 77, 78, 79, 80, 81, 102, 103, 106, 111, 114, 115, 116, and 137 are genuinely disputed. However, neither the explanation Plaintiffs provide for the purported disputes, nor the evidence to which they cite, controverts those facts; rather, they appear to offer additional evidence on those topics that they believe should be considered.

Fact 104 states: "On 9/18/17, ALONSO made a request labeled as a 'reasonable accommodation' to be able to leave the tape on his windows through the end of hurricane season and not be fined. The request was denied and he was told he needed to remove the tape." Plaintiffs' Response to Fact 104 concedes that Vilma denied the September 18, 2017 request to keep the tape on their windows, but asserts that "Vilma did not tell Carlos that he needed to remove the tapes[.]" The Court deems Fact 104 to be undisputed because by denying the request to keep tape on the windows, Vilma implicitly told Alonso he needed to remove the tape. Whether Vilma explicitly told Alonso on September 18, 2017 that Plaintiffs needed to remove tape from the windows is immaterial.

Fact 113 states: "In their 10/2/17 interview, ALONSO and MOREJON told VARGAS [the HUD investigator] that the last time they requested an assigned handicapped parking space was in January, 2017. ORTIZ [Angie's CDC+ Consultant] told VARGAS that ALONSO had never mentioned a bathroom modification." (Citations omitted.) Plaintiffs purport to dispute the first sentence of Fact 113 "because during the interview, Carlos in front of Fe, told to the HUD investigator 'the last times he requested to Vilma, the (2nd) disabled parking space reserved only for Angie were' on (April, 2017), referring to (4/7/17), see (point #39) of (CAAFF) at (PSUSB); and on (March 29, 2017), when On Call Patrol posted the parking warning on Carlos' car, see it on (docs. # 18 & 19) in [ECF No. 470] & (docs. # 66 & 67) at (App. 'A')." However, Point # 39 of Alonso's Affidavit and Docs. # 18 and 19 at Docket Entry 470 do not address Fact 113, and App. A has been stricken from the record. (D.E. 495, 501.) Neither the explanation Plaintiffs provide, nor the evidence to which they cite in support of their dispute of Fact 113 addresses the second sentence of Fact 113.

Local Rule 56.1(a), (b)(1)(B), (c), and (d); Reese, 527 F.3d at 1267-69; Tomasini, 315 F. Supp. 2d at 1260 n.11; BFI Waste Sys., 303 F. Supp. 2d at 1358.

Facts 39-44, 52-62, 69-73, 87-96, and 128-34 are deemed admitted to the extent they are supported by record evidence because the purported disputes are not separately stated and "limited as faas practicable to a single material fact" S.D. Fla. L.R. 56.1(b)(1)(B); and because the purported disputes are lumped together, the evidentiary citations supporting the purported disputes, if there are any, are not "limited to evidence specific to that [one] particular dispute," S.D. Fla. L.R. 56.19(b)(2)(C); and, if citations are included, it is unclear which citation is intended to support which supported dispute.¹⁴ See Tomasini, 315 F. Supp. 2d at 1260 n.11; BFI Waste Sys., 303 F. Supp. 2d at 1358.

Finally, Plaintiffs include additional facts throughout their Statement of Material Facts in Dispute, rather than at the end in a separate section titled

Although Plaintiffs assert that Facts "117 & 118, are Genuinely disputed," their explanation and the evidence to which they cite wholly fail to address Fact 118.

Fact 117 states: "Plaintiffs have no evidence to establish that Defendants had any advanced knowledge of their filing a 6/11/17 charge of discrimination with HUD which they admit was never served on Defendants or of the 9/27/17 charge of discrimination which was not received until 10/3/17." (Citation omitted.) Plaintiffs purport to dispute this fact on the grounds that Defendants' lawyer, Mr. Lowenhaupt, "stated in a sworn declaration . . . that he was informed . . . of the (2nd) HUD charge on (9/28/17)." (Pls. Resp. Facts ¶¶ 111 (citing, inter alia, D.E. 447-5 at 137).) The Court interprets Fact 117 as asserting that Plaintiffs cannot establish that Defendants knew that Plaintiffs were going to file a HUD charge before they filed a HUD charge, not that Plaintiffs cannot establish that Defendants knew about the second HUD charge after it had been filed but before Defendants received it. Thus, the fact that Mr. Lowenhaupt knew of the second HUD charge before Defendants received it does not controvert the Fact asserted.

Plaintiffs specifically respond to the first sentence of Fact 135, but do not address the second and third sentences of Fact 135.

¹⁴ Although Plaintiffs group together other purported disputes, (see, e.g., Pls.' Resp. Facts ¶¶ 23-24, 31-32, 33-34, 35-36, 47-49, 65-66, 76-77, 79-81, 83-84, 102-03, 113-14, 117-18), the Court was able to distinguish the purported disputes.

“Additional Facts,” as required by Local Rule 56.1(b)(2)(D) and this Court’s Omnibus Order Reopening the Case, (D.E. 483 at 20-21). (See Defs.’ Resp. Facts ¶¶ 28, 30, 46, 65-66, 76-77, 78, 79-81, 102-03, 106.) The Court exercises its discretion to consider these additional facts to the extent the Court can discern them, they are material, they are supported by properly cited record evidence, and they have not already been stricken. See *Silverstein v. Boehringer Ingelheim Pharms., Inc.*, Case No. 19-CIV-81188-Ruiz/Reinhart, 2020 WL 6110909, at *5 (S.D. Fla. Oct. 7, 2020) (“Despite the parties’ non-compliance with Local Rule 56.1, to the extent the additional facts are material and supported by evidence in the record, I consider them.”).

b. Plaintiffs’ “New Facts” (D.E. 492 at 24-25)

At the end of Plaintiffs’ Statement of Material Facts in Dispute of Defendants’ Concise Statement of Material Facts, Plaintiffs assert five “New Facts.” The New Facts are single-spaced and therefore fail to comply with this Court’s Order of June 25, 2019, which requires that “all filings shall be doubled-spaced (with the exception of block quotations)”

(D.E. 21 at 6.) The New Facts also suffer from other deficiencies, as noted below.

1. New Fact 138

In New Fact 138, Plaintiffs assert:

138. – Defendants arguments allegedly supported by the “Month to Month Good Conduct Addendum” (MMGCA), are invalid and mere pretexts, because: (1) most provisions included in the MMGCA, are contrary to the statutes in Chapter 83 of Fla. Stat and the regulations in the (File # 56) at (PSUSB), and (2) those provisions, were drafted

based in the false statements, that Vilma, fraudulently and without telling about it to the plaintiffs, added as the (2nd) and (3rd) lines in the handwritten language on the lease addendums of 2013, 2014 & 2015, because the plaintiffs never violated the rules and did not have bad records as tenants, which materially altered those contracts, therefore making them and the MMGCA void and non-enforceable. See (point # 101) of (CAAFF) and the (File # 33/Vilma Falsified the Lease Addendums) both at (PSUSB). See (Point # 22) at [ECF No. 470]. As it was explained in [ECF No, 470], the plaintiffs were evicted through fraud on the court committed by Vilma and fraud upon the court, committed by Mr. Lowenhaupt. Plaintiffs really were evicted for requesting reasonable accommodations for Angie on (9/12/17) and (9/18/17) and for telling Vilma on (9/18/17) that a new HUD complaint against her would be filed. See the explanation in the (points # 4, 5, 12, 13, 14, 15, 16 & 17) at [ECF No. 470].

(D.E. 492 (emphases in original).) Defendants' response to New Fact 138 states:

Disputed as to any "facts" raised in ¶138 and objected to for the following reasons: ¶138 does not add new facts relating to the remaining counts of the SAC but attempts to add two entirely new legal claims never previously pled in the SAC based on fraud and an FHA retaliation claim and previously undisclosed material fact which has been raised for the first time post-MSJ in Plaintiff's Response. These claims are subjects of Defendants' Motion to Strike Previously Unasserted Claims and New Facts. ¶138 is based entirely on legal opinion, legal argument, and legal conclusion ("invalid") ("mere pretexts"), ("contrary to statutes") ("fraudulently") ("materially altered") ("void") ("unenforceable") ("really were evicted ... for telling Vilma on 9/18/17...."); personal opinion ("the plaintiffs were evicted through fraud..."). The issue of fraud on the court is barred by res judicata because it was raised in the Eviction Proceeding between the same parties on the same issue in a post-trial motion made by Plaintiffs under Fla. R. Civ. P. 1.540(b) and denied by the Miami-Dade County Court on 1/11/21. See [Def. Supp. Appx, Tab G1]. The only claim remaining in the SAC related to the parties' landlord-tenant relationship in Count 14. To the extent that Plaintiffs raises new issues of fact about never violating any rules, Defendants refer to their Summary Judgment motion [DE 364], all materials in their prior Appendix [DE 380], their Reply and all materials in the Supplemental Appendix.

(D.E. 520 (emphasis in original).)

First, the Court finds New Fact 138 is made up almost entirely of legal arguments and/or legal conclusions, not “facts,” including that: (1) Defendants’ arguments regarding the Good Conduct Addendum “are invalid and mere pretexts”; (2) most provisions of the Good Conduct Addendum are “contrary to” Chapter 83, Florida Statutes and the regulations cited in File # 56 of Plaintiffs’ USB drive; (3) the Good Conduct Addendum was drafted “fraudulently” and is “void and non-enforceable”; (4) Plaintiffs’ were “evicted through fraud on the court”; (5) Plaintiffs were evicted in retaliation for requesting reasonable accommodations; and (6) Plaintiffs were evicted in retaliation for telling Vilma that Alonso was going to file a HUD complaint against her. The Court will disregard these legal conclusions.¹⁵ See *Zatarian v. Brown*, No. CV-11-BE-3508-M, 2014 WL 2434478, at *1 (N.D. Ala. May 29, 2014) (“Although the Plaintiff also lists conclusions of law as ‘facts’ . . . the court finds that the legal conclusions are not facts; therefore, the court includes below the undisputed facts but not the legal conclusions.”); *Daniels v. Howe Law Firm, P.C.*, CIVIL ACTION NO. 1:15-cv-00827-SCJ-RGV, 2016 WL 11581822, at *2 (N.D. Ga. May 17, 2016) (disregarding “those facts that . . . are stated as issues or legal conclusions”); *Farina v. Sushi Takara, Inc.*, CASE NO. 07-60069-CIV-GOLD/TURNOFF, at *1 (S.D. Fla. Jan. 7, 2008) (“[L]egal conclusions are not proof of fact for purposes of summary judgment.”).

¹⁵ Indeed, the Court has already stricken the claim that Plaintiffs were evicted in retaliation for telling Vilma that Alonso was going to file a HUD complaint against her. (See Omnibus Order on Defendants’ Motion to Strike Previously Unasserted Claims. (D.E. 553 at 35).)

In the light most favorable to Plaintiffs, New Fact 138 could be construed to assert the following purported facts: (1) Vilma added the 2nd and 3rd lines in the handwritten language on the 2013, 2014, and 2015 lease addendums; (2) Plaintiffs never violated the rules and did not have bad records as tenants; (3) Plaintiffs submitted a request for a reasonable accommodation on September 12, 2017; (4) Plaintiffs submitted a request for a reasonable accommodation on September 18, 2017; and (5) Plaintiffs told Vilma on September 18, 2017 that a new HUD complaint would be filed against her.

The Court finds that Fact 138 violates Local Rule 56.1(b)(1)(A) because it is not “limited as far as practicable to a single material fact, with each fact supported by specific, pinpoint references to particular parts of record material” At best, it is limited to five facts, and only one of those facts if supported by specific, pinpoint references to particular parts of record evidence—specifically, the allegation that Vilma added the 2nd and 3rd lines in the handwritten language on the 2013, 2014, and 2015 lease addendums is supported by a citation to Alonso’s Affidavit. Although Plaintiffs cite “points” made in Docket Entry 470 to support other statements made in Fact 138, those “points” are “arguments” made in their Motion to Reopen, and not evidence. Also, the Court has already stricken the allegation that Plaintiffs told Vilma on September 18, 2017 that a new HUD complaint would be filed against her. (See D.E. 553 at 33, 38.)

The Court will consider Plaintiff's statement that Vilma added the 2nd and 3rd lines in the handwritten language on the 2013, 2014, and 2015 lease addendums if material to a fact in issue.

2. New Fact 139

In New Fact 139, Plaintiffs assert:

139. – In the Count XIV of the Amended Complaint, [Plaintiffs' former attorney] Mr. Lufty to save space, did not put all the violations that occurred at VOHA, which plaintiffs narrated to him and they considered as violations of their right to the quiet enjoyment of the premises. Instead, Mr. Lufty used the expression ("including but not limited to"). Plaintiffs provided to Mrs. Langbein, the statements about those violations during their depositions and the evidence during discovery. The court could find them all from the (point # 76) to the (point # 90) of (CAAFF) at (PSUSB), and see each folder included in the (Files # 20, 21, 22, 23, 24, 26, 27, 28, 29 & 30) at (PSUSB).

(D.E. 492 (emphases in original).) Defendants' response to New Fact 139 states:

Disputed that the evidence Plaintiffs attempt to incorporate to prove Count IV [sic] constitute "new facts." All the materials in Files 20-30 of PSUSB were previously produced by Plaintiffs. The events displayed in the photos and videos were testified to by ALONSO at his deposition and argued in the MSJ. Plaintiffs argued these points in their Response. ¶139 is a misuse of Rule 56.1(b)(2) to re-argue the same points.

(D.E. 520.)

The Court finds that New Fact 139 is not a material fact; rather, Plaintiffs are attempting to assert that the statements made in Paragraphs 76 to 90 of Alonso's Affidavit are additional material facts—specifically, ways in which Defendants breached the covenant of quiet enjoyment. By merely citing to Alonso's Affidavit, the "facts" have not been properly raised. If Plaintiffs desired to argue that Defendants breached the covenant of quiet enjoyment in ways not specified in

the Second Amended Complaint, they should have listed those ways in the “Additional Facts” section so that Defendants had an opportunity to dispute each of them. See *Laremore v. Holiday CVS, LLC*, CASE NO. 20-CIV-61650-RAR, 2021 WL 3053348, at *3 (S.D. Fla. July 20, 2021) (“By failing to comply with Local Rule 56.1, [Plaintiffs] prevented [Defendants] from responding to each specific factual assertion relevant to the Motion.”). Even assuming arguendo that Paragraphs 76 to 90 of Alonso’s Affidavit contain material facts, New Fact 139 is not “limited as far as practicable to a single material fact” Local Rule 56.1(b)(1)(B). Rather, it purports to incorporate many material facts. Additionally, Paragraphs 76 to 90 are single-spaced in violation of the Court’s Order of June 25, 2019, (D.E. 21 at 6), and span six pages. The Court finds that Plaintiffs have attempted to incorporate Paragraphs 76 to 90 of Alonso’s Affidavit into their New Facts to get around the five-page limitation on statements of additional facts imposed by Local Rule 56.1(b)(2)(D). For these reasons, the Court will disregard New Fact 139.

3. New Fact 140

In New Fact 140, Plaintiffs assert:

140. – On (9/20/20), Plaintiffs asked to defendants for other reasonable accommodation request for Angie, asking them to allow Angie to state in the (Apt. 1301) at VOHA, because it was the most suitable and safe apartment for him until that time and to protect Angie from an infection with COVID-19, but defendants denied the request outright, with total disregard for Angie’s rights and based in their false arguments to evict plaintiffs. See (docs. # 75, 76 & 77) of (App. “A”) and the (File # 64/Angie’s Aggressive Behavior . . .) at (PSUSB).

(D.E. 492.) The Court has already stricken this allegation as being “wholly outside the scope of the Second Amended Complaint.” (D.E. 553 at 25.) The Court adopts

that finding. The allegation is also not supported by the record evidence to which Plaintiffs cite. For these reasons, the Court will disregard New Fact 140.

4. **New Fact 141**

In New Fact 141, Plaintiffs assert:

141. – Fe and Jany, recorded the videos included in (File #2/Angie Can Heard While Sleeping). See the explanation about such videos in (point # 20/page #11) at [ECF No. 447].

(D.E. 492.) Defendants' response to New Fact 141 states:

Disputed and objected to because this video was never produced in discovery prior to the discovery cut-off and it purposefully was not disclosed for the purpose of impeachment at trial. See Plaintiffs Response to Motion to Strike at [DE 447] which was itself stricken.

Objections: unscientific audiological testing and medical opinion offered by Plaintiffs who have no training in audial sensitivity; irrelevant to the issue of whether ANGIE's "mental condition" makes him more sensitive to loud noise and in any event its relevance is substantially outweighed by its staging, waste of time, prejudice, and confusion of issues under Rule 403[.] (D.E. 520.)

The Court finds that whether Fe and Jany recorded the videos included in File #2 of Plaintiffs' USB drive is not a material fact; rather, Plaintiffs are attempting to offer additional evidence regarding Angie's alleged sensitivity to hearing that they believe should be considered.

However, "[o]n motions for summary judgment, [a court] may consider only that evidence which can be reduced to an admissible form." *Rowell v. BellSouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005). See also *Snover v. City of Starke, Fla.*, 398 F. App'x 445, 449 (11th Cir. 2010) (same); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1299 (11th Cir. 2008) ("The grant of summary judgment is appropriate where, upon viewing the admissible evidence and

drawing all reasonable inferences therefrom in the light most favorable to the non-moving party, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”); *United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994) (“Summary judgment may be based on any evidence which would be admissible at trial.”). Federal Rule of Civil Procedure 26(a)(1)(A)(ii), requires a party to produce “a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.]” “If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). ““The burden of establishing that a failure to disclose was substantially justified or harmless rests on the nondisclosing party.” *Mitchell v. Ford Motor Co.*, 318 F. App’x 821, 824 (11th Cir. 2009).

Here, because the videos of Angie opening his eyes would be used to prove Plaintiffs’ claims, they must be considered substantive and not solely for impeachment. See *Kapp v. Schiavi*, CIVIL NO. 1:08-cv-2-HSO-JMR, 2010 WL 11530416, at *4 (S.D. Miss. Mar. 11, 2010) (citing *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993)). As such, Plaintiffs were required to disclose the videos during discovery pursuant to Rule 26(a)(1)(A)(ii). See *id.* Their failure to do so precludes them from using the videos in opposition to Defendants’ Motion for

Summary Judgment unless their failure to disclose was “substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Plaintiffs have not carried their burden of establishing that their failure to disclose these videos was substantially justified or is harmless. Consequently, the Court will not consider these videos at the summary judgment stage.

5. New Fact 142

In New Facts 142, Plaintiffs assert:

142. – On (09/18/17), Carlos informed Vilma that he had already filed a complaint with HUD, but he would file another one after leaving her office. See (point # 53) of (CAAFF) in (PSUSB).

(D.E. 492.) The Court has already stricken this allegation as an improper attempt to amend the Second Amended Complaint in Plaintiffs’ opposition to Defendants’ Motion for Summary Judgment. (D.E. 553 at 38 (citing *Pyrsa Panama, S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1238 (S.D. Fla. 2008) (“A complaint cannot be amended merely by raising new facts and theories in plaintiffs’ opposition papers, and hence such new allegations and claims should not be considered in resolving the motion’ for summary judgment.”); *Schambau Props., LP v. Waffle House, Inc.*, CIVIL ACTION 11-0029-WS-B, 2011 U.S. Dist. LEXIS 149607, at *20 (S.D. Ala. Dec. 30, 2011) (“Plaintiff’s de facto attempt to amend its pleadings via summary judgment response to assert a brand new, unpleaded set of facts and circumstances giving rise to ASI’s liability is impermissible.”).) As such, the Court will disregard this allegation.

V. Facts¹⁶

During the relevant period, Defendant 245 C&C LLC owned the Villas of Hialeah Rental Apartments ("VOH") located in Hialeah, FL. (Defs.' Facts ¶ 1.) Vilma Hernandez ("Vilma") has been the Property Manager at VOH since 2008. (Id. ¶ 3.)

In October 2011, Plaintiffs Carlos Alonso Cano and Fe Morejon Fernandez entered into their initial one-year lease with VOH.¹⁷ (Id. ¶ 4.) Thereafter, the family—consisting of Alonso, Morejon, their adult son Angie, and their daughters

¹⁶ The following facts are gleaned from Defendants' Concise Statement of Material Undisputed Facts, ("Defs.' Facts," D.E. 366), Plaintiffs' Statement of Material Facts in Dispute of Defendants' Concise Statement of Material Facts, ("Pls.' Resp. Facts," D.E. 492 at 1-24), which contains five New Facts, ("Pl.'s New Facts," id. at 24-25), and Defendants' Reply and Objections to Plaintiffs' Statement of New Undisputed Facts, ("Defs.' Reply Facts," D.E. 520.) To the extent possible, the Court has limited the recitation of facts to the material facts and/or facts that are necessary for context. The facts are undisputed unless otherwise indicated.

