CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS
ex rel. MILADYS AGOSTO,

Petitioner,

-against-

AMERICAN CONSTRUCTION ASSOCIATES, LLC, O. VALENTINE JOHNSON, and NICOLA M. JOHNSON,

Respondents.

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Complaint No. M-H-G-15-1031012

OATH Index No.: 1964/15

AMENDED DECISION AND ORDER

On October 14, 2014, Complainant Miladys Agosto filed a verified complaint ("Verified Complaint") with the Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau"), alleging housing discrimination on the basis of her lawful source of income by Respondents American Construction Associates, LLC ("American Construction"), O. Valentine Johnson ("Valentine Johnson"), and Nicola Johnson (collectively, "Respondents"). Complainant alleges that Respondents discriminated against her by refusing to accept a government-issued voucher as security for her rental of a unit in Brooklyn, in violation of § 8-107(5) of the New York City Human Rights Law ("NYCHRL"), codified as N.Y.C. Admin. Code tit. 8. (Bureau Ex. 2.)

Respondents filed papers responding to the Verified Complaint, styled as a "Cross motion to the Verified Complaint Motion in opposition" ("Cross Motion") (Bureau Ex. 3), but otherwise failed to cooperate with the Bureau's investigation or the discovery process. They did

not appear at a conference at the Office of Administrative Trials and Hearings ("OATH") on April 29, 2015, and did not respond to the Bureau's August 4, 2015 discovery request for interrogatories, production of documents, and Respondents' witness list ("August 4 discovery demands"). *See In re Comm'n on Human Rights ex rel. Agosto v. Am. Constr. Assocs., LLC*, OATH Index No. 1964/15, Mem. & Dec., 2015 WL 5927473 (Sept. 16, 2015). Instead, on or about September 1, 2015, Respondents sent a package of materials to OATH, including copies of a case-scheduling letter and the Bureau's August 4 discovery demands, each of which had been written over with "Offer to Contract Denied" and "No Contract," and ink-stamped with various references to the Uniform Commercial Code. (*See* Bureau Ex. 7 at 2-10.) Respondents also submitted copies of a request they made to the Office of the Attorney General of the State of New York ("OAG"), raising unspecified constitutional challenges to this case, and a copy of a letter from OAG to OATH declining to intervene in the case. (*Id.* at 14-20.)

On January 22, 2015, the Bureau issued a Notice of Probable Cause and Intent to Proceed to Public Hearing. (Bureau Comments 1.) When Respondents failed to cooperate with the discovery process, the Bureau filed a motion to compel discovery on September 1, 2015. In a Memorandum Decision dated September 16, 2015, Administrative Law Judge ("ALJ") John Spooner granted the Bureau's motion, directing Respondents to respond to the Bureau's discovery demands within five days or risk the imposition of sanctions, including the preclusion of evidence and adverse inferences at trial. *Agosto*, 2015 WL 5927473 at *2. Respondents did not comply with ALJ Spooner's order. (Bureau Comments at 6.)

A two-day administrative hearing was held in this case on September 29 and October 16, 2015, before ALJ Spooner. Respondents again failed to appear. Based on the evidence presented and the Respondents' default, ALJ Spooner issued a report and recommendation dated December

1, 2015 ("Report and Recommendation" or "R&R"), recommending that the Office of the Chairperson of the Commission on Human Rights (the "Commission") hold Respondents liable for discrimination on the basis of lawful source of income and, as a remedy, award $6,000.00 in emotional distress damages to Ms. Agosto, impose a civil penalty of $10,000.00, and direct that Respondents' staff undergo anti-discrimination training. *In re Comm'n on Human Rights ex rel. Agosto v. Am. Constr. Assocs., LLC*, OATH Index No. 1964/15, R&R, 2015 WL 10015481, at *5-9 (Dec. 1, 2015). Both parties submitted written comments and objections to the Report and Recommendation, in accordance with § 1-76 of the Commission's rules. *See* 47 RCNY § 1-76. After reviewing the Report and Recommendation, the hearing transcript, the evidence admitted during the hearing, the Bureau's post-trial brief, and the parties' comments to the Report and Recommendation, the Commission adopts the Report and Recommendation, except as indicated below.

I. STANDARD OF REVIEW

In reviewing a report and recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the ALJ. Though the findings of an ALJ may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other assessments to be made by a factfinder. *In re Comm'n on Human Rights ex. rel Spitzer v. Dahbi*, OATH Index No. 883/15, Dec. & Order, 2016 WL 7106071, at *2 (July 7, 2016); *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *2 (Apr. 20, 2016); *In re Comm'n on Human Rights v. CU 29 Copper Rest. & Bar,* OATH Index No. 647/15, Dec. & Order, 2015 WL 7260570, at *2 (Oct. 28, 2015); *In re Comm'n on Human Rights v. Shahbain*,