After careful review, the Court finds that all of the facts recited herein are supported by record evidence. Most of the evidence was filed as an Appendix to Defendants' Motion, which is contained on a USB drive that was conventionally filed with the Clerk's Office. Most of Plaintiffs' evidence is also contained on a USB drive that was conventionally with the Clerk's Office.

The Court notes that on November 5, 2020, Plaintiffs filed a Motion which requested, *inter alia*, that the Court "suppress" Alonso and Morejon's deposition transcripts because they allegedly contained errors. (D.E. 358.) After the motion was fully briefed, Magistrate Judge John J. O'Sullivan issued an order denying the motion as being based upon "numerous unsupported accusations against the defendants' counsel and the court reporter[.]" (D.E. 398 at 10.)

On April 6, 2021, Plaintiffs filed an "Objection to the Use of the Deposition's [sic] Transcripts of Carlos Alonso or of Fe Morejon to Decide Summary Judgment State About the Statute of Limitation in Any Count Remaining in the Complaint." (D.E. 463.) The "Request" was not docketed as a motion, and to the extent that it can be construed as a motion, it is DENIED AS MOOT because Judge O'Sullivan already ruled on the issues raised therein and found them to grounded on nothing but "baseless conspiracy theories." (D.E. 398 at 10.)

¹⁷ Defendants' Statement of Material Undisputed Facts asserts that Plaintiffs entered into their initial one-year lease in "October, 2012." (Defs.' Facts ¶ 4.) Plaintiffs' dispute this fact on the grounds that their initial one-year lease began on October 29, 2011. (Pl.'s Resp. Facts ¶ 4.)

The evidence to which Defendants cite in support of Fact 4 confirms that Plaintiffs' initial one-year lease began in October 2011. Specifically, the Declaration of Vilma Hernandez asserts that Plaintiffs "became residents in October, 2011." (App'x at 3.) Moreover, a copy of Plaintiffs' 2013-2014 lease agreement indicates that their move-in date was October 29, 2011. (Id. at 447.) Therefore, the Court finds that Defendants' statement that Plaintiffs entered into their initial one-year lease in "October, 2012" is a typographical error, and that it is undisputed that Plaintiffs' entered into their

Jany and Katy—resided in Apartment 1301, a two-bedroom, two-bath unit on the third floor of the “2500 Building” at VOH. (Id. ¶¶ 5-6.)

The family’s one-year lease was renewed from year to year until August 3, 2016. (Id. ¶ 12.) They were given an option to vacate Apartment 1301 or agree to a month-to-month lease with additional terms called a “Good Conduct Addendum.” (Id.) The Good Conduct Addendum had two purposes: first, to establish a quid pro quo waiver of certain rights in exchange for the privilege to remain tenants at VOH; second, to place them on notice that any violation of the month-to-month lease or Good Conduct Addendum could result in immediate termination of their lease. (Id.) Alonso and Morejon took a month to make the decision. (Id.) On October 28, 2016, they decided to remain VOH residents and signed the month-to-month lease and the Good Conduct Addendum. (Id.)

a. Handicapped parking space (Count One)

Angie is the only family member who is handicapped; he cannot drive, but Alonso obtained a Florida handicapped parking permit for him under Section 320.0848, Florida Statutes. (Id. ¶ 7.) Angie never walked anywhere; he was always transported in his wheelchair to and from Apartment 1301 and the handicapped parking area. (Id. ¶ 32.)

Alonso owned a 2010 Chevy Venture minivan during the time Plaintiffs lived at VOH. (Id. ¶ 18.) The minivan was six feet wide; Angie’s wheelchair was thirty-

initial one-year lease in October, 2011. The Court further finds that whether Plaintiffs entered into their initial one-year lease in October 2011 or 2012 is immaterial.

two inches wide. (Id.) The minivan's rear door slid back rather than swung open.

(Id.) The minivan was not equipped with a wheelchair ramp or lift. (Id.)

VOH was constructed in 1989 with thirteen officially designated handicapped parking spaces. (Id. ¶ 13.) Each of the thirteen handicapped parking spaces measured eleven feet wide and abutted a six-foot wide striped access aisle. (Id. ¶ 17.) The five handicapped parking spaces in front of the 2500 Building were the closest spaces to its entrance. (Id. ¶ 14.) A sixth handicapped space was located at the rear of the 2500 Building and was accessible through a rear entrance. (Id.) All parking at VOH was on a first come, first served basis. (Id. ¶ 15.) Alonso never drove around the property to find other handicapped parking spaces. (Id.)

In early February 2013, Alonso requested an assigned handicapped parking space, but Vilma denied this request based on the "first come, first served" policy. (Id. ¶ 28.) Plaintiffs dispute this fact—not as to accuracy but as to completeness. Specifically, they assert that they requested an assigned handicap space "several times," including on March 29, 2017 and April 7, 2017.^{18/19} (Pls.' Resp. Facts ¶ 28.)

¹⁸ Plaintiffs allege that they also requested an assigned handicapped parking space "(1) two times during 2013; (2) at the end of 2015, . . . and (3) at the end of 2016" (Pls.' Resp. Facts ¶ 28.) However, these allegations are outside the scope of the Second Amended Complaint which alleges that "[f]rom March 2017 to June 2017, [Alonso] made various requests to Vilma for a disabled parking spot reserved exclusively for Angie." (D.E. 92 ¶ 39.) As such, the Court deems these "facts" to be immaterial.

¹⁹ In support of this assertion, Plaintiffs cite to evidence contained in App. A, which has been stricken from the record. They also cite to Carlos's Affidavit (which is contained on Plaintiffs' USB drive), which asserts that he requested a reserved handicap parking space on March 29, 2017 and April 7, 2017. (Carlos Aff. ¶¶ 34, 39.)

There was no need to drive Angie to a daycare, a program, a school or anywhere else on a daily basis; he spent most of the day watching television or sleeping due to medications he took. (Defs.' Facts ¶ 20.) Plaintiffs transported Angie in the minivan for medical appointments and family outings. (Id. ¶ 21.) Plaintiffs never were late for or had to cancel a medical appointment for Angie because of their inability to load him into the minivan. (Id. ¶ 22.)

b. Parking issues (Count Ten)

VOH contracts OnCall Patrol LLC, d/b/a OnCall Parking (hereafter, "OnCall Parking") to provide parking management services that include registering tenants' and guests' vehicles, collecting parking permit fees, issuing parking permits, notifying tenants and guests of expired parking permits and other types of parking violations, and monitoring parking on the property. (Defs.' Facts ¶ 86.) At VOH, OnCall Parking's onsite team began their shift at 10:00 PM and ended it the following morning at 6:00 AM. (Id.) The onsite team's function was to patrol the property. (Id.)

The only tenant information to which OnCall Parking had access was tenants' names, email addresses, cell phone numbers and the make, model, and license tag of their vehicles. (Id. ¶ 88.) This information was acquired from tenants at the time they registered their vehicles online with OnCall Parking Management software system. (Id.)

OnCall Parking's onsite team affixed warning stickers to unauthorized vehicles on the property and the vehicles of tenants or guests who committed violations of the property's parking regulations. (Id. ¶ 89.) Team members entered the violations into the OnCall Parking Management software system's central database. (Id.) The OnCall Parking Management software system then automatically sent electronic (email or text message) notifications to the affected tenant's email/cellphone in real time. (Id.) The OnCall Parking electronic messaging system is programmed to automatically send text messages to residents whose parking permits have expired. (Id. ¶ 95.) The system is programmed to send daily reminders until a tenant takes action to renew the permit. (Id.) VOH also used the OnCall electronic messaging system to notify all registered tenants about important information, such as the dates the management office would be open to accept payment of rent. (Id. ¶ 90.)

Tenants were able to access OnCall Parking's system and email customer service to resolve issues through On Call Parking's internet site or its smart phone application. (Id. ¶ 91.)

Alonso registered his minivan with OnCall Parking. (Id. ¶ 92.) When he did so, he gave express consent to receive text messages from OnCall Parking about his vehicle. (Id.) Any text messages he received from OnCall were the result of reminders, an expired parking permit, or parking violations entered by the onsite patrol team or VOH using the OnCall Parking Management software system to

send a notification to all tenants about a particular property management related matter. (Id.)

The Management Office at VOH is not open the same hours that the OnCall onsite team works. (Id. ¶ 87.) The onsite team, therefore, does not interact with Vilma or her staff. (Id.) No one with On Call Parking, including its administration or onsite team staff had access to tenant files. (Id.; Guadalupe Decl. ¶ 5 (App'x at 80).) Millie Guadalupe, Director of Client Services with On Call Parking, never spoke to Vilma or any of her staff about issues concerning Alonso's tenancy nor discussed his tenancy with any member of On Call's onsite team at VOH. (Id. ¶ 96.) She has never been directed to send electronic messages to Alonso for the purpose of harassing or intimidating him. (Id.)

c. Modification of bathroom (Count Three)

Angie's bedroom had its own bathroom. (Defs.' Facts ¶ 9.) Upon moving into VOH, Angie was always bathed by sitting on a shower chair and being washed, rather than showered. (Id. ¶ 37.)

Angie participated in the CDC+ Medicaid Waiver program which is administered by the Florida Agency for Persons with Disabilities ("APD"). (Defs.' Facts ¶ 39.) The CDC+ program allows Medicaid Waiver participants the greatest flexibility to self-determine how they will use Waiver funds to satisfy their needs. (Id.) A CDC+ consultant assists program participants in planning and preparing their budget and support plans. (Id.) Angie's CDC+ consultant was Amanda Ortiz

(“Ortiz”) of Superior Life Management Care, Inc. (Id.) Alonso served as Angie’s representative under the Medicaid Waiver programs. (Id.)

APD publishes the CDC+ Handbook to explain the permissible uses of CDC+ funds and the criteria it uses to approve funding request. (Id. ¶ 41.) Another handbook, published by the Florida Agency for Healthcare Administration, titled Developmental Disabilities Individual Budgeting Waiver Services and Limitations Handbook, explains the procedures recipients must use to prepare an “iBudget” and draw down from funds to make purchases. (Id.) Both handbooks specify that Medicaid is a payor of last resort for services and that Medicaid Waiver fund recipients first must exhaust available community resources, natural supports, and saved funds. (Id.)

The first step in APD’s administrative process to obtain approval for the use of CDC+ funds to pay for a reasonable modification is to obtain approval to conduct an Environmental Accessibility Adaption Assessment (“EAAA”). (Id. ¶ 44.) A request to use funds for this purpose also must be budgeted and approved by APD. (Id.)

In August 2018, Alonso conferred with Ortiz about setting funds aside from Angie’s monthly Medicaid funds to pay for a bathroom modification. (Id. ¶ 45.) They prepared and submitted an “iBudget” request dated August 4, 2018 seeking approval to spend \$789.58 for an EAAA. (Id.)

On August 26, 2018, Alonso emailed Vilma requesting permission to modify Angie's bathroom to remove the bathtub.²⁰ (Id. ¶ 47.) Vilma forwarded the email to VOH's attorney, Ken Lowenhaupt, Esq., who responded to Alonso the following day, August 27, 2018, granting Alonso's request. (Id.; Lowenhaupt Decl. ¶ 19 (App'x at 42).)

Alonso's EAAA request was partially approved by APD on November 20, 2018. (Id. ¶ 49.) However, he never spent the \$789.58 for an EAAA, and never took any other steps to complete the APD's administrative process for approval to use Angie's CDC+ funds to modify the bathroom. (Id. ¶ 50.)

d. Painting bathtub without toxic substances (Count Four)

On August 5, 2018, Alonso emailed Vilma requesting that VOH refinish the surface of the bathtub in the apartment's guest bathroom. (Id. ¶ 52.) VOH's attorney, Mr. Lowenhaupt, responded by letter dated August 7, 2018 advising that Plaintiffs needed to sign and return the consent/release form required by the tub refinishing service, Tobby Tubs Refinishing Corp., and that the work could not be completed without it. (Id. ¶ 53; Aug. 7, 2018 Letter from Lowenhaupt to Alonso (App'x at 503); Vilma Decl. ¶ 22 (App'x at 8); Archila Decl. ¶ 8 (App'x at 61).)

The same day, August 7, 2018, Alonso emailed Mr. Lowenhaupt stating that Tobby Tubs uses a toxic ingredient in the painting process, and requested—as a

²⁰ Defendants' Facts state that Alonso submitted a written request to Vilma on "8/26/17[.]" (D.E. 366 ¶ 47.) However, the evidence to which it cites indicates that Alonso made the request on August 26, 2018. (See Vilma Decl. ¶ 47 (App'x at 7); see also Lowenhaupt Decl. ¶ 19 (App'x at 42).)

“reasonable accommodation”—that Bobby Tubs not use the toxic ingredient when painting inside the apartment. (Aug. 7, 2018 email from Alonso to Lowenhaupt (App’x at 502).) Alonso stated that he was making the request “in order to protect our son’s health, because now he is suffering of severe cerebral palsy and spasticity, and is very difficult to move him out from the apartment, and keep him out for many hours.” (Id. (caps omitted).)

On August 25, 2018, Alonso emailed Vilma and Defendants demanding a response to his prior request that VOH refinish his guest bathtub without toxic substances. (Aug. 25, 2018 email from Alonso to Vilma (App’x at 505).) He asserted that the toxic substances “could affect [his] disabled son’s health, who is allergic.” (Id.)

It is impossible to refinish the surface of a bathtub without using toxic substances. (Defs.’ Facts ¶ 55; Archila Decl. ¶¶ 4-7, 9.)

On August 27, 2018, Vilma visited Plaintiffs’ apartment to deliver Plaintiffs a copy of Bobby Tubs’ consent/release form. (Defs.’ Facts ¶ 58.) While she was there, she inspected the bathtub. (Id.) She discovered that the bathtub did not need to be refinished, but just needed a good cleaning. (Id.) Plaintiffs cleaned the tub and continued to use it. (Id.) Alonso never returned Bobby Tubs’ consent/release form to Vilma and she never heard anything further from them about refinishing the guest bathtub. (Id. ¶¶ 59-60; see also Vilma Decl. ¶ 24 (App’x at 8).)

**e. Operation of noisy equipment near Plaintiffs' apartment
(Count Five)**

The Villas of Hialeah apartment complex is comprised of two separate four story, garden-style apartment buildings, each with an open interior courtyard. (Defs.' Facts ¶ 62.) There were tall trees and palms planted in the interior courtyard of the 2500 Building. (Id.) Additionally, the parking areas and open spaces surrounding each apartment building were shaded by large, mature hardwood trees and palms. (Id.)

Defendant contracted with a tree service to provide annual, and sometimes semi-annual, trimming of all the trees and palms throughout the property. (Id. ¶ 63.) One tree service is scheduled ahead of hurricane season, and others occur as needed. (Id.) It takes multiple days to complete the tree trimming. (Id.)

The tree trimming company used a large truck with a hydraulic bucket lift, gas-powered chain saws, and a gas-powered industrial size mulcher/chipper to perform the tree trimming service. (Id. ¶ 64.) Its crew stationed and moved the truck and woodchipper together for efficiency of task and time. (Id.) The gas-powered chainsaws allowed the crew to efficiently cut through thick branches and fronds. (Id.) The mulcher/chipper was used to shred the debris so the property could be quickly cleared of tree trimmings. (Id.) The machinery and equipment are and were essential to the tree company's operations. (Id.)

On September 12, 2018, at 3:33 PM, Alonso emailed Vilma to inform her that the tree company had parked its machinery in front of Apartment 1301, and

claimed that the loud noise awakened Angie and disturbed the family. (Id. ¶ 65.) In the email, Alonso requested that Vilma ask the crew to move its trucks and equipment farther away from Apartment 1301 so that Angie would not suffer “discomfort.” (Id.) The email contained no information connected to a disability.²¹ (Id.)

It was too late in the day and the project to consider what administrative and logistical issues would arise from Alonso’s request. (Id.) Defendants’ compliance with Alonso’s request would have created great inefficiency in the tree service’s operations, logistical problems for tenants and visitors, and further increase the time needed to complete each tree trimming project. (Id. ¶ 66; Garcia Decl. ¶¶ 10-12.) For example, parking the mulcher/chipper at a radius of at least 300 feet away from the 2500 Building would require the tree service’s on-site crew to make numerous trips throughout a work day to lug branches and fronds from the areas being trimmed to wherever the truck and mulcher/chipper could be parked. (Id.)

²¹ Defendants purport to dispute this fact on the grounds that in 2012, Vilma requested that Carlos provide her a medical letter regarding Angie’s condition. Plaintiffs submitted a letter dated September 13, 2012 from Dr. Gladys Y. Alonso, M.D., which states, in relevant part: “After two examinations, I have diagnosed the patient [Angie] with obesity, abnormality of gait, difficulty walking, wheelchair dependence, memory deficiency, generalized anxiety, full incontinence, abnormal speech, mental retardation and chronic allergies.” (D.E. 470 at 98.) Plaintiffs assert that this letter “should preclude Vilma, her maintenance workers and defendants to make any loud noise or locate any noisy machine near or in front of plaintiffs’ apartment due to Angie’s physical and mental disabilities.” (Pls.’ Resp. Facts ¶¶ 65-66.) However, Dr. Alonso’s letter says nothing about audio sensitivity or a need to shield Angie from loud noises. Thus, Dr. Alonso’s letter does not create a genuine issue of material fact regarding whether Defendants knew that Angie had a disability that resulted in loud noises causing Angie “discomfort.”

The time each crew member spent making repeated trips to the mulcher/chipper to cut branches and fronds effectively reduces the amount of time they have to perform the tasks that must be completed that day. (Id.)

The inefficiency is compounded because then another crew member must stop performing assigned duties to act as a traffic controller, stopping vehicles from crossing the roadway and parking area each time the other crew members are dragging the branches and fronds away from the 2500 Building. (Id.) This would not only disrupt the tree service's planned workflow, but also result in a constant logjam of traffic flowing in, out, and throughout the property. (Id.) Additionally, lugging branches and fronds across internal roadways and parking areas to reach the mulcher/chipper parked a substantial distance away from a work area also increases the risk of property damage to vehicles that likely would occur while dragging the branches and fronds through the roadway or parking areas. (Id.) It also increases the likelihood of worker's compensation claims as crew members strain to drag the heavy branches and fronds over and over for longer distances. (Id.) Finally, placing the machinery a substantial distance away from the 2500 Building would impact tree trimming services at the 2510 Building next to it. (Id.) The inefficiencies to operations and additional assumed risk would have caused the All Smooth Lawn Maintenance and Landscaping, Inc. to raise its charges to CFH by an additional \$3,000 or more for the additional days of work it would require to complete each tree trimming. (Id.)

Plaintiffs have not identified a non-handicapped comparator who was not similarly affected by the noise of the tree-cutting machinery equipment. (Defs.' Facts ¶ 67.)

On January 23, 2019, VOH gave one week's advance notice to all tenants of the 2500 Building that it was going to be pressure-cleaning the corridors. (Id. ¶ 68.)

One week later, on January 30, 2019, VOH began a maintenance job to pressure clean the corridors of the 2500 Building. (Id. ¶ 69.) The crew began on the fourth floor and planned to work their way down to the first floor. (Id.) Alonso made no complaint about noise on January 30, 2019. (Id.)

The next day, January 31, 2019, the crew pressure cleaned the third floor (where Apartment 1301 is located). (Id. ¶ 70.) Alonso did not notify Vilma about any issues with noise on January 31, 2019. (Id.)

The next day, February 1, 2019, at 1:10 PM, while the maintenance crew was pressure cleaning the second floor, Alonso emailed Vilma complaining that the noise from the pressure cleaning on January 30, January 31, and February 1 kept Angie from napping in the afternoon. (Id. ¶ 71; Alonso's Feb. 1, 2019 email to Vilma (App'x at 554).) The email requested "a reasonable accommodation" that VOH relocate the pressure cleaning machine farther from Apartment 1301. (Id.) Plaintiffs never informed Vilma or anyone else about a handicapping condition that required this action. (Id.)

Defendants assert that Vilma had no way to station the pressure cleaning equipment farther away, (*id.* ¶ 74); Plaintiffs dispute this assertion and cite to a photograph and video of the pressure washing machine, (Pls.' Resp. Facts ¶ 74).

On April 18, 2019, the tree trimming company returned to VOH to prepare the property for hurricane season. (Defs.' Facts ¶ 76.) At 10:59 AM, Alonso emailed Vilma stating that although Angie was not sleeping he feared the noise would keep Angie awake. (*Id.*) Alonso requested that the machines be relocated farther from Plaintiffs' apartment as a "reasonable accommodation" so that Angie could sleep. (*Id.*; Alonso Apr. 18, 2019 email to Vilma (App'x at 555).) Plaintiffs produced no information regarding what condition Angie suffered from that made the effect of the noise any different on him than other similar non-handicapped tenants.²² (*Id.*)

On July 2, 2020, during the course of this lawsuit, Alonso and Morejon took Angie to audiologist Dr. Molly Smeal at University of Miami Health Systems. (Defs.' Facts ¶ 79.) Alonso told Dr. Smeal that Angie was bothered by loud sounds. (*Id.*) Dr. Smeal performed a series of audiological tests on Angie but could not replicate Angie's purported reactions to loud sounds, as alleged by Alonso. (*Id.*) Indeed, Angie showed no physical reaction at all to noises up to 100 decibels in loudness except

²² Plaintiffs appear to assert that on August 24, 2019, when the tree service began working on the trees in front of the 2500 Building, (see Defs.' Facts ¶ 78), Alonso made another request for a reasonable accommodation "and provided to defendants the medical recommendation letter from Dr. Hoffer saying that the [wood chipper machine] should be relocated from plaintiffs apartment at least at 100 meters[.]" and Defendants ignored the request, (Pls.' Resp. Facts ¶ 78). However, the evidence to which they cite indicates that this request was made on September 24, 2020, (see Alonso Aff. ¶ 128), which is beyond the scope of the Second Amended Complaint.

that he smiled when Alonso's voice was projected into a sound booth at 60 decibels. (Id.)

Ultimately, Dr. Smeal was unable to reach any conclusion about Angie's hearing sensitivity or establish a correlation between Angie's vocalization and sounds he heard or did not hear. (Id. ¶ 80.) To the contrary, Dr. Smeal diagnosed Angie with "unspecified hearing loss." (Id.; Smeal Report (App'x at 251).) She recommended that Alonso follow up with Dr. Michael Hoffer if he wanted a medical letter. ²³(Id.; Smeal Report (App'x at 254).)

Defendants assert that Paul Gallner, CFH Group LLC's Safety and Compliance Manager, tested the noise level of the tree trimming equipment used at VOH and found that at a distance of 25 feet from the noise sources, the wood chipper and the gas-powered chainsaws together produced sound at a level of 85.3 decibels. (Defs. Facts ¶ 83.) He also measured the distance from the base of the balcony of Apartment 1301 to the ground and found that the distance was 18 feet. (Id.) Alonso measured the distance from Angie's bed to the balcony and found that it was 13 feet. (Id.) Consequently, Angie was approximately 31 feet from the noise source of the tree equipment when it was parked directly below Apartment 1301.

²³ Plaintiffs purport to dispute Paragraphs 79 and 80. However, Plaintiffs do not genuinely dispute that Dr. Smeal made the findings and conclusions recited in Defendants' Statement of Facts; rather, they dispute that Dr. Smeal's findings are correct. In support they cite three videos provided on their USB drive which show that Angie opens his eyes when someone (1) gets close and talks to him and (2) drops a water bottle on the floor. However, the Court has found that because Plaintiffs failed to produce these videos in discovery in violation of Rule 26(a)(1)(A)(ii), pursuant to Rule 37(c) they cannot be used in opposition to Defendants' Motion for Summary Judgment. (See *supra* Section IV(b)(4).)

(Id.) Given that OSHA standards predict sound for a source decreased by 6 decibels for every meter from the sound source, the tree trimming equipment would have been approximately at a level of 73.3 decibels without factoring the insulating factor of the sliding glass door. (Id.) Mr. Gallner tested the sound level of the gas-powered generator Plaintiffs placed on Angie's patio on September 12 and 13, 2017 and determined that it emitted sound at a level of 76.6 decibels at a distance of ten feet. (Defs.' Facts ¶ 84.)

Plaintiffs dispute these facts on the grounds that Mr. Gallner's measurements are not admissible evidence because (1) Mr. Gallner is not an expert witness or otherwise certified to take such measurements, (2) the measurements are not reliable, and (3) the measurements were not certified by an authorized institution. (Pls.' Resp. Facts ¶¶ 83-84.)

f. Lease termination (Count Nine)

On June 11, 2017, Alonso and Morejon filed a housing discrimination complaint with the United States Department of Housing and Urban Development ("HUD") under penalty of perjury.²⁴ (Id. ¶ 29.) It was never processed by HUD nor served on Defendants. (Id.)

²⁴ The June 11, 2017 HUD Complaint was filed in Spanish. (See App'x at 567.) Case 1:19-cv-21826-JAL Document 555 Entered on FLSD Docket 08/17/2022 Page 49 of 118

Hurricane Irma was scheduled to strike South Florida on September 10, 2017. (Id. ¶ 97; National Weather Service, Hurricane Irma Local Report/Summary, available at [https://www.weather.gov/mfl/hurricane irma](https://www.weather.gov/mfl/hurricane%20irma) (last visited Apr. 16, 2021).)

Defendants assert that Vilma sent all VOH tenants notice to prepare for the hurricane and reminded them that they could not tape their glass windows or doors. (Defs.'s Facts ¶ 97; Pre-Hurricaneirma Notice, App'x at 478.) The notice further informed tenants that they could not have gas generators inside their units. (See id.; App'x at 478.) Plaintiffs dispute these assertions, arguing that Defendants did not inform tenants before Hurricane Irma that they could not put tape on their glass doors and windows or that they could not use gas generators. (Pls.' Resp. Facts ¶ 97.)

On September 12, 2017, Alonso requested to be provided with a portable gas generator and portable air conditioner as a reasonable accommodation for Angie. (Id. ¶ 99; Alonso's Sept. 12, 2017 Reasonable Accommodation Request (App'x at 550).) Defendants assert that Vilma denied the request because it was illegal. (Id.; Vilma Decl. ¶ 39.) Plaintiffs dispute this assertion and state that Vilma refused to give them a generator because she did not have one, not because it was dangerous or prohibited.²⁵ (Pls.' Resp. Fact. ¶ 98.)

²⁵ Plaintiffs assert that "Vilma refused to give the generator because she did not have one, but she said that Carlos should buy it by himself if he needed it." (Pls.' Resp. Facts ¶ 99.) The

In any event, Alonso purchased a gas generator. (Defs.' Facts ¶ 100.) According to Defendants, Plaintiffs operated the generator on their balcony while other residents, including Plaintiffs' upstairs neighbor in Apartment 1401, had their windows open. (Id.; Hernandez Decl. ¶¶ 19, 21.) It operated from about 9:00 PM on September 12, 2017 to about 5:00 AM on September 13, 2017, in violation of the Florida Fire Prevention Code. (Id.) Plaintiffs dispute these assertions. (See Pls.' Resp. Facts ¶ 100.) They state that the generator ran from about 10:30 PM on September 12, 2017 to about 2:30 AM on September 13, 2017, and that their upstairs neighbors were not home during that time.²⁶ (Id.)

Defendants assert that on September 13, 2017, they warned Alonso and other tenants that if they continued to use gas generators the police would be called. (Defs.' Facts ¶ 101.) Plaintiffs dispute this assertion. They appear to concede that Vilma sent an email regarding the use of generators on September 13, 2017, but argue that the email did not apply to Plaintiffs because "plaintiffs' generator was not running" at the time, and "Defendants never told plaintiffs that the police would

Court has stricken this assertion as an improper attempt to amend the Second Amended Complaint through a brief in opposition to a motion for summary judgment. (See D.E. 553 at 35-38.)

²⁶ They further appear to dispute that running a gas generator on their balcony was a violation of the Florida Fire Prevention Code "because the firefighters refused to stop the generators of other tenants since their superiors did not order them to enforce any fire prevention code during that emergency, so the defendants should not claim a violation of that code either." (Pls.'s Facts ¶ 100(b) (emphasis in original).) However, they cite no evidence supporting this purported dispute. Rather, they cite arguments they made in their Motion to Reopen the Case. (D.E. 470 at 19 ¶¶ 25-26.) The arguments to which they cite do not address the issue of whether Plaintiffs' violated the Florida Fire Prevention Code.

be called on them, because they never saw our generator running.” (Pls.’ Resp. Facts ¶ 101.)

Defendants assert that on September 14, 2017, Vilma sent a follow-up notice instructing all tenants who had not removed tape from their windows to do so, (Defs.’ Facts ¶ 102; Sept. 14, 2017 Notice (App’x at 482)); Alonso received a copy of the notice, (id.). On September 15, 2017, Vilma sent a notice to all remaining residents with tape on their windows stating that if they did not remove it they would be subject to a \$150 fine. (Id. ¶ 103.) According to Plaintiffs, they first “received” a notice to remove tape on the morning of September 16, 2017. (Pls.’ Resp. Facts ¶ 102.)

On September 18, 2017, Alonso requested, as a “reasonable accommodation,” that he be able to leave the tape on his glass doors and windows through the end of hurricane season and not be fined. (Id. ¶ 104.) The request was denied. (Id.)

Alonso failed to comply with the notices and on September 25, 2017, Vilma issued a Seven Day Notice to Cure to Alonso and Morejon demanding that they remove the tape within seven days or face a lease termination. (Id. ¶ 106; Vilma Decl. ¶ 45; Sept. 25, 2017 Seven Day Notice to Cure (App’x at 487).)

On September 26, 2017, Mariela Hernandez, Plaintiffs’ upstairs neighbor in Apartment 1401, complained to Vilma about being harassed by Alonso and Morejon and also informed that she and her family were forced to vacate their apartment when Alonso and Morejon operated the gas generator on the balcony of their apartment. (Defs.’ Facts ¶ 107.) Plaintiffs dispute that Ms. Hernandez and her

family were forced to vacate their apartment due to the generator.²⁷ (Pls.' Resp. Facts ¶ 107.) They assert that Ms. Hernandez and her family left the apartment before the hurricane and did not return until after Plaintiffs' generator stopped working.²⁸ (Id.; see also id. ¶ 100.)

Vilma conferred with her regional manager, Marlen Garcia, and they made the decision to non-renew Plaintiffs' lease. (Id. ¶ 108.) CFH directed its attorney, Kenneth Lowehaupt, P.A., to prepare a notice terminating Plaintiffs' month-to-month tenancy. (Id.) The letter was posted on their door the same day, September 26, 2017. (Id.) The letter required Plaintiffs to vacate the apartment by October 31, 2017. (App'x at 488.)

On September 27, 2017, Alonso and Morejon filed a second housing discrimination complaint with HUD. (Defs.' Facts ¶ 109.) HUD Equal Opportunity Specialist Adoniram Vargas was assigned to investigate the charge of discrimination. (Id. ¶ 110.) Defendants received the charge on or about October 3, 2017. (Id. ¶ 111.) Defendants' attorney, Mr. Lowenhaupt, immediately reached out to Vargas to introduce himself and request an extension of time to respond to the charge. (Id.) During that conversation, Vargas asked Lowenhaupt if Defendants were willing to extend the family's move-out date to January 31, 2018 to permit HUD time to complete its investigation. (Id.) Varags stated that if Defendants

²⁷ Plaintiffs also dispute that they ever harassed Ms. Hernandez or her family, but fail to cite record evidence in support of this purported dispute. (Pls.' Resp. Facts ¶ 107.)

²⁸ Plaintiffs cite no evidence supporting this purported dispute in Paragraph 107, but do cite evidence supporting this purported dispute in Paragraph 100.

agreed to this proposition and Plaintiffs failed to move out on January 31, 2018, then Defendants would be free to initiate the eviction immediately. (Id.) Defendants agreed to HUD's request and Lowenhaupt sent a new termination letter extending the date by which Plaintiffs must move out to January 31, 2018. (Id.)

Vargas interviewed Alonso on two separate occasions. (Id. ¶ 112.) He also interviewed Vilma, Mariela Hernandez, and CDC+ Consultant Amanda Ortiz. (Id.)

On December 26, 2017, at the conclusion of its investigation into Plaintiffs' September 27, 2017 HUD Complaint, HUD issued a report finding that no reasonable cause existed to believe that a discriminatory housing practice had occurred. (Defs.' Facts ¶ 116; see also Dec. 26, 2017 HUD Letter (App'x at 611).)

g. Eviction proceedings (Count Eleven and Twelve)

Plaintiffs refused to move out on January 31, 2018, and 245 C & C, LLC initiated eviction proceedings in Miami-Dade County Court on February 1, 2018, per its understanding with HUD. (Id. ¶ 118.) The eviction case was tried in the Miami-Dade County Court on November 15, 16, and 19, 2018. (Id. ¶ 120.) The trial judge retired before issuing a ruling. (Id.) A successor judge was appointed and issued a final judgment on June 20, 2019, finding in favor of Alonso and Morejon. (Id. ¶¶ 120-21.) 245 C & C, LLC appealed the adverse final judgment, and on September 3, 2020, the Appellate Division of the Miami-Dade Circuit Court reversed the final judgment and remanded the case with instructions to enter judgment for 245 C & C, LLC and to calculate an award of attorney's fees for 245 C & C, LLC. (Id. ¶ 122; Appellate Division Opinion (Defs.' App'x at 316).)

h. Implied covenant of quiet enjoyment (Count Fourteen)

There is one main water shutoff for the entire 2500 Building. (Id. ¶ 130.)

There are no sub-meters to individual apartments. (Id.) When there is a leaking pipe or any other type of water emergency in the 2500 Building, it is necessary to shut off the water to the entire building to make the repair and prevent damage to the tenant's and Defendants' properties. (Id.) Water emergencies interrupt all 103 apartments in the 2500 Building. (Id. ¶ 131.) There is not enough time to notify all 103 tenants that the water must be shut off due to an emergency. (Id.) The repairs are made as quickly as possible so that the water can be turned back on. (Id.) At no time was the water shut off specifically and only to Apartment 1301. (Id. ¶ 132.)

When a repair or maintenance is capable of being planned in advance, VOH gives tenants as much advanced notice as possible. (Id. ¶ 133.)

There is no provision in the lease that obligates Defendants to provide Plaintiffs with a laundry room and working laundry room equipment. (Id. ¶ 134.) Alonso notified VOH's Management Office around February 18, 2017 about broken laundry equipment.²⁹ (Id. ¶ 135.) The equipment was owned by a contractor. (Id.) The contractor replaced the laundry equipment two weeks later. (Id.)

²⁹ Fact 135 states that Alonso notified VOH about broken laundry equipment on "2/18/18." (Defs. Facts ¶ 135.) Plaintiffs dispute this fact on the grounds that the complaint was made in 2017. (Pls.' Resp. Facts ¶ 135.) Both Parties cite the same police report dated February 18, 2017 as supporting evidence. (See Defs.' App'x at 548-49; Pls.' USB File # 22.) Thus, the Court deems it undisputed that Alonso notified VOH about broken laundry equipment on February 18, 2017.

VI. Discussion

a. Count One

In Count One, Plaintiffs allege that Defendants violated the Fair Housing Act by failing to provide a reasonable accommodation—specifically, a handicapped parking spot with an access aisle on the driver’s side reserved exclusively for Angie. (Second Am. Compl. ¶¶ 39, 128-43.)

Defendants argue that this claim is barred by the FHA’s two-year statute of limitations, because Alonso only requested an assigned handicapped parking space twice, first on February 3, 2013, and second on August 5, 2016, both of which are beyond the limitations period. (Mot. at 4-5.) They further argue that the claim otherwise fails on the merits because the requested accommodation was neither reasonable nor necessary. (Mot. at 5-9.) Defendants argue that the request was unreasonable because: (1) if they had assigned Plaintiffs a reserved handicapped space, it would have denied all others access to the space, which would have the effect of permanently obstructing the space in violation of Florida law and the Miami Dade County Code of Ordinances, thereby “fundamentally alter[ing] Florida’s and Miami Dade County’s statutory schemes[.]” (id. at 6); and (2) if they had assigned Plaintiffs a space, it would have decreased “an already limited number of parking spaces available to other handicapped persons.” (Id. at 6.) Defendants argue that a reserved handicapped parking space was unnecessary because Angie “was not enrolled in any school, program or organizational activity[.]” “had no need to be transported anywhere on a daily basis[.]” “[v]irtually all of ANGIE’s time was

spent in Apt. 1301 with MOREJON sleeping or watching TV[;]" "[m]ore often than not" Plaintiffs parked in their "preferred" spot anyway; Plaintiffs could not recall a single time when they returned from a family outing to find no handicapped spaces available; Plaintiffs could not recall a single time that they were forced to miss an appointment or an outing because Angie could not be loaded into the minivan; and based on the dimensions of the handicapped parking spaces and Angie's wheelchair, there was no need for an access aisle to load and unload Angie from the minivan. (Id. at 7-8 (citations omitted).) Defendants further argue that Plaintiffs cannot "meet their burden [even] when measured against ANGIE's nearest handicapped comparator." (Id. at 8.) Specifically, Osvaldo Cordero "is a senior with a mobility disability who also resided in the 2500 Building during the Relevant time Period. He used a rollator as an aid." (Id.) "Unlike Mr. Cordero who physically ambulated the 360 feet from his apartment to the handicapped parking area, ANGIE exerted no physical effort when coming and going between his apartment and the parking lot: he was always seated in a wheelchair." (Id.)

Plaintiffs appear to argue that this claim is not barred by the statute of limitations because Alonso also requested an assigned handicapped parking space on March 29, 2017 and April 7, 2017, both of which are within the limitations period. (Resp. at 11.) Plaintiffs further appear to argue that the requested accommodation was reasonable and necessary because Angie is a member of a protected class under the FHA and has the right to go out at any time, and

Plaintiffs had difficulty getting Angie into and out of the van when not parked in an accessible parking space. (Id. at 13-14.) Plaintiffs argue that Angie was entitled to a reserved parking space pursuant to the Joint Statement of the Department of Housing and Urban Development and the Department of Justice ("Joint Statement"), (Resp. at 13), and cite to App. A, (see id. at 3). However, App. A. has been stricken from the record pursuant to Plaintiffs' Notice of Striking. (D.E. 495, 501.) They further appear to argue that pursuant to Section 320.0848, Florida Statutes, Angie was "entitled" to a specific, reserved parking space of Alonso's choosing. (Id. at 13.) They further argue that Osvaldo Cordero is not "comparable" to Angie because Mr. Cordero "ambulated the 360 feet from his apartment to the handicapped parking area," whereas Angie could not. (Id. at 14.)

In their Reply, Defendants argue that Plaintiffs have failed to establish that a reserved handicapped parking space was reasonable or necessary to afford Angie an equal opportunity to enjoy VOH. (D.E. 514 at 5.) They argue that Plaintiffs have failed to show that the other handicapped parking spaces were unusable or unsuitable. (Id.) They argue that the Joint Statement does not require a landlord to assign a handicapped space to any person with a visible mobility impairment. (Id. at 6.) They argue that there is no evidence showing that Angie suffered pain or distress while being transferred to and from the parking area in his wheelchair, or that he was subject to risks or embarrassment while being transferred to and from the parking area in his wheelchair. (Id. at 7.) Similarly, they argue that there is no evidence that Angie's enjoyment of living at VOH diminished because his parents

were not assigned a handicapped parking space. (Id. at 7-8 (citing *United States v. Cal. Mobile Park Home Park Mgmt. Co.*, 107 F.3d 1374, 1381 (9th Cir. 1997)).)

“The FHA prohibits discriminating against a person on the basis of a ‘handicap,’ or a disability, by refusing to make reasonable accommodations when necessary to afford the person equal opportunity to use and enjoy a dwelling.” *Bhogaita v. Altamonte Heights Cono. Ass’n Inc.*, 765 F.3d 1277, 1285 (11th Cir. 2014) (citing 42 U.S.C. § 3604(f)(3)(B)). The FHA prohibits discrimination “because of a handicap” against persons with handicaps and “any person associated with that person.” 42 U.S.C. § 3604(f)(2)(C). “A successful failure-to-accommodate claim has four elements. To prevail, one must prove that (1) he is disabled within the meaning of the FHA, (2) he requested a reasonable accommodation, (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation.” Id. (citing *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1218-19 (11th Cir. 2008)). It is undisputed that Angie has a disability for purposes of the FHA. (Defs.’ Facts ¶ 7; Pls.’ Resp. Facts ¶ 7.) “Whether a requested accommodation is required by law is ‘highly fact-specific, requiring case-by-case determination.’” *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002) (quoting *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1044 (6th Cir. 2001)).