OATH Index No. 13-2439, Dec. & Order, 2014 WL 4211293, at *4 (May 22, 2014). The Commission is also tasked with the responsibility of interpreting the NYCHRL and ensuring the law is correctly applied to the facts. *See Spitzer*, 2016 WL 7106071 at *2; *In re Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, 2016 WL 1050864, at *2 (Mar. 14, 2016); *In re Comm'n on Human Rights v. Crazy Asylum*, OATH Index Nos. 2262/13, 2263/13, 2264/13, 2015 WL 7260568, at *3 (Oct. 28, 2015). Therefore, the Commission has the final authority to determine "whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge correctly applied the New York City Human Rights Law to the facts." *N.Y.C. Comm'n on Human Rights v. Ancient Order of Hibernians in Am., Inc.*, Compl. No. MPA-0362, Dec. & Order, 1992 WL 814982, at *1 (Oct. 27, 1992); *see also In re Cutri v. N.Y.C. Comm'n on Human Rights*, 113 A.D.3d 608, 609 (2d Dep't 2014) ("As the Commission bears responsibility for rendering the ultimate determination, it was not required to adopt the recommendation of the Administrative Law Judge assigned to the proceeding . . ."); *In re Orlic v. Gatling*, 44 A.D.3d 955, 957 (2d Dep't 2007) ("it is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations").

When parties submit comments, replies, or objections to a report and recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission's other factual determinations and conclusions of law. The Commission reviews a report and recommendation and the parties' comments and objections *de novo* as to findings of fact and conclusions of law. *Stamm,* 2016 WL 1644879 at *2; *Howe*, 2016 WL 1050864 at *3; *CU29 Copper Rest. & Bar*, 2015 WL 7260570 at *2.

II. HEARING TESTIMONY AND EVIDENCE

For purposes of this Decision and Order, knowledge of the facts described in the Report and Recommendation is generally assumed. During the hearing, the Bureau called two witnesses, Complainant Miladys Agosto and Ms. Agosto's case worker and tenant counselor, Jorge Gomez. The Bureau also entered eleven documentary exhibits into evidence. In the face of Respondents' failure to appear, the Bureau presented proof that Respondents were properly served with notice of both hearing dates (*see* Bureau Exs. 1 & 9; Tr. of OATH Hearing ("Tr.") at 4:22-7:5, 49:21-50:9) and ALJ Spooner found Respondents to be in default (Tr. at 6:20-24).[1]

Ms. Agosto testified that she was looking for an apartment in the spring of 2014 after the person with whom she had been staying asked her to move out. (*Id.* at 16:5-20.) She first went to view an unfinished apartment at 2129 Pitkin Avenue in Brooklyn ("the Building") on or about July 19, 2014. (*Id.* at 16:21-25, 17:12-14; Bureau Exs. 4, 5.) As alleged in the Verified Complaint and conceded by Respondents in their Cross Motion, Respondent American Construction is the owner of the Building, Respondent Nicola Johnson is the Chief Financial Officer of American Construction, and Respondent Valentine Johnson is the Building's managing agent. (Bureau Ex. 2 at ¶¶ 2-4; *see generally* Bureau Ex. 3.)

Ms. Agosto testified that the Building contains three floors (Tr. at 17:12-16), though she only viewed the interior of the second floor, which contained six separate units with a shared bathroom and kitchen. (*Id.* at 17:21-18:10.) Ms. Agosto stated that it was her understanding that the third floor of the Building was laid out in a similar manner to the second floor, with six

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[1] In advance of the hearing date, Respondents returned to OATH a marked-up copy of ALJ Spooner's case scheduling letter, which set forth the hearing date of September 29, 2015. (*See* Bureau Ex. 7 at 2-10.) This mailing from Respondents provides further evidence, beyond the affidavits of service produced by the Bureau, that Respondents received actual notice of the hearing, yet chose not to appear.

separate units and a shared kitchen and bathroom (*id.* at 18:11-15), and that the first floor was also occupied (*id.* at 17:17-19). Ms. Agosto's description of the Building was largely corroborated by documentary evidence, including the certificate of occupancy, confirming that the Building has three floors, and a March 2015 notice of violation issued by the New York City Department of Buildings ("DOB") citing the Building because of the impermissible conversion of one floor from a single unit into five units with a shared kitchen and shared bathroom. (Bureau Exs. 4 & 11.)

On or about July 30, 2014, Ms. Agosto entered into a two-year lease agreement with Respondent American Construction, beginning August 1, 2014, for the rental of one of the second-floor units in the Building, at a rate of $750.00 per month. (Tr. at 20:3-23; Bureau Ex. 5.) Ms. Agosto paid Respondent Valentine Johnson $415.00 toward her first month's rent, comprised of $200.00 in cash and an emergency assistance check for $215.00 from the New York City Human Resources Administration ("HRA"). (Tr. at 26:4-27:4.) To cover the required one-month security deposit, Ms. Agosto obtained a voucher from HRA, which "guarantees that HRA will pay up to the equivalent of one month's rent if it is verified that the tenant who occupied the apartment failed to pay his/her rent and/or caused damages to it," and if valid proof of the unpaid rent or damage is submitted to HRA within three months after the tenant vacates the apartment. (Bureau Ex. 6; *see also* Tr. at 21:6-25.) Respondent Valentine Johnson initially signed the security voucher, then apparently changed his mind, telling Ms. Agosto that he did not want it and would not rent to her unless she paid her security deposit in cash. (*See* Tr. at 22:17-21.)