The FHA provides for a two-year statute of limitations in which a plaintiff must commence his action. 42 U.S.C. § 3613(a)(1)(A). Specifically, an “aggrieved person” who has been “injured by a discriminatory housing practice” is entitled to

file a civil action “not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice,” 42 U.S.C. §§ 3602(i)(1), 3613(a)(1)(A). The FHA’s “statute of limitations begins to run when ‘facts supportive of the cause of action are or should be apparent to a reasonably prudent person similarly situated.’” *Wood v. Briarwinds Cond. Ass’n Bd. of Dirs.*, 369 F. App’x 1, 4 (11th Cir. 2010) (quoting *Hipp v. Liberty Nat’l Ins. Co.*, 252 F.3d 1208, 1222 (11th Cir. 2001)). For example, the FHA’s statute of limitations begins to run when a request for a reasonable accommodation, or for permission to make a reasonable modification, is denied. See *Oliver v. Fox Wood at Trinity Cmty. Ass’n, Inc.*, Case No: 8:17-cv-585-T-30AAS, 2018 WL 4608325, at *7-8 & n.5 (M.D. Fla. July 30, 2018) (finding that the FHA’s statute of limitations began to run when a reasonably prudent person would have become aware that a requested accommodation or permission to modify was denied, and that an injury is not a “continuing injury” simply because a request was denied) (citing *Telesca v. Vill. of Kings Creek Condo. Ass’n, Inc.*, 390 F. App’x 877, 882 (11th Cir. 2010)). However, “[t]he computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice.” 42 U.S.C. § 3613(a)(1)(B). The FHA’s statute of limitations is not tolled by a request for administrative review of a no-cause determination. See *Allen v. Hous. Auth. of City of Auburn, Ala.*, 638 F. App’x 825, 831 (11th Cir. 2015) (observing that “nothing in the statutory scheme of the FHA expressly contemplates such review” and that “the

FHA's implementing regulations do not provide for administrative review of determinations of no reasonable cause").

First, the Court finds that a genuine issue of material fact exists regarding whether Plaintiffs requested a reasonable accommodation, and whether Defendants denied such a request, within the FHA's limitations period. Defendants assert that Alonso only requested a reserved handicapped parking space one time, in February 2013. (Defs.' Facts ¶ 28; Alonso Dep. Tr. (D.E. 462-1) at 29:13 – 30:13.) Vilma denied the request, advising Alonso that "the handicapped parking spaces were on a 'first come, first served' basis, which is what Florida law and ordinance require." (Defs.' Facts ¶ 28; Vilma Decl. ¶ 15 (App'x at 5).) Alonso never contacted Vilma about an assigned handicapped parking space again after that.³⁰ (Vilma Decl. ¶ 15 (App'x at 5).) However, Plaintiffs assert that Alonso requested an assigned handicapped parking space on March 29, 2017 and April 7, 2017, (Pls.' Resp. Facts ¶ 28; Alonso Aff. ¶¶ 29-34, 39), and Vilma denied the request each time. (Alonso Aff. ¶¶ 29-34, 39.) Although Plaintiff filed the original Complaint in this case more than two years later on May 6, 2019, (D.E. 1), the limitations period was tolled for approximately

³⁰ Alonso testified at his deposition that in August of 2016, Plaintiffs visited Tom Cabrerizo—who is variously described in the record as "Vice President" and "CEO" of Defendant CFH Group, LLC, (see App'x at 578, 584, 603)—and told Mr. Carbrerizo "about the distrust we had regarding Vilma and about . . . the reluctance . . . to allow for . . . the parking space." (Alonso Dep. Tr. (D.E. 462-1 at 33:17-23.) The record does not reflect that Alonso requested an assigned handicapped parking space from Mr. Cabrerizo in August 2016 (or at any other time). And in any event, the Second Amended Complaint does not allege that Plaintiffs requested an assigned handicapped parking space from Mr. Cabrerizo, or that Mr. Cabrerizo denied a request for an assigned handicapped parking space. The Second Amended Complaint alleges only that Alonso "made various requests to Vilma for a disabled parking spot reserved exclusively for Angie." (D.E. 92 ¶ 39.) Additionally, a request for a reasonable accommodation in August 2016 is beyond the FHA's two-year statute of limitations.

three months during HUD's investigation, from approximately September 27, 2017 to December 26, 2017. See *Kennedy v. Warren Props., Inc.*, CIVIL ACTION NO. 17-00114-KD-N, 2017 WL 6002803, at *5 (S.D. Ala. Dec. 1, 2017); *Binns v. Marietta Hous. Assistance Program*, Civil Action No. 1:07-CV-0070-RWS, 2010 WL 1138453, at *7 (N.D. Ga. Mar. 22, 2010). The Court finds that a reasonable jury could conclude, based on the record evidence, that Alonso requested a reserved handicapped parking space as a reasonable accommodation, and Defendants denied such a request, within the FHA's two-year limitations period.

Next, the Court finds that a genuine issue of material fact exists as to whether a reserved handicapped parking space with an access aisle on the driver's side was "necessary to afford [Angie] equal opportunity to use and enjoy' the relevant dwelling." *Bhogaita*, 765 F.3d at 1288 (quoting 42 U.S.C. § 3604(f)(3)(B)). "The word 'equal' is a relative term that requires a comparator to have meaning." *Schwarz*, 544 F.3d at 1226. "Under the FHA, the comparator is a person without a disability, and an accommodation extends an equal opportunity when it addresses the needs the disability creates." *Bhogaita*, 765 F.3d at 1288 (citing *Schwarz*, 544 F.3d at 1226). "Thus, a 'necessary' accommodation is one that alleviates the effects of a disability." *Id.* (citing *Schwarz*, 544 F.3d at 1226).

It is undisputed that that there was no need to drive Angie anywhere on a daily basis, and he spent most of the day watching television or sleeping due to medications he took. (Defs.' Facts ¶ 20.). It is undisputed that Angie never walked

anywhere; he was always transported to and from Apartment 1301 and the handicapped parking area. (Defs.' Facts ¶ 32.) Plaintiffs transported Angie in the minivan for medical appointments and family outings, but they could not remember any specific instances where they were late for or had to cancel a medical appointment for Angie because of their inability to load him into the minivan. (Id. ¶¶ 21-22.) Defendants produced evidence from which a reasonable jury could conclude that based upon the dimensions of the handicapped parking spaces, the width of Alonso's van, and the width of Angie's wheelchair, a handicapped parking space with an access aisle on the driver's side was unnecessary, and Angie could get into and out of the van from any handicapped parking space. (Mot. at 7-8; Defs. Facts ¶¶ 17-18.)

On the other hand, Plaintiffs have produced video and photographic evidence showing Alonso and Morejon transferring Angie from his wheelchair into the van. (See Pls.' USB File # 4.)

The Court finds that based on the photographs and videos, a reasonable jury could conclude that a reserved handicapped parking space with an access aisle on the driver's side was necessary to provide Angie an equal opportunity to enjoy Apartment 1301. Stated differently, a reasonable jury could find that a reserved handicapped parking space access aisle on the driver's side ameliorates the effects of Angie's disability, which cause him to be transported to and from the van in a wheelchair.

Finally, the Court finds that a genuine issue of material fact exists as to whether a reserved handicapped parking space with an access aisle on the driver's side was reasonable. The reasonableness determination "asks whether the requested accommodation 'is both efficacious and proportional to the costs to implement it.'" *Bhogaita* 765 F.3d at 1289 (quoting *Oconomowoc Res. Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002)). For example, an accommodation is unreasonable if (1) it would impose an undue financial and administrative burden on the housing provider or (2) it would fundamentally alter the nature of the housing provider's operations. See *Schwarz*, 544 F.3d at 1220 (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 n.17 (1987); *Harris v. Thigpen*, 941 F.2d 1495, 1527 n.48 (11th Cir. 1991)); see also *Warren v. Delvista Towers Cond. Ass'n, Inc.*, 49 F. Supp. 3d 1082, 1086 (S.D. Fla. 2014).

Here, Defendants argue that the requested accommodation is unreasonable because it would fundamentally alter the legal schemes governing handicapped parking spaces. (Mot. at 6 (citing *United States v. WHPC-DWR, LLC*, 491 F. App'x 733 (7th Cir. 2012) (affirming district court's entry of summary judgment in favor of property owner where tenant claimed that property owner violated FHA's reasonable accommodation provision by denying him an assigned parking space near the building's entrance, but declining to reach issue of reasonableness of accommodation request); *Money v. Kendallville Place Apt.*, 1:14-cv-00253, 2016 U.S. Dist. LEXIS 28320, at *9-13 (N.D. Ind. Mar. 7, 2016) (finding that FHA accommodation request to create access aisle around plaintiff's reserved parking

space was unreasonable after balancing interests). Plaintiffs do not expressly address the reasonableness inquiry, other than to argue that Defendants' arguments are "mere pretexts." (Resp. at 12.)

Based on the record evidence, a reasonable jury could conclude that a reserved handicapped parking space with an access aisle on the driver's side was a reasonable accommodation. See *WHPC-DWR, LLC*, 491 F. App'x at 737-38 (observing that "HUD regulations interpreting the FHA assume that in some circumstances a 'first come, first served' parking policy must yield to accommodate residents with impaired mobility"). Accordingly, Defendants Motion for Summary Judgment as to Count One is denied.

b. Count Three

In Count Three, Alonso, Morejon, and Angie allege that Defendants violated the FHA by refusing to permit a reasonable modification to their apartment. (Second Am. Compl. ¶¶ 150-56.) Specifically, they allege that "from March 2017 to August 2018, Carlos requested that they be allowed to modify the bathroom of Angie, but Vilma in more than one occasion refused the modification, saying they never allowed it in 'Villas.'" (Id. ¶ 59.) They concede that Defendants "eventually provided an authorization to the bathroom's modification on August 27, 2018[.]" (id. ¶ 60), but allege that they received a "constructive denial[.]" (id. ¶ 153).

Defendants argue that there is insufficient evidence regarding Alonso's alleged March 2017 request for a reasonable modification to defeat summary

judgment. (Mot. at 9-10 (citing *McBride v. Vill. of Michiana*, Case No. 4:92-CV-155, 1998 U.S. Dist. LEXIS 6082 (W.D. Mich. Apr. 2, 1998); *Chandler v. James*, 985 F. Supp. 1094, 1100 (M.D. Ala. 1997)).) They argue that “[b]ecause Plaintiffs cannot recall ‘specific facts’ to counter Defendants’ denial of alleged requests for a bathroom modification before 8/26/[2018],³¹ their generalized statements do not create disputed issues of fact.” (Id. at 10.) They further argue that Count Three is not ripe because after Defendants approved the modification Plaintiffs failed to complete APD’s administrative procedures by paying the \$789.58 for an environmental accessibility adaption evaluation, even though Alonso received approval to use \$798.58 of Angie’s Medicaid Waiver account for the evaluation. (Id. at 10-11.) They argue that “Plaintiffs seek a judicial determination that they were denied opportunities to modify ANGIE’s bathroom when the record clearly establishes they were neither ready nor willing to commence the bathroom modification using their own funds until APD determine[d] if they could apply funds in ANGIE’s CDC+ Medicaid Waiver account for that purpose. Count III is simply an abstract dispute not ripe for adjudication.” (Id. at 11.)

Plaintiffs argue that Alonso requested permission to modify Angie’s bathroom at the beginning of March 2017, and on March 29, 2017. (Resp. at 14 (citing Alonso’s Aff. ¶¶ 26-33).) They further argue that after Defendants approved the

³¹ Defendants’ Motion and Paragraph 47 of Defendants’ Facts state that Alonso submitted a written request to Vilma on “8/26/17[.]” (D.E. 366 ¶ 47; Mot. at 10.) However, the evidence to which Defendants cite indicates that Alonso made the request on August 26, 2018. (See Vilma Decl. ¶ 47 (App’x at 7); see also Lowenhaupt Decl. ¶ 19 (App’x at 42).)

August 27, 2018 request, they did not complete APD's administrative procedures for "many reasons," including that the approval was not timely. (Id. at 17 (citing Pls.' Resp. Facts ¶ 50).)

In their Reply, Defendants argue that Plaintiffs' failure to recall specific facts about the March 2017 requests to modify Angie's bathroom until their opposition to the Motion for Summary Judgment evinces "gamesmanship," the new details Alonso provides are "inherently inconsistent" with his prior deposition testimony, and the new details the rest of the family provides are inadmissible hearsay under Federal Rules of Evidence 602 and 802. (Resp. at 9.) They further argue that even if Plaintiffs could establish that they requested the modification in March 2017, "the requested modification was unnecessary because an alternative means was found to accomplish the same purpose and it achieved the same effect"—specifically, Alonso built Angie a shower chair that fit in Plaintiffs' bathtub. (Id. at 10.) Defendants argue that there is no evidence showing that this alternative means caused Angie pain or discomfort. (Id.)

The FHA prohibits discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap" 42 U.S.C. § 3604(f)(2). For purposes of the FHA, "discrimination" includes

a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter

agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

42 U.S.C. § 3604(f)(3)(A). “To prevail on a section 3604(f)(3)(A) claim, a plaintiff must establish that (1) she is disabled or handicapped within the meaning of the FHA, (2) she requested a modification of the premises, (3) such modification was reasonable, (4) such modification was necessary to afford her full enjoyment of the premises, and ([5]) the defendants refused to permit the modification to be made at plaintiff’s expense.” *Sackman v. Balfour Beatty Cmtys., LLC*, No. CV 113-066, 2014 WL 4415938, at *5 (S.D. Ga. Sept. 8, 2014). “The failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation [or modification], ‘as an indeterminate delay has the same effect as an outright denial.’” *Bhogaita*, 765 F.3d at 1286.

The Court finds that genuine issues of material fact preclude summary judgment on this claim. During his deposition, Alonso testified that he requested a modification to Angie’s bathroom in the “[b]eginning of March ’17.” (Alonso Dep. Tr. (D.E. 462-1) at 83:8.) He stated that he asked to “[r]emove the bathtub completely from the bathroom, make a – install flooring that was completely flat. . . . And in the flat bathroom install a chair that was bigger and more comfortable for Angie.” (Id. at 90:12-17.) Although the deposition transcript is not entirely clear as to what Vilma’s specific response was, a reasonable jury could conclude that Vilma denied the request. (See id. at 90:5 – 92:21.)

However, Vilma submitted a sworn Declaration denying that Plaintiffs requested a reasonable modification to Angie's bathroom prior to August 2018.

(Vilma Decl. ¶ 18 (App'x at 6-7).) She states that

[t]he first time the issue was ever raised with me was on 8/26/2018 when ALONSO emailed me a request for permission to modify their son's bathroom and remove the bathtub. I turned the letter over to our attorney, Ken Lowenhaupt, Esq. to answer because ALONSO then was represented by attorneys (whom he copied on the request). Mr. Lowenhaupt responded to ALONSO the following day via email with a letter attached. The letter denied ALONSO's claim that he previously had discussed this with me but indicated that 245 C and C LLC granted approval of the request with conditions that ALONSO performed the work with a permit, hired a licensed contractor, and coordinated construction with my office. . . .

Three days later on 8/30/18, ALONSO sent me an email again asking for approval. This time I responded to him directly and told him to review Mr. Lowenhaupt's 8/27/18 responsive letter. I also informed him that in addition to the conditions already set out in Mr. Lowenhaupt's letter, he would be financially responsible for returning the bathroom back to its original condition at the conclusion of their lease.

I never heard anything further after this exchange from ALONSO or MOREJON about moving forward with the bathroom modification project.

I have never told ALONSO or MOREJON that 245 C&C LLC or CFH Group LLC would not permit reasonable modifications. . . .

(Id. ¶¶ 19-21.) Additionally, when asked by HUD Equal Opportunity Specialist Adoniram Vargas on October 13, 2017 whether she had ever spoken with Plaintiffs about specific plans for a bathroom modification, Vilma replied: "Never." (App'x at 602.) When asked whether she had spoken with Plaintiffs about who would pay for any such modification, or who would restore the bathroom to its original condition if Plaintiffs left the unit, Vilma replied: "Never." (Id.)

Thus, there are genuine issues of material fact as to whether (1) Plaintiffs requested a modification to Angie's bathroom in March 2017, and (2) whether Defendants refused to permit the modification to be made at Plaintiffs' expense.

Although Defendants argue that Alonso's failure to recall specific facts regarding the March 2017 request is insufficient to create a factual issue, the Court disagrees. The cases Defendants cite are distinguishable. In *McBride*, the plaintiff alleged that certain individuals made derogatory statements about her in phone calls. 1998 U.S. Dist. LEXIS 6082, at *13-15. The plaintiff provided no foundation for her knowledge of the contents of those phone calls, and the individuals who allegedly made the phone calls could not remember what was said during the phone calls. *Id.* As such, the court found that the plaintiff had failed to raise genuine issues of material facts as to those claims. *Id.* Here, Alonso did not testify that he could not remember what he spoke with Vilma about—rather, he testified that he had a conversation with Vilma in March 2017 about modifying Angie's bathroom, but that he cannot remember the precise date on which it occurred. (Alonso Dep. Tr. (D.E. 462-1) at 21:22.) Thus, *McBride* is inapposite.

In *Chandler*, the court found that "a witness who states that he cannot remember whether or not an event alleged to have happened by the moving party actually took place does not help the nonmoving party to meet its burden." 985 F. Supp. at 1100. "The nonmoving party must come up with evidence that negates the version of events alleged by the moving party—an acknowledgment that the event may have occurred, but the witness cannot remember, falls short." *Id.* In this case,

Alonso did not testify that he could not remember whether he requested permission to modify Angie's bathroom in March 2017—rather, he testified that he did request such permission, but that he cannot remember the precise date on which it occurred. (Alonso Dep. Tr. (D.E. 462-1) at 21:22.) Thus, *Chandler* is inapposite.

Although Defendants argue that this claim is not ripe because when Defendants did approve Plaintiffs' request to modify Angie's bathroom they did not commence the modification, a reasonable jury could conclude that the circumstances had changed such that the modification was not yet feasible. There is evidence that Plaintiffs requested permission to make a reasonable modification to Angie's bathroom in March 2017, and that Defendants denied the request. (See Alonso Dep. Tr. (D.E. 462-1) at 83:8 – 93:21.) Then, on September 26, 2017, Defendants terminated Plaintiffs' lease and ordered them to move out by October 31, 2017. (Lowenhaupt Decl. ¶ 11 (App'x at 40).) The next day, September 27, 2017, Plaintiffs filed their second HUD Complaint. (App'x at 577.) Defendants subsequently extended the move-out date to January 31, 2018 so that HUD could complete its investigation. (Lowenhaupt Decl. ¶ 13.) On December 26, 2017, HUD issued its conclusion that no reasonable cause existed to believe a discriminatory housing violation occurred. (App'x at 610-11.) However, Plaintiffs refused to vacate Apartment 1301 on January 31, 2018, and Defendants instituted eviction proceedings on February 1, 2018. (Defs.' Facts ¶ 118.)

Then, Plaintiffs made another request for permission to modify Angie's bathroom on August 26, 2018, (App'x at 506), which was granted the following day,

August 27, 2018, (App'x at 6-7, 42). Vilma conditioned the permission to modify Angie's bathroom on Plaintiffs' agreement to return the bathroom to its original condition at the conclusion of their lease, at Plaintiffs' expense. (Vilma Decl. ¶ 19.) Ultimately, Plaintiffs did not move forward with the modification after securing approval to use \$798.58 of Angie's Medicaid Waiver account for the environmental accessibility adaption evaluation. (Ortiz Aff. (App'x at 93).)

Construing the evidence, and drawing all reasonable inferences therefrom, in the light most favorable to Plaintiffs, a reasonable jury could conclude that in light of the pending eviction proceedings and the fact that they would be required to return the bathroom to its original condition at their expense at the conclusion of their lease, Plaintiffs did not move forward with the modification because they were uncertain whether they would be permitted to remain in Apartment 1301.

Therefore, the Court finds that genuine issues of material fact preclude summary judgment as to Count Three.

c. Count Four

In Count Four, Plaintiffs allege that Defendants violated the FHA by failing to provide a reasonable accommodation—specifically, painting the bathtub in the guest bathroom without using toxic substances. (Second Am. Compl. ¶¶ 157-62.)

In their Statement of Facts, Defendants state that on August 5, 2018, Alonso made a written request to VOH to refinish the guest bathtub. (Defs.' Facts ¶ 52.) In their Motion, Defendants state that the request was made on August 6, 2017. (Mot. At 11.) The evidence to which Defendants cite in their Statement of Facts reflects

that the request was made in August 2018. (See Vilma Aff. ¶ 22 (Defs.' App'x at 8); Aug. 7, 2018 email from Alonso to Lowenhaupt (App'x 502).)

Defendants argue that they are entitled to summary judgment on this claim for at least three reasons: (1) the requested accommodation was impossible to carry out and therefore unreasonable, (Mot. at 12 (citing *Reyes-Garay v. Integrand Assur. Co.*, 818 F Supp. 2d 414, 438 (D.P.R. 2011)); (2) Plaintiffs refused to cooperate by suggesting an alternative means to complete the project, (*id.* (citing *Polite v. Winn Residential*, NO. 3:14-cv-01921 (VAB), 2016 U.S. Dist. LEXIS 5233 (D. Conn. Jan. 15, 2016))), and also by denying Defendants' entry into their apartment to complete the project when opportunities to do so were available, (*id.*); and/or (3) refinishing the bathtub was not necessary due to an effective alternative that was suggested and accepted, (*id.*).

Plaintiffs devote most of this section of their Response to arguing that the request was made on August 7, 2017, and Defendants "decided to ignore the request" for twenty days, when they asked Plaintiffs to sign *Tobby Tubs'* waiver. (D.E. 491 at 17-18.) The Court considers this to be a typographical error, and that Plaintiffs intended to assert that the request was made on August 7, 2018, as there is no evidence of any request to refinish a bathtub in August 2017. Plaintiffs appear to argue that Defendants' constructively denied the request by not promptly responding to it. (*Id.* at 18.) Although Plaintiffs appear to dispute some of Defendants' factual assertions, they do not directly respond to the remainder of

Defendants' legal arguments, other than to assert that they "are after the fact mere pretexts[.]" (Resp. at 18.)

In their Reply, Defendants state that "Plaintiffs correctly state their request to paint the tub in guest bathroom was made on 8/7/18, not 8/20/18." (Reply at 10.) However, they argue that this fact is immaterial because a twenty-day gap between a reasonable accommodation request and a response is not unreasonable. (Id. (citing *Moody v. Gongloff*, 687 F. App'x 496, 499 (6th Cir. 2017); *Taylor v. The Hous. Auth. of New Haven*, 267 F.R.D. 36, 70 (D. Conn. 2010); *Elliott v. QF Circa 37, LLC*, Case No. 16-cv-0288-BAS-AGS, 2018 U.S. Dist. LEXIS 98668 (S.D. Cal. June 12, 2018)).) Defendants argue that after Alonso refused to sign the Bobby Tub's consent form, Plaintiffs never made an effort to find an alternative means to paint the tub, and never contacted Vilma about the issue again. (Id. at 11.) They argue that "[a] plaintiff must demonstrate behavior consistent with a good faith effort to find a reasonable accommodation." (Id. (citing *Gray v. Coliseum Med. Ctr.*, CASE NO.: 5:09-CV-0069 (WLS), 2011 U.S. Dist. LEXIS 162726 (M.D. Ga. Mar. 31, 2011)).)

As previously stated, "[t]he FHA prohibits discriminating against a person on the basis of a 'handicap,' or a disability, by refusing to make reasonable accommodations when necessary to afford the person equal opportunity to use and enjoy a dwelling." *Bhogaita*, 765 F.3d at 1285 (citing 42 U.S.C. § 3604(f)(3)(B)). "A successful failure-to-accommodate claim has four elements. To prevail, one must prove that (1) he is disabled within the meaning of the FHA, (2) he requested a

reasonable accommodation, (3) the requested accommodation was necessary to afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation.” Id. (citing *Schwarz*, 544 F.3d at 1218-19).

The admitted facts establish that on or about August 5, 2018, Alonso emailed Vilma requesting that VOH refinish the surface of the bathtub in the guest bathroom. (Defs.’ Facts ¶ 52.) On August 7, 2018, Mr. Lowenhaupt emailed Alonso a letter advising that Plaintiffs needed to sign Toby Tubs Refinishing Corp.’s consent form before the work could commence. (Id. ¶ 53; see also *Lowenhaupt* Aug. 7, 2018 email and letter (App’x 502-03).) On August 7, 2018, Alonso responded to Mr. Lowenhaupt’s email/letter and requested, as a reasonable accommodation, that the bathtub be refinished without the use of toxic substances. (App’x at 502.) On August 25, 2018,³² Alonso emailed Vilma and Defendants demanding a response to his prior request that VOH refinish his guest bathtub without toxic substances. (Defs.’ Facts ¶ 54; Aug. 25, 2018 email from Alonso to Vilma (App’x at 505).) He asserted that the toxic substances “could affect [his] disabled son’s health, who is allergic.” (Id.) On August 27, 2018, Vilma visited Plaintiffs’ apartment to deliver Plaintiffs a copy of Toby Tubs’ consent/release form. (Defs.’ Facts ¶ 58.) While she was there, she inspected the bathtub. (Id.) She discovered that the bathtub did not need to be refinished, but just needed a good cleaning. (Id.) Plaintiffs cleaned the tub and continued to use it. (Id.) Alonso never returned Toby Tubs’ consent/release form to

³² Defendants’ Facts state that the email was sent on August 20, 2017, (see Defs.’ Facts ¶ 54), but the email to which they cite was sent on August 25, 2018, (App’x at 505).

Vilma and she never heard anything further from them about refinishing the guest bathtub. (Id. ¶¶ 59-60; see also Vilma Decl. ¶ 24 (App'x at 8).)

Denis R. Archila, the President of Tobby Tubs Refinishing Corp., has submitted a sworn declaration describing the standard industry method for resurfacing a bathtub, which includes the application of epoxy paint. (Archila Decl. ¶¶ 4-7.) He avers that "there is no epoxy paint that can be used to refinish a bathtub that does not contain toxic fumes. Therefore it was impossible to complete the job." (Id. ¶ 9; see also Defs.' Facts ¶ 55-56.)

The Court finds that Defendants are entitled to summary judgment on Count Four because the requested accommodation was neither reasonable nor necessary to afford Plaintiffs an equal opportunity to use and enjoy their dwelling. First, the accommodation was unreasonable because the admitted facts and record evidence establish that "[i]t is impossible to refinish the surface of a bathtub without use of toxic substances." (Defs.'s Facts ¶ 55; Archila Decl. ¶¶ 4-9.) An accommodation that is impossible to provide is an unreasonable one. See *Reyes-Garay*, 818 F. Supp. 2d at 438 (finding that the plaintiffs' requested accommodation was unreasonable where the plaintiffs requested to relocate to a particular apartment unit that was uninhabitable due to damage from concrete falling from the ceiling).

Second, the accommodation was not necessary to afford Plaintiffs an equal opportunity to enjoy their dwelling. The admitted facts establish that Plaintiffs

cleaned their guest bathtub and continued to use it. (Defs.' Facts ¶ 58.) During the deposition of Angie's sister, Jany, the following exchange occurred:

Q. Do you know that it's extremely toxic to paint a bathtub with and it has to be painted with epoxy. So there are dangerous fumes. And you have to leave the apartment to do that. So can you give me any suggestion of how we can get this done?

A. No.

Q. Have you talked to your dad about how he thinks it could get done?

A. No.

Q. Okay. So in the meantime that you haven't had the bathtub painted have you suffered any damages because of that?

A. No. Because we clean it.

Q. Okay. So the bathtub is cleaned and – and most of the stain is gone?

A. Yes.

Q. Okay. Was the stain caused by dirt? Just extremely –

A. Yes.

Q. -- hard to remove dirt?

A. Yes.

(App'x at 189.) Because refinishing the bathtub without toxic substances was not necessary for its utility as a bathtub or to afford Plaintiffs the equal opportunity to use and enjoy Apartment 1301, it was not a necessary accommodation. See *Schwarz*, 544 F.3d at 1226 ("The FHA's reasonable accommodation provision requires only those accommodations that 'may be necessary . . . to afford equal opportunity to use and enjoy a dwelling.'") (42 U.S.C. § 3604(f)(3)(B)); cf. *Polite*, 2016 U.S. Dist. LEXIS 2533 at *9-10 (finding that the plaintiff failed to state an FHA

failure to accommodate claim where the plaintiff rejected the defendant's proposed reasonable accommodation without suggesting a reasonable alternative). Accordingly, Defendants are entitled to summary judgment as to Count Four.

d. Count Five

In Count Five, Alonso, Morejon, and Angie allege that Defendants violated the FHA by failing to provide a reasonable accommodation—specifically, removing the operation of noisy equipment near Plaintiffs' apartment. (Second Am. Compl. ¶¶ 163-68.) The Second Amended Complaint alleges that “[t]his accommodation was reasonable and necessary due to Angie’s disabilities, to provide Angie and his family a peaceful and healthy living in ‘Villas,’ avoiding discomfort to Angie, who needs sleep and rest, and to afford them equal opportunity to use and enjoy its apartment.” (Id. ¶ 166.)

Defendants argue that Plaintiffs have produced no admissible medical evidence or expert testimony to establish that during the relevant time period an effect of Angie’s handicaps was a particularized sensitivity to noise. (Mot. at 12-13 (citing *Magee v. Boston Land Co. Mgmt. Servs.*, 90 F. App’x 560 (2d Cir. 2004); *Matarese v. Archstone Pentagon City*, 761 F. Supp. 2d 346, 364 (E.D. Va. 2011); *Davis v. Echo Valley Condo. Ass’n*, 349 F. Supp. 3d 645, 658-59 (E.D. Mich. 2018)).) They argue that

Dr. Hoffer’s letter of medical necessity is inadmissible because his conclusions were based on reviewing (unidentified) videos of ANGIE made by ALONSO (i.e. self-diagnosis) rather than on his personal observations of ANGIE under such conditions and his conclusions directly conflicted with Dr.

Smeals' test findings which Dr. Hoffer reviewed prior to his consultation with ALONSO and ANGIE. See *Knox v. Cessna Aircraft Co.*, 314 Fed Appx. 230 (11th Cir. 2008) [holding inadmissible a medical certificate issued by a doctor due to his lack of personal knowledge about the patient's needs and relying instead on a plaintiff's self-diagnosis]. Dr. Hoffer's letter also does [not] address if non-handicapped persons would be similarly affected, as discussed in *Matarese*, *supra*.

(Id. at 13 n.23.) As such, Defendants argue that "Plaintiffs cannot meet their burden to prove ANGIE's handicaps produced a condition that harmed him in a way that did not similarly impair a non-handicapped tenant much less to establish a nexus between that condition and the need for the requested accommodation." (Id. at 13 (citing 42 U.S.C. § 3604(f)(3)(B); *Schwarz*, 544 F.3d at 1226).) They further argue that even if Plaintiffs had met these burdens, they failed to establish that Defendants owed Angie a duty to accommodate because their vague requests—which noted that Angie was "awakened" or "inconvenienced" by the noises and that the noises disturbed the entire family—did not place Defendants on notice of Angie's purported sensitivity to noise. (Id. at 13-14 (citing *Hawn v. Shoreline Towers Phase 1 Condo. Ass'n*, 347 F. App'x 464 (11th Cir. 2009); *Bone v. Vill. Club Inc.*, 223 F. Supp. 3d 1203, 1213 (M.D. Fla. 2016); *Patton v. Jacob's Eng'g Grp.*, 863 F.3d 419, 425-26 (5th Cir. 2017); *Chandler v. Chartwell Holdings*, Civil No. 19-cv-36-PB, 2019 U.S. Dist. LEXIS 156634 (D.N.H. Sept. 13, 2019)).) They further argue that Plaintiffs' April 18, 2019 request was not based on Angie's hearing but rather on his need to take medication. (Id. at 14.) They further argue that by signing the Good Conduct Addendum Plaintiffs "implicitly admitted that the noise would not

affect ANGIE and/or agreed to accept the risk and tolerate it, and waived their right to object to, noise associated with tree-trimming and other maintenance projects.”

(Id.) They further argue that the fact that Plaintiffs placed a very large gas generator on Angie’s balcony after Hurricane Irma undermines their claim that Angie suffers from a sensitivity to loud noise. (Id. at 15.) As to reasonableness, Defendant argue that a balancing of the Parties’ interest does not weigh in Plaintiffs’ favor—to wit:

It was far easier for them to plan in advance how they would manage ANGIE’s purportedly sensitivity to loud noise than to require Defendants and their vendor to create and execute a large-scale logistical plan on the spur of the moment in the middle of a tree trimming project that required moving an essential piece of machinery 324 ft. away from the spot it needed to be and with little time to consider how implementation of the requested accommodation would affect all other residents and visitors of VOH and the mode, methods and efficiency of the work yet to be done. Implementation of the accommodation not only would have created a logistical and administrative nightmare, but also would have substantially increased Defendants’ costs. [TAB A 1 ¶ 28; TAB A 5 all parts]. Plaintiffs, on the other hand, could have easily achieved the same benefit for ANGIE by simply purchasing an inexpensive set of ear plugs or the like. This alternative was recommended by Dr. Smeal. [TAB J 1.1] Query: if ANGIE truly suffered from sensitivity to loud noise, it is unclear why ALONSO and MOREJON purposely chose not to avail themselves of this option. [TAB C, pp. 266:15-24; 267:5-15]. *Harsy v. Mid-American Apt. Cmty, Inc.*, 2017 U.S. Dist. 97751 at HN 14 (E.D. Va. 2017) [accommodation unnecessary where the purported effect on a handicap’s condition could have been avoided through plaintiff’s own action].

(Id.) Defendants argue that the same principles apply to Plaintiffs’ claim regarding the pressure cleaning project:

Assuming Plaintiffs were able to establish through admissible medical proof that ANGIE suffered from a sensitivity to loud noise, they tendered no evidence that ANGIE actually heard and suffered injury from noise originating in the corridors of the 2500 Building. It is undisputed that ANGIE’s bedroom is located at the rear of Apt. 1301 whereas the pressure cleaning took place outside in front of their unit. [TAB E, pp. 58:17-23].

Second, it is also undisputed that (like the annual tree trimmings), Plaintiffs were given advance notice of the pressure cleaning project with sufficient time to advance plan how they would manage ANGIE's condition, if necessary. [TAB N 16]. Again, Plaintiffs' made their request for an accommodation in the middle of the project: Plaintiffs never made a request on either the 1st day of the pressure cleaning project when the equipment was used in the corridors of the floor above their apartment nor on the 2nd day when it was used on their own floor and would have had the greatest impact on ANGIE if he could hear it. Instead, Plaintiffs waited until mid-project to suddenly request the pressure cleaning equipment be moved farther away. See [TAB A 1 ¶¶ 30-33] and Defendants' response to Plaintiffs' Motion for Temporary Relief [DE 337] (incorporated by reference). Third, Defendants had no greater knowledge of ANGIE's particularized sensitivity to loud noise; all they were told was that ANGIE was awakened by the pressure washer's noise, the same effect that a non-disabled person might suffer while attempting to take an afternoon nap.

(Id. at 16.)

Plaintiffs argue that Dr. Smeal and Dr. Hoffer both determined that Angie was "sensible [sic] to loud noise, and it cause a lot of distress to him because he is mental retarded, wheelchair dependent and could not move far from the source of the noise as any normal person." (Resp. at 18.) They argue that Alonso first complained to Vilma in 2012 that maintenance workers woke Angie up when they

“knocked hard” on the front door when they needed to fumigate. (Id. at 19.) At Vilma’s request, Alonso provided a medical letter in September 2012. (Id.) Plaintiffs argue that based on the medical letter and Alonso’s complaints, Defendants knew or should have known that the “workers and vendors should not make noise or locate any noisy machine[s] near plaintiffs’ apartment.” (Id.) Plaintiffs state that Alonso first requested that Defendants move the woodchipper machines in 2013. (Id.) They argue that Defendants almost always ignored Alonso’s requests, and only once denied Alonso’s request outright. (Id. at 20.) Plaintiffs argue that Defendants were required to engage Plaintiffs in an interactive process to determine whether a reasonable accommodation was necessary. (Id. (citing *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996); *Jacobs v. Concord Vill. Condo. X Ass’n, Inc.*, No. 04–60017CIVLENARD, 2004 WL 741384, at *2 (S.D. Fla. Feb. 17, 2004); *Armant v. Chat-Ro Co., L.L.C.*, No. Civ.A.00-1402, 2000 WL 1092838, at *2 (E.D. La. Aug. 1, 2000)).) Plaintiffs argue that Defendants’ arguments regarding the reasonableness and necessity of the requested accommodation, and the undue burden it would cause, “are after the facts mere pretexts . . .” (Id.)

In their Reply, Defendants argue that there is no evidence that Defendants were aware the Angie suffered from a disability that made him sensitive to loud noise. (D.E. 514 at 2.) They further argue that there is no “competent” evidence establishing that Angie is hypersensitive to loud noise. (Id. at 3.) They argue that because Plaintiffs failed to designate an expert witness to prove that Angie had a

condition that made him hypersensitive to loud noises, they are now attempting to reinterpret Dr. Smeal's findings, "[b]ut the scientific, clinical tests she administered to ANGIE established he suffered from hearing loss. And because ANGIE displayed no reaction to sound up to 100 dB, Dr. Smeal could not determine ANGIE's degree of aural sensitivity." (Id.) Defendants argue that Plaintiffs "are not trained audiologists and their lay opinions cannot substitute for Dr. Smeal's interpretation of scientific, clinical test results." (Id. (citing Fed. R. Evid. 701).) Defendants maintain that Dr. Hoffer's medical notes are inadmissible hearsay and are based on hearsay, and argue that Plaintiffs' failure to respond to this argument in their Response constitutes an abandonment of their position that Dr. Hoffer's notes are admissible. (Id.) Defendants further argue that Plaintiffs' failure to identify a comparator is fatal to Count Five. (Id. at 4.) They argue that Jany, Katy, and Morejon's Affidavits establish that the loud noises had the same effect on them as they did on Angie. (Id.)

As previously stated, "[t]he FHA prohibits discriminating against a person on the basis of a 'handicap,' or a disability, by refusing to make reasonable accommodations when necessary to afford the person equal opportunity to use and enjoy a dwelling." *Bhogaita*, 765 F.3d at 1285 (citing 42 U.S.C. § 3604(f)(3)(B)). "A successful failure-to-accommodate claim has four elements. To prevail, one must prove that (1) he is disabled within the meaning of the FHA, (2) he requested a reasonable accommodation, (3) the requested accommodation was necessary to

afford him an opportunity to use and enjoy his dwelling, and (4) the defendants refused to make the accommodation.” Id. (citing *Schwarz*, 544 F.3d at 1218-19).

The FHA’s reasonable accommodation provision requires only those accommodations that “may be necessary . . . to afford equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B) (emphases added). The word “equal” is a relative term that requires a comparator to have meaning. In this context, “equal opportunity” can only mean that handicapped people must be afforded the same (or “equal”) opportunity to use and enjoy a dwelling as non-handicapped people, which occurs when accommodations address the needs created by the handicaps. If accommodations go beyond addressing these needs and start addressing problems not caused by a person’s handicap, then the handicapped person would receive not an “equal,” but rather a better opportunity to use and enjoy a dwelling, a preference that the plain language of this statute cannot support.

Schwarz, 544 F.3d at 1226. “Thus, a ‘necessary’ accommodation is one that alleviates the effects of a disability. *Bhogaita*, 765 F.3d at 1288. Of course, for liability to attach, the defendant must know of the plaintiff’s disability and that the accommodation is, in fact, necessary. *United States v. Hialeah Hous. Auth.*, 418 F. App’x 872, 875 (11th Cir. 2011) (citing *Schwarz*, 544 F.3d at 1219).