At the hearing, Ms. Agosto conceded that she had not paid the full $750.00 toward her first month's rent when Respondents rejected her tenancy. (*Id.* at 26:9-27:7.) She testified,

however, that Respondents never requested the outstanding $300.00 before turning her away expressly on account of the security voucher. (*See* Tr. at 27:5-9.)

In their Cross Motion, Respondents admit that they "clearly informed and stated to Ms. Agosto verbally[,] having two witness[es] in our office that will testify, we do not accept 'security vouchers' as a security deposit for our rentals[.] [I]ts our choice of practice." (Bureau Ex. 3 at 2.) Respondents further state that they "don't like to take security vouchers as replacement for security deposits from ('welfare') because of past bad experiences." (*Id.*)

Ms. Agosto testified that after Respondents turned her away, she was forced to stay for two or three days with a friend and then lived "in the street," staying in "[o]ld houses, one day here, one day there" for what she described as "a long time." (Tr. at 23:16-19.) The Bureau subsequently submitted a letter to OATH clarifying that Ms. Agosto secured housing approximately two months later, in October 2014. (Bureau Ex. 10.) Ms. Agosto stated that Respondents' actions left her feeling "[v]ery bad," and that, while homeless, she was unable to sleep and had to "go into places asking to take a shower." (Tr. at 23:23-24:2.)

Mr. Gomez testified that he is a tenant counselor and has been working with Ms. Agosto since approximately March or April 2014, typically meeting with her approximately once a month. (*Id.* at 31:14-32:9, 42:24-43:3-4.) Mr. Gomez recalled advising Ms. Agosto in or about early August 2014 to seek government assistance to help secure her rental of an apartment in the Building. (*Id.* at 32:16-24.) He further recalled that in or about late August or early September, Ms. Agosto arrived at his office in tears because her rental in the Building had fallen through. (*Id.* at 33:8-13.) Mr. Gomez testified that he then called the office of American Construction to ask why Ms. Agosto had been denied the apartment, and was told that it was because the

company would not accept the government assistance that Ms. Agosto intended to use. (*Id.* at 33:16-34:6.)

Mr. Gomez testified that it was his understanding that Ms. Agosto had found a housing accommodation in October 2014. (*Id.* at 41:15-19.) He also testified that, to the best of his knowledge, Respondents initially refused to return Ms. Agosto's emergency public assistance check from HRA, which she had paid toward her first month's rent, and that she had needed to engage the help of Brooklyn Legal Services Corporation A to recover the rental check from Respondents. (*Id.* at 61:5-21.)

III. DISCUSSION

A. Legal Standard

The NYCHRL expressly provides that it "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL] have been so construed." N.Y.C. Admin. Code § 8-130. Pursuant to the Local Civil Rights Restoration Act of 2005, "[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise." Local Law No. 85 (2005); *see also* Local Law No. 35 (2016); *Albunio v. City of N.Y.*, 23 N.Y.3d 65, 73 (2014) ("the New York City Council's 2005 amendment to the NYCHRL was, in part, an effort to emphasize the broader remedial scope of the NYCHRL in comparison with its state and federal counterparts and, therefore, to curtail courts' reliance on case law interpreting textually analogous state and federal statutes").

B. Respondents Discriminated Against Ms. Agosto By Refusing To Accept Her Security Voucher

In relevant part, § 8-107(5)(a) of the NYCHRL, provides:

> It shall be an unlawful discriminatory practice for the owner, lessor, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation . . . or any agency or employee thereof:
>
> (1) To refuse to sell, rent, lease approve the sale, rental or lease or otherwise deny to or withhold from any person or group of persons such a housing accommodation or an interest therein because of . . . any lawful source of income of such person . . .

N.Y.C. Admin. Code § 8-107(5)(a). A housing accommodation is defined to include "any building, structure, or portion thereof which is used or occupied or intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings," and "[e]xcept as otherwise specifically provided, such term shall include a publicly assisted housing accommodation." N.Y.C. Admin. Code § 8-102(10).

In a case of default, such as this, the petitioner must establish a *prima facie* case of the respondent's liability. *See Walley v. Leatherstocking Healthcare, LLC*, 79 A.D.3d 1236, 1238 (3d Dep't 2010); *Stamm*, 2016 WL 1644879 at *4. "To do so under Section 8-107(5), the Bureau must show that: (1) the complainant is a member of a protected class as defined by the NYCHRL; (2) respondents are covered entities under the NYCHRL; (3) respondents refused to sell, rent or lease, or approve the sale, rental or lease of a housing accommodation; and (4) respondents acted in such a manner and circumstances as to give rise to the inference that its actions constituted discrimination in violation of Section 8-107(5)." *Howe,* 2016 WL 1050864 at *5 (citing *Romo v. ISS Action Sec.*, OATH 674/11, R&R, 2011 WL 12521359, at *5 (Apr. 12, 2011), *adopted*, Dec. & Ord. (June 26, 2011)). In addition, the "Bureau may also establish

its *prima facie* case with direct evidence of discrimination." *Id.* Claims of discrimination under the NYCHRL must be proven by a preponderance of the evidence. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 (2d Cir. 2013); *Stamm*, 2016 WL 1644879 at *6; *Howe*, 2016 WL 1050864 at *5. Here, the record amply supports a finding that Respondents are liable for discriminating against Ms. Agosto on the basis of her lawful source of income.

1. Government-Issued Security Vouchers Are a "Lawful Source of Income" Within the Meaning of the NYCHRL

Under the NYCHRL, lawful source of income "shall include income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers." N.Y.C. Admin. Code § 8-102(25). Protections on the basis of lawful source of income were added to the NYCHRL in 2008. *See* Local Law No. 10 (2008). Legislative history reveals that, at the time that the amendment was passed, its main purpose was to ensure greater housing access for Section 8 voucher recipients who were regularly being denied residential leases by private landlords. *See generally* N.Y.C. Council, Report of the Governmental Affairs Division, Committee on General Welfare (Mar. 26, 2008); Press Release, N.Y.C. Council, *Preserving Access to Affordable Housing, Council Votes to Protect Low-Income Renters from Discrimination* (Mar. 26, 2008); *accord* Letter from Mayor Michael Bloomberg to City Clerk & Clerk of the Council Hector Diaz (Feb. 29, 2008). The text of § 8-102(25) also makes clear, however, that the term "lawful source of income" reaches a broad range of government assistance. *See* N.Y.C. Admin. Code § 8-102(25) (defining "lawful source of income" to include "income derived from social security, or any form of federal, state or local public assistance or housing assistance"); *Howe,* 2016 WL 1050864 at *9 ("Individuals seeking to pay for their housing with the use of Section 8 or other types of public assistance vouchers

should be viewed by housing providers in the same way as people paying for their housing through other means."). Like Section 8 vouchers, security vouchers provide government financing directly to private landlords as a means of ensuring access to affordable, private housing for low-income beneficiaries. *See Bush v. Mulligan,* 57 A.D.3d 772, 773 (2d Dep't 2008) (discussing purpose of Section 8). In light of the language of § 8-102(25) of the NYCHRL, and the legislative history of the law, the Commission concludes that security vouchers constitute a "lawful source of income" under the NYCHRL. Accordingly, the Commission finds that Ms. Agosto, as a security voucher holder, is entitled to the protections of § 8-107(5) of the NYCHRL.

2. Respondents and the Building Are Covered Under § 8-107(5) of the NYCHRL

The undisputed evidence in this case shows that the Building is intended to be used and occupied as a residence and, thus, falls within the NYCHRL's definition of a housing accommodation. *See* N.Y.C. Admin. Code § 8-102(10); (Bureau Ex. 3 at 1). There is also no dispute that each of the Respondents qualifies as one of the categories of listed persons under § 8-107(5)(a), since Respondents admit that Respondent American Construction owns the Building, Respondent Nicola Johnson is an executive-level employee of American Construction, and Respondent Valentine Johnson is the managing agent of the Building. (*See generally* Bureau Ex. 3.) The only remaining question is whether Respondents are exempt, pursuant to § 8-107(5)(o), from the NYCHRL's prohibitions on housing discrimination based on lawful source of income.

Here, the record demonstrates that the Building contains more than five units and, thus, Respondents are not exempt under § 8-107(5)(o). *See* N.Y.C. Admin. Code § 8-107(5)(o). At the hearing, Ms. Agosto credibly testified that she personally viewed six separate rental units on the second floor of the Building and that it was her understanding that the third floor had a layout

similar to that of the second. (Tr. at 17:21-18:15.) She further testified that it was her understanding that the first floor of the building was occupied by residents. (*Id.* at 17:17-20.) The Bureau also presented documentary evidence from DOB showing that an unspecified floor of the three-floor building had been illegally converted from a single unit to five separate rental units with a shared kitchen and bathroom. (Bureau Ex. 4.)[2] Based on the undisputed evidence, the Commission finds that there were 17 separate housing units in the Building.[3] Accordingly, the exemption from liability for housing discrimination on the basis of lawful source of income does not apply.

In their papers, Respondents raised several jurisdictional challenges premised on unspecified state constitutional provisions, the Uniform Commercial Code, and their purported residence in "Nation, New York Republic . . . Without the United States." (*See* Resp'ts' Comments; Bureau Exs. 3 & 7.) There is, however, no legal support for any of these frivolous, inchoate jurisdictional arguments. For all the foregoing reasons, the Commission concludes that Respondents in this case are subject to the NYCHRL's prohibition on discrimination based on lawful source of income.

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[2] The NYCHRL's protections on the basis of lawful source of income turn on the actual number of units contained in a housing accommodation, not the number of units lawfully permitted. *See* N.Y.C. Admin. Code § 8-107(5)(o) ("The provisions of this subdivision, as they relate to unlawful discriminatory practices on the basis of lawful source of income, shall not apply to housing accommodations that *contain* a total of five or fewer housing units") (emphasis added).

[3] A calculation of 17 units comprises five units on the first floor, as supported by the DOB notice of violation, and six units on each of the first and second floors, as supported by Ms. Agosto's testimony. This is in contrast with ALJ Spooner's finding of "as many as ten rooms being rented on two floors of the building" (R&R at 6), but appears to more accurately reflect all of the credible, undisputed evidence in the record.