The Court finds that Defendants are entitled to summary judgment as to Count Five because there is no evidence that Defendants knew Angie suffered from a disability that caused audio sensitivity, or required “sleep and rest” in the middle of the day, (Second Am. Compl. ¶ 166), such that the requested accommodation was necessary to alleviate the effects Angie’s handicap. To begin with, the admitted facts establish that Angie’s hearing was never medically tested until July 2, 2020—during the pendency of this lawsuit. (Defs.’ Facts ¶ 79.) Plaintiffs made an appointment at University of Miami Health Systems with audiologist Dr. Molly

Smeal for the purpose of obtaining proof to use in this case. (Id. (citing Smeal Report (App'x at 251); Hoffer Report (App'x at 255)).) Alonso and Morejon told Dr. Smeal that Angie was bothered by loud sounds. (Id. (citing Smeal Dep. Tr. at 13:2-18 (App'x at 232)).) Alonso showed Dr. Smeal some videos of Angie allegedly reacting to loud sounds recorded in the apartment. (Id. (citing Smeal Dep. Tr. at 37:19 – 38:15 (App'x at 243-44)).) Dr. Smeal performed a series of audiological tests on Angie but could not replicate Angie's purported reactions to loud sounds that were allegedly reflected in the videos. (Id.) (citing Smeal Dep. Tr. at 14:1-5 (App'x at 233), 15:18-21 (App'x at 234)).) For example, Dr. Smeal performed audiometry and tympanometry tests, and Angie showed no physical reaction at all to noises up to 100 decibels with one exception—he smiled once when he heard Alonso's voice projected into a sound booth. (Id.; see also (Smeal Dep. Tr. at 15:16-24 (App'x at 234); 27:16-25 (App'x at 237); 29:2-13 (App'x at 238)).) Dr. Smeal was unable to reach any conclusion about Angie's hearing sensitivity or establish a correlation between Angie's vocalization and sounds he heard or did not hear. (Defs.' Facts ¶ 80 (citing Smeal Dep. Tr. at 36:6-20 (App'x at 242)).) In fact, she diagnosed him with "unspecified hearing loss" in both ears. (Id. (citing Smeal Report (App'x at 251)).)

Nor did Alonso inform Defendants that Angie suffered from a disability that caused audio sensitivity in his three requests to move noisy equipment far from Apartment 1301. Plaintiffs argue that Defendants knew or should have known that loud noise affected Angie since September 13, 2012, when Plaintiffs submitted a

medical letter from Dr. Gladys Y. Alonso, M.D. (Resp. at 19.) Dr. Alonso's letter states:

The patient mentioned above has been under my medical care since November 2012. After two examinations, I have diagnosed the patient with obesity, abnormality of gait, difficulty walking, wheelchair dependence, memory deficiency, generalized anxiety, full incontinence, abnormal speech, mental retardation and chronic allergies. The patient is requires [sic] assistance performing all activities of daily living. He also requires assistance managing his own affairs and medication regiment [sic]. He is mostly unable to communicate effectively when he is feeling badly. Therefore, at the suggestion of his parents and at my professional suggestion, it should be wise and beneficial to refrain from spray pesticides around his apartment. . . .

(D.E. 470 at 98.) Dr. Alonso's letter says nothing about audio sensitivity or a need to shield Angie from loud noises. Thus, Dr. Alonso's letter does not create a genuine issue of material fact regarding whether Defendants knew that Angie had a disability that resulted in loud noises causing Angie "discomfort."

The record further reflects that on September 12, 2018, Alonso emailed Vilma to complain about the noise caused by the tree trimming service. (Defs.' Facts ¶ 65 (citing Sept. 12, 2018 email from Alonso to Vilma (App'x at 553)).) The email states, in its entirety:

Good morning Vilma Hernandez

During this weeks workers contracted by you are cutting trees in this property. They are parking trucks and equipmnts [sic] in front of our aparatment [sic], causing loud noises, which awakened my disabled son, and are disturbing my family.

I request you talk to these workers and request them to move those trucks and equipments far from our apartment, since the parking area in thies [sic] apartment complex is big, and allow them to park their equipment farder [sic], in order to not cause discomfort to my disabled son.

1.- When they are not introducing the branches in the bigger cutting machine, still keep that machine running, causing a great discomfort.

2.- I suggest that they use small cutting machines to cut the branches first, and transport [sic] them to a place located far from our apartment, since the noise is bigger when they introduce the branches in their big cutting machine, causing an unbearable noise, awakening my disabled son, several times on Tuesday (9/11/18), and also today Wednesday (9/12/18). Right now they are still causing these loud noises, disturbing my son's pattern of sleep.

(App'x at 553.) In her sworn Declaration, Vilma acknowledges that she received Alonso's September 12, 2018, email but states that she "had no idea what ALONSO meant by 'sleep pattern' because ALONSO never had spoken to me about their son's daily routine or activities. ALONSO also never had informed me or anyone else in the Management office of the full nature and extent of his son's handicaps." (Vilma Decl. ¶ 27 (App'x at 9-10).)

Next, on February 1, 2019, while a maintenance crew was pressure cleaning the second floor of the 2500 Building, Alonso emailed Vilma to complain about the noise. (Defs.' Facts ¶ 71.) The email states, in its entirety:

To whom it may concern:

1.- On Wednesday (1/30/2019), the maintenance workers of Villas of Hialeah, started cleaning the building 2500, where we live at Apt #1301 (at the third floor), that day they cleaned the 4th floor.

2.- On Thursday (1/31/2019), they cleaned the 3rd floor, where we live.

3.- Today Friday (2/1/2019), they are cleaning the second floor.

They are using what it seems an old power washer machine [sic], which is very loud, causing a discomfort to my disabled son, who could not sleep afternoons for the previous two days, as he normally does. Not sleeping afternoons, also make him not sleep well at night, making my wife and me to wake up several times overnight to accommodate him, or turning him around

in his bed, trying to allow him to sleep better, but not. That also had caused that we are tired for also not sleeping well at night for two days now.

Because the reasons above, the pattern of sleep of my disabled son and our pattern was affected.

Then, by this email I am "REQUESTING A REASONABLE ACCOMMODATION FOR MY DISABLED SON, TO THE MANAGER OF VILLAS OF HIALEAH APARTMENTS, TO ASK THEIR MAINTENANCE WORKERS TO RELOCATE THE POWER WASHER MACHINE, IN THE MOST POSSIBLE SUITABLE PLACE, FARDER FROM OUR APARTMENT, AND IF IT IS POSSIBLE WITH SOME WALLS, OBSTRUCING THE TRANSMISSION OF THE SOUND WAVES DIRECTLY TO OUR APARTMENT, SINCE THEY HAVE ENOUGH AND LARGE HOSES TO DO THAT ACCOMMODATION, IN ORDER TO AVOID MORE DISCOMFORT TO OUR SON.

We sincerely appreciate the cleanliness that is being made, because this building needed it, we recognize that they are doing a good job, but it is a job that needs several days to be done, and maybe they will need another one or two days to finish in our building. We also want to remember that any apartment complex manager should by law (ADA, Fair Housing Law) provide certain accommodations for disabled persons as my son, when necessary.

Then we maintain our request, which is legal, reasonable, fair and necessary, and hope that you will take all the actions to grant it.

(App'x at 554.) In her sworn Declaration, Vilma asserts that Alonso "never provided any papers, medical documents, photos or videos to support his need for the reasonable accommodation requests he made on behalf of their son." (Vilma Decl. ¶ 34.)

Finally, on April 18, 2019, Plaintiff emailed Vilma to complain about the tree cutting machines. (Defs.' Facts ¶ 76.) The email states in its entirety:

To whom it may concern:

In the past, several times, I have asked Vilma (manager of Villas oh [sic] Hialeah) verbally, not to allow the workers hired by her to put their trucks and noisy machines to cut trees, near or in front of our apartment, for the inconvenience that it causes to my disabled son.

Last time I did it in writing on September 2018.

Today they are using these machines again, and although they are not in front of our apartment, we can hear the noise they make, because today these machines are located at more less at 20 meters of my apartment, but in other position in the back of our apartment, which cause the same effect. If they keep these machines in those near positions, with respect to our apartment, their strident noises will not allow my son to sleep or be calm as he need, since he takes medications to be calm and rest.

So I'm asking to try this as a "reasonable accommodation request for my disabled son", and relocate these machines farther from our apartment.

Thanks. Carlos Alonso

(App'x at 555.) As stated in Vilma's sworn Declaration: "Again he made no mention [] of any condition that affected his son differently than any other resident." (Vilma Decl. ¶ 29 (App'x at 10).)

Based on the foregoing, the Court finds that there is no record evidence that Defendants knew that Angie suffered from a disability that caused audio sensitivity and/or required "sleep and rest," (Second Am. Compl. ¶ 166), or that moving noisy equipment far from Apartment 1301 was necessary to afford Angie an "equal" opportunity to enjoy Apartment 1301.

The Court rejects Plaintiffs' argument that Defendants were required to engage Plaintiffs in an interactive process to determine whether a reasonable accommodation was necessary. "[I]f a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue." *Hialeah Hous. Auth.*, 418 F. App'x at 875 (quoting *Jankowski Lee*, 91 F.3d at 985). See also *Bhogaita*, 765 F.3d at 1287. However, the landlord's duty arises only when the

landlord has notice of the tenant's alleged disability and the necessity of the requested accommodation. *Hialeah Hous. Auth.*, 418 F. App'x at 875. Here, there is no evidence from which a reasonable jury could conclude that Defendants had notice of a disability that caused audio sensitivity or required sleep during the day. Accordingly, a reasonable jury could not find that Defendants violated the FHA by denying Plaintiffs' request to remove noisy equipment far from Plaintiffs' apartment, and Defendants are entitled to summary judgment as to Count Five. See *Hawn v. Shoreline Towers Phase I Condo. Ass'n, Inc.*, 347 F. App'x 464, 468 (11th Cir. 2009) (affirming summary judgment for the defendant on the FHA failure to accommodate claim because the plaintiff had failed to present sufficient evidence to create a genuine issue of material fact as to the defendant's knowledge of the plaintiff's disability and the necessity of the requested accommodation).

e. Count Nine

In Count Nine, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA where, "[a]fter many events that [are] detailed in other portions of the [Second] Amended Complaint," Defendants threatened a \$150.00 fine if tape was not removed from Plaintiffs' windows, issued a "SEVEN DAY NOTICE TO CURE," issued a Notice of Termination of Plaintiffs' month-to-month tenancy, and finally issued an eviction notice. (*Id.* ¶¶ 187-207.)

Defendants note that each of these events occurred before Plaintiffs filed their second HUD Complaint, (Mot. at 17 (citing *Rafiq v. Lopez*, CIVIL ACTION

NO. H-15-2210, 2017 U.S. Dist. LEXIS 12038 (S.D. Tex. Jan. 3, 2017))), and Defendants lacked knowledge that Plaintiffs intended to file a charge of housing discrimination, (*id.* (citing *Martin v. Fin. Asset Mgmt. Sys.*, 959 F.3d 1048 (11th Cir. 2020); *Vales v. Miami-Dade College*, 463 F. App'x 843 (11th Cir. 2013))). As such, they appear to argue that Plaintiffs cannot rely on the filing of the second HUD Complaint as the "protected activity" that triggered the alleged retaliation.³³ (See *id.*) They further argue that the only "protected activity" Plaintiffs engaged in before Defendants threatened the fine, issued the Notice to Cure, and issued a Notice of Termination was their September 18, 2017 request to keep tape on their glass doors and windows. (Mot. at 17.) In this regard, Defendants argue that "guising a landlord-tenant dispute as a 'reasonable accommodation' request does not turn it into 'protected activity' under the FHA." (*Id.* (citing *Solomon v. Vilsack*, 736 F.3d 1, 15 (D.C. Cir. 2014); *Kitchen v. Phipps Houses Grp. of Cos.*, 380 F. App'x 99 (2d Cir. 2010))). They further argue that Plaintiffs could not have held an objective good faith belief that waiver of a fine and being the only residents allowed to keep tape on their windows was related to Angie's handicaps and necessary for Angie's use and enjoyment of Apartment 1301. (*Id.* at 17-18 (citing *Roman v. Jefferson*, 495 F.

³³ Defendants argue that Plaintiffs cannot rely on the first HUD Complaint as "protected activity" because, *inter alia*, Count Nine pleads that Defendants were unaware that Plaintiffs filed it. (*Id.* at 18 (citing Second Am. Compl. ¶ 194; Vilma Decl. ¶ 48).) The Court agrees. The Second Amended Complaint explicitly states that although Plaintiffs filed a Complaint with HUD on June 11, 2017, "Defendants were unaware of this complaint." (Second Am. Compl. ¶ 194 (emphasis in original); see also Defs.' Facts ¶ 30.) Because it is undisputed that Defendants were unaware of the first HUD Complaint, a reasonable jury could not find that Defendants subjected Plaintiffs to adverse actions "on account of" them filing it. 42 U.S.C. § 3617.

App'x 804 (9th Cir. 2012)).) They further argue that the September 18, 2017 request "lacked even subjective good faith" in that the letter does not assert disparate treatment or that the request was related to Angie's handicaps. (Id. at 18 (citing *Kendrick v. Greenburgh Hous. Auth.*, No. 07-CV-5859 (CS), 2011 U.S. Dist. LEXIS 29866 (S.D.N.Y. Mar. 22, 2011)).) Rather, the relief was justified as necessary to protect the safety of all the Plaintiffs, which reflects that it is an issue of habitability and a desire not to be fined, and not protected activity and discriminatory intent. (Id. (citing *Reule v. Sherwood Valley 1 Council of Co-Owners, Inc.*, 235 F. App'x 227 (5th Cir. 2000)).) They further argue that the \$150 fine notice was not issued for a discriminatory or retaliatory purpose, as it was applicable to all tenants who did not remove tape from their glass doors and windows and was issued "before Plaintiffs engaged in any act that might constitute 'protected activity.'" (Id.)

Plaintiffs argue that prior to Hurricane Irma's landfall, Vilma did not provide tenants notice that they were not permitted to put tape on the glass doors and windows. (Resp. at 21.) They further argue that Vilma's notice requiring tenants to remove tape from glass doors and windows was "unlawful" because Section 50-30 of the City of Hialeah Code permitted them to use tape during an emergency. (Id. at 21-22.) Plaintiffs further argue that they had a good faith belief that by taping their doors and windows and requesting to keep the tape on the doors and windows they were engaging in protected activity under the FHA "to ameliorate a bad effect on

Angie due to his physical disability” (Id. at 22.) They argue that Carlos and Fe taped the glass doors and windows “to protect Angie who is bedridden and could not move from his bedroom by himself if an object crashed through the glass door located between Angie’s bedroom and the balcony of Plaintiffs’ apartment.” (Id. at 23.)

In their Reply, Defendants argue that Plaintiffs have not established that taping windows is an “approved protection device” under the Florida Fire Prevention Code and City of Hialeah Code Section 50-30 “because they neither provided the Court with a certified copy of that code section nor reference the Fire Prevention Code provision that supports their claim.” (Reply at 12.) They further argue that Plaintiffs “cannot establish they held a good faith belief that requesting not to be fined was a reasonable accommodation” because, *inter alia*, “City of Hialeah Code Section 50-30 was not even enacted until 2019 – two years after Hurricane Irma.” (Id. (citing certified copy of City of Hialeah Ordinance No. 2019-056, City of Hialeah Code Section 50-30 (D.E. 515 at 202-04)).) They further argue that “the Response does not rebut Defendants’ point that not being fined has no ameliorative effect on ANGIE’s handicaps.” (Id.)

The FHA provides that “[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by” the FHA. 42 U.S.C. § 3617. “To establish a *prima facie* case of retaliation, a plaintiff

must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action; and (3) a causal link exists between the protected activity and the adverse action.” Philippeaux, 598 F. App’x at 644 (quoting *Walker*, 272 F.3d at 1128). “A plaintiff engages in statutorily protected activity when he or she protests . . . conduct which is actually lawful, so long as he or she demonstrates a good faith, reasonable belief that the [conduct engaged in] was . . . unlawful[.]” *Id.* (quoting *Harper v. Blockbuster Entm’t Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998)). “A plaintiff’s belief that the conduct was unlawful must be objectively reasonable.” *Id.* (citing *Harper*, 139 F.3d at 1388).

The Court finds that a reasonable jury could not find that Plaintiffs engaged in a protected activity. To begin with, the Court finds that the only “protected activities” that could form the basis of Plaintiffs’ claim in Count Nine is (1) placing tape on their window before Hurricane Irma and (2) their post-Hurricane Irma, September 18, 2017 request for permission to keep tape on their glass doors and windows through the end of hurricane season without being fined, as there is no evidence of any causal link between any other possible protected activity and the alleged adverse actions.³⁴

³⁴ Although Plaintiffs have recently asserted that Alonso told Vilma on September 18, 2017 that he had filed the first HUD complaint and intended to file a second HUD complaint, the Court has stricken that assertion as an impermissible attempt to amend the Second Amended Complaint in their opposition to Defendants’ Motion for Summary Judgment. (D.E. 553 at 32-33.)

Next, the Court finds that there is no record evidence demonstrating Plaintiffs had a subjective belief that Defendants' conduct was unlawful—much less an objectively reasonable one. As to the subjective prong, Plaintiffs second HUD Complaint—filed just ten days later on September 27, 2017—says nothing about Defendants' refusal to permit Plaintiffs to keep tape on their windows, the Notice threatening a \$150 fine, or the Seven Day Notice to Cure. (See App'x at 578.) As to the objective prong, the Court has found no legal authority that can reasonably be believed to prohibit a landlord from prohibiting a tenant from keeping tape on their glass doors and windows. Accordingly, a reasonable jury could not conclude that Plaintiffs had an objectively reasonable, good faith belief that the conduct they were protesting was unlawful. *Dixon v. The Hallmark Cos., Inc.*, 627 F.3d 849, 857 (11th Cir. 2010) (finding, in a Title VII retaliation case, that although the plaintiffs presented evidence that they subjectively believed that the defendant's policy against displaying religious artwork in the workplace was unlawful, their subjective belief was not objectively reasonable because there was "no statutory or case law that can reasonably be believed to prohibit a private employer from keeping its own workplace free of religious references").

The Court rejects Plaintiffs' argument that they believed they were engaging in protected activity pursuant to City of Hialeah Code Section 50-30, as that law was not enacted until August 13, 2019—two years after Hurricane Irma. (See City

of Hialeah Ordinance No. 2019-056, City of Hialeah Code Section 50-30 (D.E. 515 at 202-04).)

Because Plaintiffs failed to establish a prima face case of retaliation under the FHA, Defendants are entitled to summary judgment as to Count Nine.

f. Count Ten

In Count Ten, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA where, in retaliation for requesting reasonable accommodations and modifications, the company that controlled VOH's parking areas, OnCall Parking (or "On Call Patrol"), "used intimidation tactics against Plaintiffs, causing fear, loss of sleep and affecting Angie and his family." (Second Am. Compl. ¶ 210.) Specifically, Plaintiffs allege:

95. From January 2018 to March 2018, a company, called "On Call Patrol" that controlled parking areas for Defendants, used intimidation tactics against Plaintiffs, sending unwanted messages by email and cell phone to Carlos, under the assumption that Carlos was illegally parking his car in "Villas."

96. These actions made Plaintiffs nervous and scared because one of the threats was that their only owned car could be towed from "Villas." In addition, these tactics caused Angie to wake up repeatedly, due to the text messages that were made when he was asleep, thus affecting Angie's sleep pattern and his rest. Angie's parents were affected too, because they had to attend and comfort Angie when he was awakened by these tactics. In addition, Carlos and Fé could not sleep well at night for the fear that their car could be unfairly towed, since "On Call Patrol" used to tow the cars overnight or at dawn.

(Id. ¶¶ 95-96.) Plaintiffs allege that OnCall Parking threatened to tow Alonso's minivan because he was without a parking permit. (Id. ¶ 211.) They allege that

“[t]his activity was directed at Plaintiffs, including Mr. Alonso and his wife, because, among other things, they requested reasonable accommodations and modifications, and initiated a HUD investigation.” (Id. ¶ 212.)

Defendants argue that Count Ten fails as a matter of law for three reasons. First, “the 3-month gap between the 2nd HUD charge and the alleged adverse action destroys any inference of a causal connection between the events.” (Mot. at 19-20 (citing *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006)).) Second, “Plaintiffs’ proof of retaliatory intent is based on conclusory statements and sheer speculation.” (Id. at 20.) Third, Defendants have established a nonretaliatory legitimate reason for the 5 text messages sent by OnCall Parking during the time period stated in ¶ 210.” (Id.) They argue that each text message related to an expired parking permit, (id. (citing emails from OnCall Parking (App’x at 698))), and was generated by OnCall Parking’s automated electronic notification system, (id. (citing Guadalupe Decl. ¶ 6 (App’x at 80))). They further argue that OnCall Parking had no access to VOH’s tenant files and had no knowledge of Plaintiffs’ requests for accommodations, the second HUD Complaint, or any other protected activity. (Id.) They further argue that none of the messages contained a threat of towing. (Id. (citing emails from OnCall Parking (App’x at 698)).)

In their Response, Plaintiffs refer the Court to Point #132 of Alonso’s Affidavit, and Page 15 of their Statement of Material Facts, and assert, ipse dixit, that “[t]he evidence suggest [sic] the inference that Defendants are no [sic] entitled to summary judgment in Counts IX, X, XI and XII.” (Resp. at 25.) Point #132 of

Alonso's Affidavit cites to File #57 of Plaintiffs' USB drive. File #57 of Plaintiffs' USB drive appears to contain videos and photos of text messages and emails Alonso received from OnCall Parking stating that Alonso's parking decal was expired.³⁵ Alonso's Affidavit states that he could not renew his parking sticker because he was subject to an eviction notice. (Alonso Aff. ¶ 132(a).) Alonso's Affidavit states that he never received these texts and emails "before defendants filed the Eviction Lawsuit against us[.]" (Id. ¶ 132.)

In their Reply, Defendants argue that Plaintiffs have provided no evidence supporting the allegation that OnCall Parking sent the text messages and emails in retaliation for Plaintiffs' filing a HUD complaint. (D.E. 514 at 14.) They argue that the Response "does not rebut Defendants' argument that when Plaintiffs signed up for OnCall messaging they consented to receive the text messages and email." (Id.)

The FHA provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" the FHA. 42 U.S.C. § 3617. "To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action; and (3) a causal link exists between the protected activity

³⁵ There is also an undated photograph of Alonso's van with a warning on it stating: "Must park in handicap space, not cross walk." Two of the text messages and two of the emails were sent outside the dates alleged in the Second Amended Complaint. The Court will disregard these texts and emails.

and the adverse action.” *Philippeaux v. Apt. Inv. Mgmt. Co.*, 598 F. App’ x 640, 644 (11th Cir. 2015) (quoting *Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001)).

The Court finds that Defendants are entitled to summary judgment on Count Ten. To begin with, the admitted facts establish that Alonso consented to receiving the electronic notifications from OnCall Parking. (Defs.’ Facts ¶ 92.)

Regardless, assuming without deciding that OnCall Parking’s emails and text messages can be (1) considered “adverse actions” and (2) imputed to Defendants, Plaintiffs cannot establish that Defendants’ adverse actions were “on account of” Plaintiffs’ filing a Complaint with HUD or requests for reasonable accommodations and modifications. See *Fisher v. SP One, Ltd.*, 559 F. App’x 873, 877-78 (11th Cir. 2014). The admitted facts establish that Plaintiffs made various requests for accommodations and modifications on February 3, 2013 (reserved handicapped parking space), (Defs.’ Facts ¶ 28); August 26 and 29, 2017 (bathroom modification), (id. ¶¶ 47-48³⁶); August 20, 2017 (refinish bathtub with nontoxic paint), (id. ¶ 54); September 18, 2017 (tape on glass doors and windows), (id. ¶ 104), and then not again until September 2018, (id. ¶ 65). Plaintiffs also assert that they made reasonable accommodation requests on March 29, 2017 and April 7, 2017. (See Pls.’ Resp. Facts ¶ 28; Alonso Aff. ¶¶ 29-34, 39.) Plaintiffs filed their second HUD Complaint on September 27, 2017. (App’x at 574.)

³⁶ As previously noted, Defendants’ Facts state that Alonso submitted a written request to Vilma for a modification of Angie’s bathroom on “8/26/17[.]” (D.E. 366 ¶ 47.)

OnCall Parking began sending Plaintiffs automated texts and emails beginning January 31, 2018—more than four months after Plaintiffs’ most recent request for an accommodation and more than four months after Plaintiffs filed the second HUD Complaint. (App’x at 698-704.) There is no other evidence of retaliatory motive in the record. Without any other evidence of retaliatory motive, a four-month delay between the alleged protected activity and the alleged adverse action is too long to establish a causal connection. *Drago*, 453 F.3d at 1308 (“We have previously held that, in the absence of any other evidence of causation, a three and one-half month proximity between a protected activity and an adverse employment action is insufficient to create a jury issue on causation.”) (citing *Wascura v. City of S. Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001)); *Fisher*, 559 F. App’x at 877-78 (“Without any other evidence of a retaliatory motive in the record, the three-month delay between Fisher’s [HUD] complaint and the alleged adverse action was too long to establish a causal connection under our precedent.”) (citing *Higdon v. Jackson*, 393 F.3d 1211, 1220-21 (11th Cir. 2004) (holding that a three-month period between the protected conduct and the adverse action was not sufficient to allow a reasonable inference of causality in an Americans with Disabilities Act retaliation suit); *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (“A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough.”); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001) (noting that temporal

proximity between protected activity and adverse action in Title VII retaliation suits must be “very close” in order to be sufficient evidence of causality)).

However, even if Plaintiffs could establish a prima facie case of retaliation, Defendants have presented a legitimate, nondiscriminatory reason for their actions, and Plaintiffs have not demonstrated that the actions were pretext for a discriminatory motive. See *Philippeaux*, 598 F. App’x at 644 (citing *Walker*, 272 F.3d at 1128 for the principle that Title VII’s burden-shifting framework applies to retaliation claims under the FHA). Specifically, Defendants assert that the emails and text messages were generated by OnCall parking’s automated electronic notification system as a result of Alonso’s expired parking permit. (Mot. at 20 (citing emails from OnCall Parking (App’x at 698); Guadalupe Decl. ¶ 6 (App’x at 80)).) Defendants’ Appendix contains five emails from OnCall Parking to Alonso during the period alleged in the Second Amended Complaint. (App’x at 698-704.) Three of the emails were sent on January 31, 2018: one indicated that OnCall parking had issued a “violation warning” for Alonso’s minivan because his parking decal had expired, (id. at 698); one indicated that VOH had issued a “do not tow” request for Alonso’s minivan, (id. at 699); and one indicated that his parking pass had been extended for 90 days, (id. at 700). On March 12, 2018 and March 19, 2018, OnCall Parking emailed Alonso indicating that VOH issued a “do not tow” request for his minivan. (Id. at 703-04.) Plaintiffs have also produced an additional six emails (dated February 11, 12, 18, and 26, and March 2 and 5, 2018, respectively), and five text messages (dated January 31, 2018, February 11, 18, and 26, and March 2,

2018, respectively), all of which indicate that Plaintiff had an expired parking decal. (Pls.' USB File #57.) There is no evidence that Defendants' legitimate, nondiscriminatory reason for the emails and text messages was pretext for a discriminatory motive. Consequently, a reasonable jury could not conclude that the emails and texts were sent for a discriminatory reason, and for this additional reason Defendants are entitled to summary judgment as to Count Ten. See *Echemendia v. Gene B. Glick Mgmt. Corp.*, No. 1:05-CV-53, 2007 WL 869196, at *9-10 (N.D. Ind. Mar. 20, 2007) (granting summary judgment in favor of the defendant on FHA claims because the plaintiff failed to rebut the defendants' legitimate, nondiscriminatory reasons for the asserted actions).

g. Count Eleven

In Count Eleven, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA by instituting eviction proceedings in retaliation for filing a complaint with HUD. (Id. ¶¶ 217-27.) The Second Amended Complaint notes that the Miami-Dade Circuit Court found that Defendants had committed a retaliatory eviction under Florida law, and alleges that the same conduct must be considered retaliatory under 42 U.S.C. § 3617. (Id. ¶¶ 223, 225.)

Defendants initially argue that the eviction proceeding was not a new adverse action, "but the end point of a continuum that started before Plaintiffs filed

their 2nd HUD Charge:

the 9/26/17 notice of termination and its revision, the 10/4/17 letter extending their moveout date, notified Plaintiffs that their failure to vacate by a date certain would result in the filing of an eviction proceeding.” (Mot. at 20.) They argue that Plaintiffs cannot establish a causal connection because the process began before Plaintiffs filed the second HUD Compliant. (Id.) They further argue that “the entire factual predicate for Count XI -- a final judgment in their favor in the Eviction Proceeding -- was gutted when Defendants won the Appeal.” (Id. (citing Appellate Division Opinion (App’x at 293)).) They argue that

The opinion of the Appellate Division, Miami Dade Circuit Court found that the final judgment of the County Court was based on an erroneous application of the law and was the product of an abuse of discretion because 245 C and C, LLC had proven good cause to seek a writ of possession in the Eviction Proceeding. This, in turn, eviscerates Plaintiffs’ claim in Count XII that Appeal was filed for a retaliatory purpose under the FHA. *Ward v. Walmart*, 140 F. Supp 2d. 1220, 1231 (D.N.M. 2001).

(Id. at 20-21.) Defendants argue that the same evidence that supported Defendants’ decision to non-renew Plaintiffs’ lease in the eviction proceedings now suffices here to establish Defendants’ defense of legitimate, non-retaliatory reason for the alleged adverse action—specifically, that Plaintiffs violated the terms of their lease and Good Conduct Addendum. (Id.) Finally, Defendants argue that Plaintiffs cannot show that Defendants’ asserted reasons are pretext for discrimination. (Id. at 21-22.)

Plaintiffs wholly fail to substantively respond to Defendants' argument as to Count Eleven. They merely assert, *ipse dixit*, that "Defendants are no [sic] entitled to summary judgment in Counts IX, X, XI & XII." (Resp. at 25.)

In their Reply, Defendants argue that Plaintiffs' failure to respond constitutes an abandonment of any arguments that could have been raised in opposition. (D.E. 514 at 15 (citing *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001)).)

The FHA provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by" the FHA. 42 U.S.C. § 3617. "To establish a *prima facie* case of retaliation, a plaintiff must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action; and (3) a causal link exists between the protected activity and the adverse action." *Philippeaux*, 598 F. App'x at 644 (quoting *Walker*, 272 F.3d at 1128).

The Court finds that Defendants are entitled to summary judgment as to Count Eleven because Plaintiffs are unable to establish a causal link between the protected activity and the alleged retaliatory action. The admitted facts and record evidence establish that Defendants issued the Notice of Termination of Month-to-Month Tenancy on September 26, 2017—the day before Plaintiffs filed their second HUD Complaint. (Defs.' Facts ¶¶ 107-09; see also Notice of Termination (App'x at

488); Vilma Decl. ¶ 47 (App'x at 15).) The Notice of Termination required Plaintiffs to vacate the premises by October 31, 2017, (App'x at 488), but that date was later extended to January 31, 2019 as a concession to HUD so that it could complete its investigation, (Lowenhaupt Decl. ¶¶ 13-14 (App'x at 41); see also App'x at 607-08). The HUD investigator told Defendants' attorney, Mr. Lowenhaupt, that if Plaintiffs "did not move out by January 31, 2018, [Defendants] were free to commence an eviction action." (Defs.' Facts ¶ 111; Lowenhaupt Decl. ¶ 13 (App'x at 41).) On December 26, 2017, HUD issued findings of no probable cause. (Defs.' Facts ¶ 116; Lowenhaupt Decl. ¶ 16.) Plaintiffs did not move out of Apartment 1301 on January 31, 2018 at the end of the agreed-upon lease extension with HUD. (Defs.' Facts ¶ 118; Lowenhaupt Decl. ¶ 17.) As a result, Plaintiffs became holdover tenants under Chapter 83, Florida Statutes,³⁷ and Defendants filed suit to obtain possession of Apartment 1301 on February 1, 2018. (Defs.' Facts ¶ 118; Lowenhaupt Decl. ¶¶ 17-18.)

There is no evidence that Defendants filed the eviction action "on account of" Plaintiffs filing the second HUD Complaint. 42 U.S.C. § 3617.

The filing of the eviction proceedings in Miami-Dade County Court cannot be viewed in isolation—it was simply the final step in the eviction process that began on September 26, 2017 when Defendants issued the Notice of Termination of

³⁷ Under Florida law, if a rental agreement is terminated and the tenant does not vacate the premises, the landlord (or its attorney or agent) may recover possession of the unit by filing a complaint in the county court of the county where the premises are situated. Fla. Stat. §§ 83.58, 83.59(2).

Month-to-Month Tenancy and ordered Plaintiffs to vacate the premises. Plaintiffs filed their second HUD Complaint on September 27, 2017—the day after the eviction process began. (Defs.’ Facts ¶ 109.) Because Defendants began the eviction process before Plaintiffs filed their second HUD Complaint, Plaintiffs cannot establish a causal connection between the alleged retaliatory action and the protected activity. See *Manley v. DeKalb Cnty., Ga.*, 587 F. App’x 507, 513 (11th Cir. 2014) (holding, in a Title VII retaliation case, that the plaintiff failed to establish a causal connection because the alleged retaliatory acts preceded the protected activities). Accordingly, Defendants are entitled to summary judgment on Count Eleven.

h. Count Twelve

In Count Twelve, Plaintiffs allege that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA by appealing the state court’s judgment of retaliatory eviction. (Id. ¶¶ 228-38.) Plaintiffs allege that Defendants have “no legitimate argument that the lower court” erred. (Id. ¶ 232.) They argue that “the appeal is frivolous and an abuse of process, being used as a legal tactic to better position 245 C&C, LLC in this action.” (Id. ¶ 235 (emphasis in original).)

Defendants argue that the fact that the Appellate Division of the Miami Dade Circuit Court found that the final judgment of the County Court was based on an erroneous application of the law and was the product of an abuse of discretion because 245 C and C, LLC had proven good cause to seek a writ of possession in the

Eviction Proceeding "eviscerates Plaintiffs' claim in Count XII that Appeal was filed for a retaliatory purpose under the FHA." (Mot. at 20-21.)

Plaintiffs wholly fail to substantively respond to Defendants' argument as to Count Twelve. They merely assert, *ipse dixit*, that "Defendants are no [sic] entitled to summary judgment in Counts IX, X, XI & XII." (Resp. at 25.)

In their Reply, Defendants argue that Plaintiffs' failure to respond constitutes an abandonment of any arguments that could have been raised in opposition. (D.E. 514 at 15 (citing *Wilkerson*, 270 F.3d at 1322).)

The Court finds that Defendants are entitled to summary judgment as to Count Twelve because the the Appellate Division of the Miami-Dade Circuit Court found that the lower court did err, reversed the lower court's judgment, and remanded with directions to enter judgment for 245 C&C LLC; it also granted Defendants' Motion for appellate attorneys' fees and costs. (See App'x at 293-316.) As such, a reasonable jury could not find that the appeal was frivolous and/or an abuse of process. See *Treat v. Florida ex rel. Mitton*, 121 Fla. 509 (Fla. 1935) ("A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research.") (internal citation omitted); *Bothmann v. Harrington*, 458 So. 2d 1163, 1169 (Fla. Dist. Ct. App. 1984) ("There is no abuse of process . . . when

the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose. In other words, the usual case of abuse of process involves some form of extortion.”). And in any event, there is no evidence that Defendants appealed the Miami-Dade County Court’s judgment to coerce, intimidate, or retaliate against Plaintiffs.

Because the premise of Count Twelve is demonstrably false, a reasonable jury could not find that Defendants engaged in coercion, intimidation, and retaliation in violation of the FHA by appealing the state court’s judgment of retaliatory eviction.

i. Count Fourteen

In Count Fourteen, Plaintiffs allege that Defendants breached the implied covenant of quiet enjoyment and violated various provisions of Chapter 83, Florida Statutes. (Id. ¶¶ 249-57.) Specifically, they allege that

Defendants engaged in a course of conduct meant to interfere with Plaintiffs’ quiet enjoyment of its apartment through conduct including but not limited to, allowing the Defendants’ maintenance staff to enter Plaintiffs’ apartment without a twelve-hour notification (¶ 82);³⁸ repeatedly attempting to fumigate inside Plaintiffs’ apartment despite constant warnings that Angie was allergic to the chemicals and harassment to Plaintiffs’ family (¶ 83);³⁹ permitting other tenants to have their children making noises and its dogs barking incessantly without any reprimand (¶ 84);⁴⁰ and failing to maintain the laundry rooms in “Villas,” allowing the washers and dryers made

³⁸ This allegation is actually in Paragraph 103 of the Second Amended Complaint.

³⁹ This allegation is actually in Paragraph 105 of the Second Amended Complaint.

⁴⁰ This allegation is actually in Paragraph 110 of the Second Amended Complaint.

unbearable noises for the human ear that affected the sleep's pattern of Plaintiffs' family (§ 85).⁴¹

(Id. § 254.) They further argue that "Defendants' employees who entered Plaintiffs' apartment without prior notice and harassed Plaintiff and his family violated the [Fla. Stat.] § 83.53(3)." (Id. § 255 (citing Second Am. Compl. § 82).⁴²)⁴³ Although not specifically mentioned in Count Fourteen, Alonso testified during his deposition that Count Fourteen is also based on Defendants cutting off the water to the 2500 Building on several occasions.⁴⁴ (Alonso Dep. Tr. (D.E. 462-1) at 248:24 – 249:2.)

⁴¹ This allegation is actually in Paragraph 115 of the Second Amended Complaint.

⁴² Count Fourteen also alleges that Defendants breached the implied covenant of quiet enjoyment when they "commit[ted] a retaliatory eviction" (Second Am. Compl. § 256) However, because the Court has already granted summary judgment to Defendants on Plaintiffs' retaliatory eviction claim, (see Section VI(h), *supra*), the Court finds that Defendants are entitled to summary judgment as to Count Fourteen to the extent it alleges that Defendants breached the implied covenant of quiet enjoyment by committing a retaliatory eviction.

⁴³ In its July 19, 2019 Order on Defendants' motion to dismiss the original complaint, the Court found that this claim did not constitute a "shotgun pleading" because "it appears that under Florida law a landowner can breach the covenant of quiet enjoyment through a course of conduct." (D.E. 43 at 10-11 (citing *Misha Enters. v. GAR Enters, LLC*, 117 So. 3d 850, 554 (Fla. Dist. Ct. App. 2013) (finding genuine issues of material fact precluded summary judgment in favor of landowner on claim for breach of covenant of quiet enjoyment where complaint alleged, *inter alia*, that defendant harassed plaintiff and its customers for several months, towed vehicles belonging to plaintiff's customers, and "needlessly caus[ed] numerous agencies to inspect [plaintiff's] operation and property"); *Carner v. Shapiro*, 106 So. 2d 87, 89 (Fla. Dist. Ct. App. 1958) (affirming damages award for breach of covenant of quiet enjoyment where building-owner remodeled building over four-month period).)

⁴⁴ Although not specifically mentioned in Count Fourteen, Alonso testified at his deposition that Count Fourteen was also premised on: (1) the fact that in December 2016, the tree-trimming service "put those equipments to chop down trees for two whole days in front of my apartment and they were left on like for eight hours a day[.]" (Alonso Dep. Tr. (D.E. 462-1) at 248:9-13); (2) Defendants' allegedly not fixing Plaintiffs' air conditioning quickly enough, (see Alonso Dep. Tr. (D.E. 462-1) at 248:15-18); and (3) Defendants allegedly not fixing the sliding glass doors in the apartment above Plaintiffs' apartment, (*id.* at 250:2-4).

However, the Second Amended Complaint says nothing whatsoever about any tree-trimming that occurred in 2016, a failure to fix Plaintiffs' air conditioner, or a failure to fix the sliding glass doors in Apartment 1401. Accordingly, the Court finds that the Second Amended Complaint fails to state a claim for breach of the implied covenant of quiet enjoyment to the extent that Count Fourteen is based upon noisy tree-cutting machines in 2016, and Defendants' alleged failure to fix Plaintiffs' air conditioner and the sliding glass doors in Apartment 1401.

Defendants argue that many of these claims are waived by express covenants contained in Plaintiffs' lease agreements and Good Conduct Addendum, (Mot. at 22-23), while others are barred by the relevant statutes of limitations, (id. at 23). They further argue that other claims are refuted by the record evidence. (Id. at 23-24.) They further argue that "[a]ll of the occurrences about which Plaintiffs complain are common inconveniences or annoyances associated with apartment living[:]" Vilma addressed many of the issues through notices to cure, calling vendors, or fulfilling maintenance orders; other issues were outside Vilma's control; and Plaintiffs never provided written notice to Defendants under Section 83.56(1), Florida Statutes, or demanded reduced rent pursuant to Section 83.56(1)(b), to account for these conditions. (Id. at 24.) They further argue that these issues are not actionable because they did not substantially interfere with Plaintiffs' right to use and enjoy the premises for the purposes contemplated by the tenancy. (Id. (citing *Andrews v. Mobile Air Estates*, 125 Cal. App. 4th 578 (Cal. Ct. App. 2005)).) In this regard, they argue that Plaintiffs never considered moving elsewhere, chose to renew their lease year after year (and then month after month) despite the purported nuisances, and therefore waived their rights to claim breach of implied covenant of quiet enjoyment. (Id. at 24-25 (citing *Kaplan v. McCabe*, 532 So. 2d 1354 (Fla. Dist. Ct. App. 1988); *Farina v. Meridian Grp., Inc.*, No. 97-2421-FT, 1998 Wisc. App. LEXIS 339 (Wisc. Ct. App. 1998)).)

Plaintiffs argue that “competent substantial and verifiable evidence provided by Plaintiffs[] shows that Defendants violated the Plaintiffs’ right to the quiet enjoyment of the premises several times in different forms, causing a lot of discomfort and damage to Plaintiffs.” (Resp. at 25 (citing *Alonso Aff.* points #76-90).)⁴⁵

In their Reply, Defendants argue that the facts Plaintiffs allege are “are vague as to when the purported incidents occurred and because of this they cannot prove whether the events are within or barred by the Statute of Limitations.” (D.E. 514 at 15.) They further argue that plaintiffs “fail to present any legal argument why this evidence is sufficient to state a claim for breach of the Lease or of common law. And, simply denying that the GCA did not ‘waive’ the claims also does not save their claim from entry of summary judgment.” (Id.)

“Absent any inconsistent express covenants to the contrary, every lease carries an implied covenant of peaceable and quiet enjoyment.” *McClosky v. Martin*, 56 So. 2d 916, 918 (Fla. 1951) (citing *Hankins v. Smith*, 138 So. 494, 496 (1931)); see

⁴⁵ Plaintiffs also argue that the Good Conduct Addendum is void and therefore all of Defendants’ arguments in Count Fourteen are invalid. (Resp. at 25.) The Court will not consider Plaintiffs’ argument that the Good Conduct Addendum was void. Plaintiffs attempted to assert this as a “New Fact” in their Statement of Material Facts in Dispute of Defendants’ Concise Statement of Material Facts. (D.E. 492 ¶ 138.) The Court found that this assertion was not a “fact” at all, but rather a legal argument and, as such, the Court would disregard it. (See *supra* Section IV(b)(1).) Additionally, the Court has stricken the claim in *Alonso’s Affidavit* that the Good Conduct Addendum was unconscionable as an impermissible attempt to amend the Second Amended Complaint through a brief opposing summary judgment. (See D.E. 553 at 33-35 (citing, *inter alia*, *Gilmour*, 382 F.3d at 1315 (holding that the plaintiff “may not raise a contractual claim in her opposition to Gates’ summary judgment motion”)).) Therefore, the Court will disregard Plaintiffs’ assertion that the Good Conduct Addendum is void.

also *Stinson, Lyons, Gerlin & Bustamante, P.A. v. Brickell Bldg. 1 Holding Co., Inc.*, 923 F.2d 810, 813-14 (11th Cir. 1991). Where express lease provisions are inconsistent with the implied covenant of quiet enjoyment, a district court may give effect to the express covenants. *Stinson*, 923 F.2d at 815 (citing *Hankins*, 138 So. at 496).

There is little authority from Florida courts defining or discussing what constitutes a breach of the implied covenant of quiet enjoyment. See generally 34 Fla. Jur. 2d Landlord and Tenant § 91 (2021). However, other states recognize that the covenant protects “the lessee from any act or omission by the lessor which interferes with the lessee’s right to use and enjoy the premises for the purposes contemplated by the lease.” *Avalon Pac.-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC*, 192 Cal. App. 4th 1183, 1191 (Cal. Ct. App. 2011) (citation omitted). See also *Pollock v. Morelli*, 369 A.2d 458, 393 (Pa. 1976) (observing that in Pennsylvania, the implied covenant of quiet enjoyment is breached “where the landlord so substantially altered some essential features of the premises as to render the property unsuitable for the purpose for which it was leased”); *W. Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1051 (Col. 1978) (“The covenant of quiet enjoyment is breached by any disturbance of a lessee’s possession by his lessor which renders the premises unfit for occupancy for the purposes for which they were leased, or which deprives the lessee of the beneficial enjoyment of the premises, causing him to abandon them.”) (internal quotation marks and citation omitted). “Minor inconveniences and annoyances are not actionable breaches of the

implied covenant of quiet enjoyment. To be actionable, the landlords act or omission must substantially interfere with a tenants right to use and enjoy the premises for the purposes contemplated by the tenancy.” Andrews, 125 Cal. App. 4th at 589 (citations omitted); see also *Blue Cross Ass’n v. 666 N. Lake Shore Dr. Assocs.*, 427 N.E. 2d 270, 273 (Ill. App. Ct. 1981) (finding that implied covenant of quiet enjoyment could be breached by private nuisance, defined as “an individual wrong arising from an unreasonable, unwarranted or unlawful use of one” property producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage”) (internal quotation marks and citation omitted).

The admitted facts and record evidence establish that Plaintiffs one-year lease was renewed from year to year until August 3, 2016, when they were given an option to vacate Apartment 1301 or agree to a month-to-month lease with additional terms via the Good Conduct Addendum as a condition of remaining tenants. (Defs.’ Facts ¶ 12 (citing Vilma Decl. ¶ 8 (App’x at 4)).) The Good Conduct Addendum had two purposes: first, to establish a quid pro quo waiver of certain rights in exchange for the privilege to remain tenants at VOH; second, to place them on notice that any violation of the month-to-month lease or Good Conduct Addendum could result in immediate termination of their lease. (*Id.* (citing Vilma Decl. ¶ 8).) Alonso and Morejon took a month to make the decision. (*Id.*) On October 28, 2016, they decided to remain VOH residents and signed the month-to-month

lease and the Good Conduct Addendum. (Id. (citing Vilma Decl. ¶¶ 8-9; Good Conduct Addendum (App'x at 461)).) It appears that all of the issues contained in Count Fourteen occurred in 2017—after Plaintiffs entered the month-to-month lease and Good Conduct Addendum. (See Second Am. Compl. ¶¶ 102-18.)

1. Maintenance workers and fumigation

To the extent that Count Fourteen alleges that Defendants breached the implied covenant of quiet enjoyment by “allowing the Defendants’ maintenance staff to enter Plaintiffs’ apartment without a twelve[hour notification,]” (id.), and “repeatedly attempting to fumigate inside Plaintiffs’ apartment despite constant warnings that Angie was allergic to the chemicals and harassment to Plaintiffs’ family[.]” (id.), the Court finds that the claim is waived by the lease. Paragraph 12 of Plaintiffs’ Lease Agreement provides, in relevant part, that “Landlord shall have the right to enter the Apartment at any reasonable time, without notice for inspection, maintenance and pest control.” (App'x at 450.) Consequently, Defendants are entitled to summary judgment on these claims.⁴⁶ (Second Am. Compl. ¶ 254.)

⁴⁶ Although the Court need not reach the issue, it is unlikely that a reasonable jury could find that Defendants harassed Plaintiffs by attempting to fumigate their apartment. The only evidence on this issue is the following testimony from Alonso’s deposition:

Q How many times did a fumigator come and spray your apartment after they were told that they were not to spray your apartment?

A As far as I remember they only fumigated my apartment once with my consent. What bothered me, though, is that they came to knock on my door waking my son up when I had asked Vilma to tell them not to come and knock on my door because I didn’t need them.

(Alonso Dep. Tr. (D.E. 462-1) at 256:6-14.)

To the extent that Plaintiffs allege that Defendants' maintenance workers "harassed Plaintiffs by (1) unexpectedly knocking loudly on the door of Plaintiffs' apartment and (2) sometimes used master keys to enter the apartment when Angie was sleeping and/or Fé and her daughters were not dressed for Defendants' workers to enter[.]" (D.E. 92 ¶ 106), the Court finds that the claim is waived by the Good Conduct Addendum. Paragraph 11 of the Good Conduct Addendum states that Plaintiffs "acknowledge that when they place a service request, maintenance will come to their unit, knock on their door three times, and if there is no answer they will enter to do the service." (App'x at 461.) Thus, the Court finds that Defendants are entitled to summary judgment on this claim.

To the extent that Count Fourteen is premised upon "Defendants' employees who entered Plaintiffs' apartment without prior notice and harassed Plaintiff and his family[.]" (id. ¶ 255), the only evidence to which Plaintiffs cite is provided by Alonso's Affidavit. (Resp. at 25.) Alonso vaguely asserts that

a) - During 2016 and 2017, a maintenance worker called José, during two or three different days, came alone to our apartment and entered in it using his master keys without knocking the door three times and without a reasonable and timely notice, even knowing that my wife Fé mostly was in our apartment taking care of Angie.

b) - In two different occasions, José entered when my daughters were in the apartment, and my younger daughter Katy was playing or watching TV alone in the living room. Katy was able to see when José already was inside the apartment and when I went out of my bedroom and confronted José. See (pages # 188, 189 & 190) at [ECF No. 470], showing the declarations of my daughter Jany about those events.

(Alonso Aff. ¶ 77.) It is unclear whether Jose failed to knock on the two occasions he entered when Katy was playing or watching television. (See id.) However, even

assuming Jose did fail to knock on these four or five occasions, the Court finds that no reasonable jury could find that these incidents substantially interfered with a Plaintiffs right to use and enjoy the premises for the purposes contemplated by the tenancy. *Andrews*, 125 Cal. App. 4th at 589.

2. Noisy neighbors

To the extent that Count Fourteen alleges that Defendants breached the implied covenant of quiet enjoyment by “permitting other tenants to have their children making noises and its dogs barking incessantly without any reprimand,” (Second Am. Compl. ¶ 254), the Court finds the claim (and the evidence supporting it) constitutes “[m]inor inconveniences and annoyances [that] are not actionable breaches of the implied covenant of quiet enjoyment.” *Andrews*, 125 Cal. App. 4th at 489.

Under Florida law, where a breach of the implied covenant of quiet enjoyment is “mainly or exclusively within the knowledge of” the tenant, the tenant must give notice of the breach and demand performance. *Richards v. Dodge*, 150 So. 2d 477, 483 (Fla. Dist. Ct. App. 1963). Additionally, Paragraph 10 of the Good Conduct Addendum states that Plaintiffs “acknowledge that there is a certain amount of noise associated with apartment living that will occur on a daily basis. That includes normal walking around in the apartment Residents shall . . . advise management of any problems and will allow management staff to handle it in an appropriate manner.” (App’x at 461.)

The record evidence establishes that Alonso complained twice about children playing in the corridors outside—on August 4, 2017 and December 1, 2016. (Vilma Decl. ¶ 67.) Both complaints were made to the nighttime security guard. (Id.) The Court finds that two instances of children making noise while playing in the apartment corridors are “[m]inor inconveniences and annoyances [that] are not actionable breaches of the implied covenant of quiet enjoyment.” *Andrews*, 125 Cal. App. 4th at 489. The Court further finds that there is no evidence that the noises made by these children produced “material annoyance, inconvenience, discomfort, or hurt[.]” *Blue Cross*, 427 N.E. 2d at 273. In fact, Jany Alonso Morejon testified that although she heard kids playing and “screaming” in the corridor two to three times a day for a minute or two each time, the noises did not disturb Angie. (Jany Alonso Morejon Dep. Tr. at 58:7 – 59:9, 83:7-13 (App’x at 177-79).) Accordingly, Defendants are entitled to summary judgment on this claim. See *Kehl v. Davmar Corp.*, 195 A.2d 266, 267 (D.C. 1963) (affirming trial court’s directed verdict in favor of landlord on plaintiff’s claim that that the landlord’s failure to control the cotenant’s excessive noise resulted in a breach of the implied covenant of quiet enjoyment).

The record evidence further establishes that Alonso complained to Vilma about the dogs in Apartment 1401 four times. The first time was on January 7, 2017 when he complained about Mariela Hernandez’s dog continuously barking. (Vilma Decl. ¶ 68.) On January 9, 2017, Vilma issued a Seven Day Notice to Cure to

Mariela Hernandez based on Alonso's complaint about her "dog making noise constantly which disturbs them." (App'x at 476.)

The second complaint occurred on May 23, 2017 when Alonso complained that either a dog or child was making noise and disturbing him. (Vilma Decl. ¶ 68.) On May 24, 2017, Vilma issued another Notice of Violation and Seven Day Notice to Cure to Mariela Hernandez based on Plaintiffs' complaint "that your Kids or your dog are making noise disturbing other Residents." (App'x at 477.)

Alonso's third and fourth complaints about Mariela Hernandez's dog barking were on January 29, 2020 and January 30, 2020, respectively, as Mariela and her family were packing and moving from their apartment after early terminating their lease due to harassment by Alonso and Morejon. (Vilma Decl. ¶ 68.) These complaints occurred after Plaintiffs filed the Second Amended Complaint and therefore cannot form the basis for Count Fourteen.

It appears that Alonso also complained about noise emanating from Apartment 1401 to the nighttime security guard on two occasions. (See Hernandez Decl. ¶¶ 15, 17.) The security guard responded by visiting Apartment 1401 regarding the noise each time. (Id.)

There is no evidence that Defendants ignored any of Plaintiffs complaints regarding the noise caused by the tenants of Apartment 1401 (or others). Therefore, the Court finds that a reasonable jury could not conclude that Defendants breached the implied covenant of quiet enjoyment by permitting other tenants to have their children making noises and their dogs barking incessantly without any reprimand.

The Court further finds that there is no evidence that the noises made by the dog and children produced “material annoyance, inconvenience, discomfort, or hurt” such that it would be an actionable breach of the implied covenant of quiet enjoyment. *Blue Cross*, 427 N.E. 2d at 273. For these reasons, Defendants are entitled to summary judgment on these claims. See *Kehl*, 195 A.2d at 267.

3. Laundry facilities

To the extent that Plaintiffs argue that Defendants breached the implied covenant of quiet enjoyment by failing to maintain the laundry rooms and “allowing the washers and dryers made unbearable noises for the human ear that affected the sleep’s pattern of Plaintiffs’ family,” (Second Am. Compl. ¶ 254), the Court finds that the claim is unsupported by record evidence. Although Plaintiffs provide video evidence of the “noisy” laundry machines, the videos taken from inside the apartment establish that the machines are barely audible inside Plaintiffs’ apartment. (See Pls.’ USB File #22.) As such, no reasonable jury could find that Defendants breached the implied covenant of quiet enjoyment by and “allowing the washers and dryers made unbearable noises for the human ear that affected the sleep’s pattern of Plaintiffs’ family.” (Second Am. Compl. ¶ 254.)

Regardless, the admitted facts establish that there is no provision in the lease that obligates Defendants to provide Plaintiffs with a laundry room and working laundry room equipment. (Defs.’ Facts ¶ 134.) Neither CFH Group LLC nor 245 C&C LLC own the laundry equipment. (Id. ¶ 62.) In mid-February 2017, Alonso contacted VOH’s management office to report that the laundry equipment in the

laundry room near their apartment was making loud noises. (Id.) "This was the first and only time a complaint was made about noise coming from the third-floor laundry room." (Id.) VOH called the company that owns the laundry equipment and informed them of the problem. (Id.) Alonso was also advised that he could call the company and VOH's assistant manager gave him its telephone number. (Id.) The company that owned the equipment came and replaced the equipment about two weeks later. (Id.)

Although a "landlord's failure to fulfill an obligation to repair or to replace an essential structure or to provide a necessary service [c]an result in a breach of the covenant if the failure substantially affects the tenant's beneficial enjoyment of the premises[.]" *Petroleum Collections Inc. v. Swords*, 48 Cal. App. 3d 841, 846 (Cal. Ct. App. 1975), the admitted facts and record evidence establish that in this case, the landlord did not have an obligation to provide, repair, or replace the laundry equipment. Accordingly, the Court finds that a reasonable jury could not find that Defendants breached the implied covenant of quiet enjoyment by failing to maintain the laundry rooms and allowing the washers and dryers to make unbearable noises. *Cf. Macke Co. v. Hous. Mgmt. Co.*, 381 A.2d 313, 316 (Md. Ct. Spec. App. 1978) (affirming trial court's directed verdict in favor of landlord on the plaintiffs' claim that the landlord negligently maintained the laundry room of their apartment building where the evidence established that the landlord leased the laundry room to a third party and there was no evidence that the landlord retained control over the laundry area).

4. Water shut-off

Finally, although not specifically mentioned in Count Fourteen, Alonso testified at his deposition that Count Fourteen was based in part on the fact that Defendants cut the water off to the 2500 Building several times. (Alonso Dep. Tr. (D.E. 462-1) at 248:24 – 249:2.) In this regard, the Second Amended Complaint alleges that “[i]n 2017 alone, the Defendants often turned off the water in Plaintiffs’ building for periods of three (3) to four (4) hours, sometimes more, without proper warning to them.” (D.E. 92 ¶ 120.) “This occurred more than thirty (30) times in various weeks and in different days of the week, either in the morning or afternoon, sometimes both.” (Id. ¶ 121.) “Even though Carlos requested Vilma and coworkers about the need to be warned before turning the water off as a reasonable accommodation, to allow them to save a suitable amount of water due to Angie’s condition, and the hygiene needs of its family, these requests were all ignored.” (Id. ¶ 122.) “Vilma refused to notify Carlos or Fé with a simple phone call, claiming that they were no different or better than other tenants. Vilma also affirmed that it would cost a lot of money to put a written notice on each tenant’s door because of the cost of paper and ink.” (Id. ¶ 123.) “Vilma’s refusal to provide such notice caused a discriminatory effect with a disparate impact on Angie and his family.” (Id. ¶ 124.) Plaintiffs allege that

Angie suffered various infections with different bacteria by the lack of water, which prevented his parents to clean or bath [sic] Angie when needed. These infections caused damages to Angie, which included fever, high blood pressure, bleeding, loss of sleep, skin irritation, pain, suffering, and medical’s [sic] expenses, as well as having caused further deterioration of Angie’s health. The lack of water also affected Angie in other ways, because it

prevented others to cook his food, to brush his teeth, to wash his clothes, to clean his bedroom or bathroom when it was needed.

(Id. ¶ 125.) They further allege that Jany and Katy suffered "because they could not clean their faces, wash their hands, brush their teeth or maintain their personal hygiene when they returned from the school." (Id. ¶ 126.) They further allege that Alonso and Morejon were damaged "because the lack of water prevented them from taking proper care of their children's hygiene as needed. They were unable to prepare their children's food in time. They could not maintain the hygiene of their home nor wash their children's clothes properly, especially Angie's clothes." (Id. ¶ 127.) These paragraphs are incorporated by reference into Count Fourteen. (See id. ¶ 249.)

Defendants argue that the water shut-offs were due to emergencies for which Plaintiffs waived liability under the Lease Agreement and Good Conduct Addendum. (Mot. at 24.)

The admitted facts establish that there is one main water shutoff for the entire 2500 Building. (Defs.' Facts ¶ 130.) There are no submeters to individual apartments. (Id.) When there is a leaking pipe or other type of water emergency in the 2500 Building, it is necessary to shut off the water to the entire building to make the repair and prevent damage to the tenant's and Defendants' properties. (Id.) Water emergencies interrupt service to all 103 apartments in the 2500 Building. (Id. ¶ 131.) There is not enough time to notify all 103 tenants that the water must be shut off due to an emergency. (Id.) The repairs are made as quickly

as possible so that the water can be turned back on. (Id.) At no time was the water shut off specifically and only to Apartment 1301. (Id. ¶ 132.) When a repair or maintenance is capable of being planned in advance, VOH gives tenants as much advance notice as possible. (Id. ¶ 133; see also Notice of Water Shut Off (App'x at 490).)

The Court finds that this claim is waived by the Lease Agreement and Good Conduct Addendum. The Second Amended Complaint alleges that Defendants shut off the water to their apartment in 2017. (Id. ¶ 120.) During his deposition Alonso testified that the water to Plaintiffs' apartment was shut off "more than 35 times from November through September – from November 2016 through September of 2019." (Alonso Dep. Tr. (D.E. 462-1 at 226:11-13.) From November 2016 through September 2019, Plaintiffs' lease was subject to the provisions of the Good Conduct Addendum. (Defs.' Facts ¶ 12.)

Paragraph 10 of the Lease Agreement provides that the "Landlord shall furnish, as part of the Lease Agreement, the following utilities only: water, sewer, garbage removal."

(App'x at 450.) It further states that "[u]nder no circumstances shall Landlord be responsible to Resident for any interruption in furnishing services." (Id.) In Paragraph 9 of the Good Conduct Addendum, Plaintiffs agree and "acknowledge that they understand that if there is an emergency at the property, it is possible that the water may be turned off temporarily without notification." (App'x at 461.) Because Plaintiffs waived this claim pursuant to the Lease Agreement and Good

Conduct Addendum, Defendants are entitled to summary judgment to the extent Count 14 is premised on the water shut-offs.

VII. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendants' Motion for Summary Judgment (D.E. 364) is **GRANTED IN PART AND DENIED IN PART** consistent with this Order;
2. Trial on the surviving counts (Counts One and Two) will be set by separate Order.

DONE AND ORDERED in Chambers at Miami, Florida this 17th day of August, 2022.



JOAN A. LENARD
UNITED STATES DISTRICT JUDGE