3. Respondents Refused to Rent To Complainant Because of Her Reliance on a Government Voucher for Her Security Deposit

It is well-established that, under the NYCHRL, "discrimination shall play *no* role" in decisions relating to housing. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 n.27 (1st Dep't 2009) (emphasis added). At the hearing, Ms. Agosto and Mr. Gomez both credibly testified that Respondents premised their refusal to rent to Ms. Agosto on her use of the HRA security voucher. (Tr. 26:9-27:9, 33:16-34:6.) Respondents also specifically admitted that it is their "choice of practice" to "not accept 'security vouchers' as a security deposit for our rentals," and that they had advised Ms. Agosto of that fact when rejecting her tenancy. (Bureau Ex. 3 at 2.) There is, therefore, no dispute that Respondents directly discriminated against Ms. Agosto because of her lawful source of income and are liable for violating § 8-107(5)(a)(1) of the NYCHRL.

IV. DAMAGES, CIVIL PENALTIES, AND REMEDIAL ACTION

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices and order such other "affirmative action as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120(a). The Commission may also award damages to persons aggrieved by violations of the law, including complainants. *See id.* § 8-120(a)(8). In addition, the Commission may impose civil penalties of not more than $125,000.00, unless the "unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act," in which case a civil penalty of not more than $250,000.00 may be imposed. *Id.* § 8-126(a); *see In re Comm'n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Dec. & Order, 2015 WL 7260567, at *15 (Oct. 28, 2015) (finding $250,000.00 civil penalty appropriate where

respondent engaged in willful and wanton sexual harassment over a three year period). Civil penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

A. Compensatory Damages

"Compensatory damages, including emotional distress damages, are intended to redress a specific loss that the complainant suffered by reason of the respondent's wrongful conduct," and should – insofar as monetary compensation can ever compensate for emotional harm – correspond to the complainant's specific injuries, as supported by the record. *See Howe,* 2016 WL 1050864 at *6.

To support an award of emotional distress damages, the record "must be sufficient to satisfy the Commissioner that the mental anguish does in fact exist, and that it was caused by the act of discrimination." *Id.* An award for compensatory damages may be premised on the complainant's credible testimony alone. *N.Y.C. Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991) ("Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct"); *Spitzer*, 2016 WL 7106071 at *7; *In re Comm'n on Human Rights ex rel. Jordan v. Raza*, OATH Index No. 716/15, 2016 WL 7106070, at *8 (July 7, 2016). In addition to the testimony of the complainant, other forms of evidence that may be probative of emotional harm in a particular case include testimony from witnesses other than the complainant concerning the complainant's outward manifestations of emotional or mental state, *see, e.g., Bouveng v. NYG Capital LLC*, 175 F. Supp. 3d 280, 316 (S.D.N.Y. 2016), objective evidence of the impact on the complainant (including medical evidence), *see, e.g., Spitzer*, 2016 WL 7106071 at *7 (emotional distress can be evidenced with proof of "medical treatment or physical manifestation"); *Romo*, 2011 WL 12521359 at *5 (evidence of emotional distress damages included fact that complainant "stayed in his apartment

all weekend crying" and "lost 15-20 pounds"), and other circumstantial evidence, *see, e.g., N.Y.C. Transit Auth.*, 78 N.Y.2d at 216; *Charvenko v. Barbera*, No. 09-CV-6383T, 2011 WL 1672471, at *5 (W.D.N.Y. Mar. 30, 2011) (compensatory damages may be established "by testimony or inferred from the circumstances"); *In re Lebron v. Caterair Int'l*, Compl. No. E90-02061, Recommended Dec. & Order, 1994 WL 932435, at *9 (Jan. 28, 1994) ("the objective circumstances of the case corroborate that a person would reasonably suffer mental anguish in similar circumstances").

In light of the "strong anti-discrimination policy spelled out" in the NYCHRL and because the rights afforded therein are "statutory and involve[] a vindication of a public policy as well as a vindication of a particular individual's rights," "an aggrieved individual need not produce the quantum and quality of evidence to prove compensatory damages" under the NYCHRL that would be required, for example, under traditional common law tort principles. *Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights*, 359 N.Y.S.2d 25, 27-28 (1974) (discussing New York State Human Rights Law ("NYSHRL")). Thus, "[t]he fact that the damages are somewhat speculative and evanescent should not serve to limit the legislative authority vested in the Commissioner to make awards under the Human Rights Law." *Batavia Lodge No. 196, Loyal Order of Moose v. N.Y. State Div. of Human Rights*, 43 A.D.2d 807, 810 (4th Dep't 1973) (dissent) (reasoning later adopted by Court of Appeals concerning NYSHRL). Nevertheless, "the evidence of emotional distress should be 'demonstrable, genuine, and adequately explained.'" *Town of Hempstead v. State Div. of Human Rights*, 233 A.D.2d 451, 453 (2d Dep't 1996) (discussing damages under the NYSHRL) (quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1252 (4th Cir. 1996)).

The NYCHRL places no limitation on the size of compensatory damages awards. N.Y.C. Admin. Code § 8-120(a)(8). In valuing compensatory damages in a particular case, the Commission assesses the nature of the violation, the amount of harm indicated by the evidentiary record, and awards that have been issued for similar harms. *See Sch. Bd. of Educ. of Chapel of Redeemer Lutheran Church v. N.Y.C. Comm'n on Human Rights*, 188 A.D.2d 653, 654 (2d Dep't 1992). Other factors that may be relevant to valuing emotional distress damages include "the duration of a complainant's condition, its severity or consequences, any physical manifestations, and any medical treatment." *N.Y.C. Transit Auth.*, 78 N.Y.2d at 218 (discussing damages under the NYSHRL).

Here, Ms. Agosto testified that when she first sought to rent from Respondents in the spring of 2014, her housing situation was tenuous and she was facing the prospect of street homelessness. (*See* Tr. at 16:5-20.) She testified that she felt "very bad" after Respondents discriminated against her (*id.* at 23:23-24:2), and that she was left homeless for "a long time," forced to stay at first for a few days with a friend and then to live "in the street," moving around from day to day. (*Id.* at 23:16-19.) She testified that during her period of homelessness she was not able to sleep and suffered the indignity of having to seek permission to shower in different places. (*Id.* at 23:23-24:2.) Mr. Gomez confirmed witnessing Ms. Agosto cry as a result of Respondents' conduct (*id.* at 33:8-13), and noted that she had needed to obtain legal assistance from Brooklyn Legal Services Corporation A in order to recoup part of her first month's rent from Respondents (*id.* at 61:14-21).

Based on the record, the Commission finds that Ms. Agosto was street homeless for a period of one to two months.[4] Given Ms. Agosto's pressing need for a place to stay, her precarious financial situation, her prior experience of homelessness, and her response to Respondents' rejection of her tenancy, it is apparent that Respondents' conduct left her distraught and anxious about her resulting predicament. In addition, the record demonstrates that Ms. Agosto became exhausted and humiliated while homeless, unable to engage in even the most basic activities of daily life, including regular sleep and personal hygiene. (*Id.* at 23:23-24:2.) Based on these considerations, the Commission finds that significant compensatory damages are warranted in this case.

ALJ Spooner recommended emotional distress damages of $6,000.00, citing to several Commission cases in support of his general conclusion that mental anguish damages for "a single denial of an accommodation based upon a discriminatory motive" generally range from $1,000.00 to $7,500.00. (R&R at 8, 10.) In contrast, the Bureau argues that emotional distress damages of $30,000.00 are appropriate as a minimum award for "garden variety" emotional distress claims. (*See* Bureau Comments 10-11.) The Commission is wary, however, of both arguments, which appear to place undue emphasis on broad categorical limits for damages, without adequate regard for the evidence of specific harm in this particular case.

In assessing the appropriate value to assign to Ms. Agosto's emotional distress in this case, the Commission finds the cases of *Short v. Manhattan Apartments, Inc.*, 916 F. Supp. 2d 375 (S.D.N.Y. 2012), and *Howe*, 2016 WL 1050864, to offer particularly helpful guidance. In *Short*, the plaintiff alleged that in two separate series of interactions with two different brokerage

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[4] That finding is consistent with the testimony of Mr. Gomez, who confirmed that Ms. Agosto first came to him in need of housing in about August 2014 and was not able to obtain any until October 2014. (Tr. at 32:18-19, 41:19.) That timeline certainly supports the inference that Ms. Agosto was without a steady home for several months.

companies, he was denied the opportunity to view numerous apartments in his price range because of his reliance on a rental subsidy from the New York City HIV/AIDS Services Administration ("HASA"). As a result of the repeated rejections the plaintiff experienced at the hands of each of the defendants, he was left without a suitable apartment for a period of nine months, and was forced to stay in a HASA single room occupancy hotel ("SRO") that he found to be unsanitary and that lacked cooking facilities or a private bathroom. 916 F. Supp. 2d at 391. The plaintiff testified that the defendants' conduct was "very hurtful" and that he felt "discouraged," "humiliated," "depressed," and "hurt." *Id.* He also described that the experience of looking for alternative housing was frustrating. *Id.* After dismissing all of the plaintiff's claims except his source-of-income discrimination claims under the NYCHRL, the court held that the plaintiff was entitled to $10,000.00 in emotional distress damages from each of the two defendants. *Id.* at 401.

The Commission finds that the testimony of the plaintiff in *Short* concerning his emotional harm was more detailed than that provided by Ms. Agosto in this case. However, the objective circumstances in this case, and evidence concerning the impact of Respondents' conduct on Ms. Agosto, suggest that her injury was likely more severe than that experienced by the plaintiff in *Short*. While the plaintiff in that case was forced to remain in an undesirable SRO, Ms. Agosto was left completely homeless by the Respondents' conduct. In addition, there was no evidence in *Short*, as there is in this case, that the plaintiff was unable to sleep as a result of the discriminatory conduct that he experienced, or that his humiliation about the discrimination was compounded by the further humiliation of being unable to regularly bathe. However, the plaintiff in *Short* was subjected to repeated acts of discrimination by two separate, unassociated companies, an aggravating factor that is not present in this case. In addition, the nine-month

duration of the harm in *Short* was significantly longer than the approximately two month period of harm supported by the record in this case. The Commission concludes that the emotional harm suffered by Ms. Agosto in this case was somewhat greater than that experienced by the plaintiff in *Short* at the hands of one of the two defendants, but not as great as the cumulative harm caused by both.

In *Howe*, the respondents refused to show apartments to the complainant because of his reliance on a Section 8 housing voucher. As a result, the complainant was left looking for an apartment for approximately three months and was forced to settle for an apartment "riddled with problems, including water leaks, a lack of heat and hot water, and vermin." 2016 WL 1050864 at *4. The complainant testified that these events left him feeling "pretty upset," *id.*, and the Commission awarded him $2,500.00 in emotional distress damages, *id.* at *7.

In contrast with the present case, there was no evidence in *Howe* that the complainant was unable to sleep, suffered the humiliation of being unable to regularly bathe, or was reduced to tears by the respondents' discrimination. The Commission also finds that the circumstances of the discrimination in this case are objectively worse than those in *Howe*. Here, Ms. Agosto was not simply turned away at the initial inquiry stage, but invested substantial time and effort trying to coordinate the resources necessary to facilitate her rental from Respondents, only to then be left with nowhere to stay for several weeks. Moreover, after Respondents turned her away, she had to undertake legal efforts, with the assistance of Brooklyn Legal Services Corporation A, to recover the emergency assistance check that she had paid to Respondents as part of her first month's rent. (Tr. at 61:7-21.) Viewed against that background, the evidence in this case suggests that Ms. Agosto suffered a much greater level of emotional harm than that suggested by the record in *Howe*.

Based on these considerations, the Commission holds that an award of $13,000.00 in emotional distress damages is appropriate here. Because the Bureau did not present evidence of Ms. Agosto's economic damages, the Commission is unable to award such damages in this case.

B. Civil Penalties

In assessing whether the imposition of civil penalties will vindicate the public interest, the Commission may consider several factors, including, but not limited to: (1) respondents' financial resources; (2) the sophistication of respondents' enterprise; (3) respondents' size; (4) the willfulness of the violation; (5) the ability of respondents to obtain counsel; and (6) the impact on the public of issuing civil penalties. *See, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570 at *4. The Commission also considers the extent to which respondents cooperated with the Bureau's investigation and with OATH, *see, e.g., Cardenas*, 2015 WL 7260567 at *15; *Howe*, 2016 WL 1050864 at *8; *Crazy Asylum*, 2015 WL 7260568 at *6, as well as the amount of remedial action that respondents may have already undertaken, *see, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570 at *4 (holding "civil penalties are not necessary to deter Respondents from future violations of the NYCHRL, as they have committed to publishing advertisements that comply with the law").

In this case, ALJ Spooner recommended civil penalties of $10,000.00, which neither party contests. (*See* R&R at 12; Resp'ts' Comments; Bureau Comments at 17.) For the reasons that follow, the Commission concludes that a larger civil penalty is warranted.

1. Respondents' Size, Sophistication, Financial Resources, and Ability To Obtain Counsel

To the limited extent that Respondents appeared in this case, they did so unrepresented by counsel, and their written submissions reveal a lack of sophistication. (*See* Bureau Exs. 3, 7; Resp'ts' Comments.) As for Respondents' size and financial resources, the record suggests that

they own and operate a single residential building with at least 17 units, from which they receive approximately $750.00 per unit per month, for a gross total of approximately $153,000.00 per year at full occupancy. (*See* Bureau Exs. 4 & 5; Tr. 17:17-18:15.) Viewed in isolation, such considerations tend to weigh in favor of a moderate civil penalty. However, the Commission is mindful that the record on Respondents' finances is limited specifically because Respondents failed to produce financial records or cooperate in the investigative and discovery processes. As discussed below, that failure to cooperate requires a heightened fine.

2. Respondents' Lack of Cooperation with the Investigation and Hearing Process

Throughout the course of this case, Respondents have defiantly refused to cooperate with the Bureau or with OATH. Respondents failed to appear at any scheduled conference or hearing dates before OATH, refused to comply with the Bureau's discovery requests, even in the face of an OATH order, and consistently asserted spurious objections to the proceeding. *See generally Agosto*, 2015 WL 5927473; (*see also* Resp'ts' Comments). Such "steadfast refusal to take this process seriously militates in favor of a higher penalty '[b]ecause it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices.'" *Howe*, 2016 WL 1050864, at *8 (quoting *Crazy Asylum*, 2015 WL 7260568, at *6).

3. Willfulness of the Violation

The record shows that Respondents' violation of the NYCHRL was willful. *See Smith v. Wade,* 461 U.S. 30, 39 n.8 (1983) (discussing common law meaning of "malice," "wantonness," and "willfulness" in civil context); *Greene v. Pa. R.R. Co.*, 23 Misc. 2d 894, 894 (1st Dep't 1960) ("[w]anton or willful misconduct entails a reckless disregard of safety or of right or of consequences"). Respondents expressly and unapologetically admitted in their Cross Motion that it is their "choice of practice" to refuse to accept security vouchers. (Bureau Ex. 3 at 2.)

Moreover, as a whole, the record suggests that Respondents acted intentionally and with reckless disregard both for Ms. Agosto's rights and for the harm that their conduct was likely to cause her. Such willful violations of the NYCHRL generally warrant higher civil penalties. *See, e.g., Cardenas*, 2015 WL 7260567 at *15.

4. Impact of Civil Penalties on the Public

The record also suggests that robust civil penalties are necessary to advance and protect the public interest. As the Commission has previously noted, and as Ms. Agosto's experience demonstrates, housing discrimination on the basis of lawful source of income is "particularly harmful," because the individuals who rely on housing assistance vouchers "are some of New York City's most vulnerable residents." *Howe*, 2016 WL 1050864 at *9. In addition to the harm such discrimination directly causes an individual, it also undermines the City's efforts to combat homelessness and to keep pace with the high demand for affordable housing. Discrimination against recipients of government housing assistance remains alarmingly common, representing the most reported form of housing discrimination in New York City and the basis for approximately one-quarter of all housing discrimination complaints that the Bureau received in 2016. *See* N.Y.C. Comm'n on Human Rights, *2016 Annual Report*, 19 (2017), *available at* http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2016FINAL.pdf.

The high incidence of discrimination based on lawful source of income in New York City and the injurious effect that such discrimination has indicate a strong public need to deter future violations. That is particularly true where, as here, respondents have indicated that they do not intend to comply with the law in the future. It is, moreover, apparent from the design and pricing of rental units in Respondents' Building that Respondents' business is directly targeted to individuals with low income, who are disproportionately likely to rely on housing assistance.

The size of the Building also suggests that Respondents' conduct could impact upward of 17 New York City residents.

The Commission finds that the case of *Commission on Human Rights v. Tantillo*, OATH Index Nos. 105/11, 106/11 & 107/11, Dec. & Order (May 23, 2011),[5] offers useful guidance in assessing civil penalties in this case. In *Tantillo*, the respondents were fined $20,000.00 after refusing to accept a Section 8 voucher from a tenant. *Id.* at 17. The Commission held that, as the owners of 17 residential units within New York City, the respondents in *Tantillo* "are not the largest of housing providers" but "are not the smallest either." *Id.* at 16. The Commission also placed significant emphasis on the fact that respondents had completely failed to participate in the administrative litigation process, thereby hampering the Commission's ability to gather evidence regarding the impact of the respondents' discrimination. *Id.* at 16-17.

As in *Tantillo*, the Respondents in this case are mid-size housing providers who have completely failed to cooperate in the litigation process, and whose conduct threatens real harm to the residents of New York City. For all the foregoing reasons, the Commission finds that a civil penalty of $20,000.00 is appropriate here. *Accord Howe,* 2016 WL 1050864 at *10 (imposing fine of $100,000.00 for discrimination on the basis of lawful source of income where respondent had approximately 5,000 apartments in the City); *Comm'n on Human Rights v. Coticelli*, OATH Index No. 970/11, Dec. & Order (Nov. 21, 2011) (imposing $10,000.00 fine where respondent was held liable for a single act of race-based housing discrimination, but had rented only one apartment, which she no longer owned at the time of the hearing).[6]

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5 Available on OATH's website at http://a820-isys.nyc.gov/ISYS/.

6 Available on OATH's website at http://a820-isys.nyc.gov/ISYS/.

C. Additional Affirmative Relief

The Commission has frequently required individuals who have been found liable for violations of the NYCHRL to attend Commission-led trainings in order to strengthen their understanding of their obligations under the law. *See, e.g., Spitzer,* 2016 WL 7106071 at *10; *Jordan*, 2016 WL 7106070 at *11; *Stamm*, 2016 WL 1644879 at *11. The Commission agrees with the Report and Recommendation that such training is appropriate for Respondents Valentine and Nicola Johnson, and all other managerial employees of Respondent American Construction.

The Commission also orders that Respondents post a notice of rights in a place conspicuously visible to current and prospective tenants, as set forth in further detail below.

V. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that Respondents immediately cease and desist from engaging in discriminatory conduct.

IT IS FURTHER ORDERED that no later than 30 calendar days after service of this Order, Respondents pay Complainant Agosto $13,000.00 in emotional distress damages, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: Recoveries, a bank certified or business check made payable to Miladys Agosto, including a written reference to OATH Index No. 1964/15.

IT IS FURTHER ORDERED that no later than 30 calendar days after service of this Order, Respondents pay a fine of $20,000.00 to the City of New York, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: Recoveries, a bank certified or business check made payable to the City of New York, including a written reference to OATH Index No. 1964/15.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this Order, Respondents Valentine and Nicola Johnson and all other managerial staff of Respondent American Construction shall attend a Commission-led training on the NYCHRL. A schedule of available trainings may be obtained by calling the Director of Training and Development at (212) 416-0193 or emailing trainings@cchr.nyc.gov.

IT IS FURTHER ORDERED that within 30 calendar days of service of this Order, and for a period of no less than two (2) years Respondents post, in a location conspicuous to current and prospective tenants, a copy of the Notice of Rights available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/CCHR_NoticeOfRights2.pdf.

Failure to timely comply with any of the foregoing provisions shall constitute non-compliance with a Commission Order. In addition to any civil penalties that may be assessed against Respondents, Respondents shall pay a civil penalty of $100.00 per day for every day the violation continues. N.Y.C. Admin. Code § 8-124. Furthermore, failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Dated: New York, New York
April 5, 2017

SO ORDERED:
New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair