To be argued by:
Jota Borgmann
10 Minutes

Supreme Court Of The State Of New York
Appellate Division: Second Judicial Department

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Barry Green, Philip Noonan, Kenneth Paltzik
and Lisa Soto,

Plaintiffs-Appellants,

- against -

Lakeside Manor Home For Adults, Inc.
and Lakeside Manor Homes For Adults, Inc.

Defendants-Respondents.

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Appellate Division
Docket No.:

2011-08580

# BRIEF OF PLAINTIFFS-APPELLANTS

Jota Borgmann, of counsel to
Jeanette Zelhof, Esq.
MFY Legal Services, Inc.
Attorneys for Plaintiffs-Appellants
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3717

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**Statement Pursuant to CPLR 5531**

1. The Index Number in the trial court was 104359/07.

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, Richmond County.

4. The summons and complaint were served on November 16, 2007. The answer was served on December 10, 2007.

5. The object of the action is to obtain equitable relief, damages, and attorney's fees for breach of contract, breach of the warranty of habitability, and violations of the Fair Housing Act.

6. The appeal is from the order and judgment of the Supreme Court, Richmond County dated July 6, 2011, and entered July 11, 2011, made by Justice Philip Minardo.

7. The appeal is being perfected by the appendix method.

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## QUESTIONS PRESENTED

1. Were Defendants-Respondents entitled to summary judgment, where there were issues of fact as to whether: (a) Defendants-Respondents violated their admission agreements with Plaintiffs-Appellants; (b) Defendants-Respondents breached the warranty of habitability; (c) Defendants-Respondents violated the Fair Housing Act; and (d) Plaintiffs-Appellants are entitled to damages, attorney's fees, and costs?

   The trial court determined that Defendants-Respondents were entitled to summary judgment.

2. Did Defendants-Respondents comply with the applicable telephone regulation?

   The trial court determined that Defendants-Respondents came into compliance with the telephone regulation.

3. Are Plaintiffs-Appellants' claims moot based on Defendants-Respondents' alleged post-litigation compliance?

   The trial court determined that Plaintiffs-Appellants' claims were moot.

4. If Plaintiffs-Appellants' claims are moot, do they meet the exception to the mootness doctrine?

   The trial court did not address this question.

Plaintiffs-Appellants respectfully submit this Memorandum of Law in support of their appeal of the order of the Supreme Court, Richmond County, dated July 6, 2011, which granted Defendants-Respondents' Motion for Summary Judgment and dismissed Plaintiffs-Appellants' complaint.

## PRELIMINARY STATEMENT

This case concerns the failure by Lakeside Manor, an adult care facility, to provide basic telephone service to its residents as required by regulation, contract and the warranty of habitability. Lakeside Manor has failed to provide these basic, essential services for more than 25 years—services that allow vulnerable residents to maintain contact with friends, families, health providers, and public agencies. Plaintiffs-Appellants are current and former residents of Lakeside Manor. It was only after they brought this lawsuit, and the court entered a temporary restraining order and a preliminary injunction, that Lakeside Manor changed its practices.

The final order of the trial court rests on the incorrect assumption that post-litigation compliance with the law shields a defendant from any liability. In the proceedings before the trial court, Plaintiffs-Appellants provided evidence of Lakeside Manor's violations of their admission agreements and of the warranty of habitability. Plaintiffs-Appellants provided evidence of the harm and monetary damages they suffered as a result. They also provided evidence that disability-based

animus motivated these actions in violation of the Fair Housing Act. Nevertheless, the trial court erroneously determined that Lakeside Manor came into compliance with the applicable regulation after this action was commenced and that this compliance rendered Plaintiffs-Appellants' claims moot. The trial court granted summary judgment to Lakeside Manor and dismissed the complaint. Plaintiffs-Appellants ask this Court to reverse the order of the trial court and remand the case for trial.

## STATEMENT OF FACTS

### The Parties

Plaintiffs-Appellants Barry Green ("Mr. Green") and Philip Noonan ("Mr. Noonan") are residents of Lakeside Manor, and Lisa Soto ("Ms. Soto") and Kenneth Paltzik ("Mr. Paltzik") are former residents. See A-15, 26, 38, 43. Each has been determined by the Social Security Administration to be a person with a disability, and each receives benefits as a result of that determination. See id.

Defendants-Respondents Lakeside Manor Home for Adults, Inc. and Lakeside Manor Homes for Adults, Inc. operate an adult home located at 797 Brighton Avenue, Staten Island, New York 10301. See A-16, 38. As operator of an adult care facility, Defendants-Respondents are licensed by the New York State Department of Health ("DOH") and subject to New York State law and regulations. See A-16-17,

38. Pursuant to 18 NYCRR § 487.2(a), an adult home is a type of adult care facility that is "established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision" to the residents. Defendants-Respondents hold a certificate of incorporation for the purpose of operating an adult care facility pursuant to Section 460-a of the Social Services Law. See A-16, 38. At all relevant times, Defendants-Respondents were operating as a home for adults and were authorized to do business as such within the State of New York. See A-17, 39.

Defendants-Respondents provide temporary or long-term residential care and services to adults who have physical or other limitations associated with age, disability, or other factors. It is undisputed that each of the Plaintiffs-Appellants has a disability, and that Defendants-Respondents regard each as having a disability. See A-16, 39, 391, 411, 546. During the relevant time periods, no fewer than 161 individuals resided at Lakeside Manor. See A-348-349, 350-351. Pursuant to Section 461-c of the Social Services Law, Defendants-Respondents are required to execute an admission agreement with every resident. See A-20, 23, 40, 41.

**The Admission Agreements between Plaintiffs-Appellants and Lakeside Manor**

Each Appellant lives or has lived at Lakeside Manor pursuant to a valid admission agreement and amendments thereto. See A-432, 433-442, 443, 444-455, 456-467, 622-630, 826, 855, 857, 859. Each Appellant has paid their rent in

accordance with their admission agreement and admission agreement amendments, and none owe Lakeside Manor any rent. See A-386-387, 397, 403, 409. Plaintiffs-Appellants' admission agreements all contain the same language concerning Lakeside Manor's duty to adhere to New York State Social Services Law and implementing regulations. See A-433-442, 444-454, 456-466, 622-630. The admission agreements state the following:

> The parties to this agreement understand that this facility is an adult care facility providing lodging, board, housekeeping, personal care and supervision services to the resident in accordance with New York State Social Services Law and the Regulations of the New York State Department of Social Services.

See A-433, 444, 456, 622. In setting forth the financial terms of the contract, Plaintiffs-Appellants' admission agreements state that "[t]he resident and the resident's representative agree to pay and the operator agrees to accept the following payment in full satisfaction of the services which the operator must provide according to law and regulation ...." See A-434, 445, 457, 623 (emphasis added).

**Telephone Service at Lakeside Manor: Deficient for More Than 25 Years**

Lakeside Manor is obligated to make at least five telephones available to its approximately 200 residents for outside calls. See 18 NYCRR § 487.11(l)(15) ("All facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof.")

(emphasis added). For approximately ten years prior to October 2007, there was only one pay telephone at Lakeside Manor that the entire home's population could use to make outgoing telephone calls without asking permission from adult home staff. See A-352-354. Defendants-Respondents have admitted that this was the case for approximately 26 years, from 1981 until October 2007. See A-791-792.

In October 2007, Lakeside Manor installed a second pay telephone. See A-352-354, 511. The two pay telephones were located in the lobby of Lakeside Manor. See A-356-357. It did not cost Lakeside Manor any money to install the two pay telephones, Lakeside Manor did not incur any charges for these telephones on a monthly basis, and Lakeside Manor did not make any payments to the owner of the pay telephones. See A-364-365,421, 549. When this lawsuit was filed, these two pay telephones were the only outgoing telephones that residents could use without asking permission from adult home staff. See A-372-373. Defendants-Respondents have admitted that, at times, the pay telephones have been inoperable. See A-358, 492-493.

Defendants-Respondents have admitted that they received complaints about the pay telephones from the Resident Council of Lakeside Manor.[1] See A-426, 427, 512-513, 578-583. Defendants-Respondents have also admitted that there have been

[1] A Resident Council is a type of resident organization in adult homes which may discuss and present to the administration any complaints, problems or issues, which the administration must address in writing. See 18 NYCRR § 487.5(b).

times when the only available pay telephone was in use by residents, or, after October 2007, the two available pay telephones were both in use by residents. See A-486-488.

Avi Lustig is the administrator for Lakeside Manor and he installed the two pay telephones located within Lakeside Manor. See A-490-491. The manual for Lakeside Manor's pay telephones clearly states that the default charge for toll-free phone calls is $0.00. See A-505-510, 575. Yet, Avi Lustig intentionally programmed the telephones to charge $.50 for toll-free calls. See A-494-504, 583, 584-603. Thus, residents were charged $.50 to make a telephone call to a toll-free number from these two telephones in October and November 2007. See A-359-362, 827, 856, 858, 860.

**Defendants-Respondents' Assumptions About Disabled Residents at Lakeside Manor**

As the operator, Sander Lustig makes operational decisions at Lakeside Manor, including whether to install more telephones. See A-485. In sworn testimony, Sander Lustig revealed his biases against and negative perceptions of adult home residents in explaining why Lakeside Manor had only two pay telephones. He stated: "many [residents] have either no capacity to make phone calls because of their disabilities, or no one to call." A-470. He also stated that "[t]he characteristics of adult home residents have changed in a number of other ways over the years. For example, residents today tend to have much fewer family and friend

support [sic] than years ago, resulting in less demand for outgoing telephone usage." A-471. During his deposition, Mr. Lustig reiterated his belief that additional telephones were not necessary, because some residents lack the capacity to make telephone calls and others have no one to call. See A-414-418. In his affidavit, he added that "Residents do not have to call out for [ ] services for the additional reason that as part of our case management responsibilities, it is our job to arrange for all needed services. We do that, not the residents." A-470-471.

In discussing complaints, like those made by Mr. Green and by Plaintiffs-Appellants' attorney on behalf of Plaintiffs-Appellants, Sander Lustig elaborated on his perceptions of the residents:

> Our residents are for the most part mentally ill, and a [sic] dually diagnosed with substance abuse issues. That is why they are in the Home. Mentally ill residents often complain about things that have no foundation or substance. Residents routinely withdraw their complaints, not because they have been threatened or abused, but because the complaint is without any basis.

A-474. During his deposition, Mr. Lustig reiterated his belief that people who have psychiatric disabilities often complain about things that have no foundation or substance. A-411-412, 419. He added that he believes that people who are mentally ill tend to lie because "lying is part of the disease." A-412. At no point did Sander Lustig provide an explanation for his decision to limit telephone access to residents that was supported by the Social Services Law or implementing regulations.

**Harm Suffered by Plaintiffs-Appellants Due to Inadequate Telephone Service**

Plaintiffs-Appellants have been injured and suffered damages as a result of Defendants-Respondents' breach of contract, breach of the warranty of habitability, and violations of the Fair Housing Act. See A-827-828, 855-586, 857-858, 859-861. Because there have not been enough pay telephones at Lakeside Manor for its 200 residents to share: (1) Plaintiffs-Appellants have often not been able to make telephone calls that they wanted or needed to make; (2) Plaintiffs-Appellants—including those who have scoliosis and arthritis or chronic obstructive pulmonary disease—have had to walk to another pay telephone in the neighborhood when the pay telephones at Lakeside Manor were not working or were being used by other residents; and (3) Mr. Green and Mr. Paltzik have incurred significant costs by having to order private telephone services. See id. Moreover, Plaintiffs-Appellants were unable to make toll-free calls, including calls to the DOH, when the pay telephones at Lakeside Manor required a $.50 deposit in order to make the "toll-free" call. See id.

**Harm Suffered by Mr. Green**

Mr. Green calls a number of people on a regular basis. See A-179-193, 827. When there were two or fewer operable telephones for Lakeside Manor's 200 residents, Mr. Green was often unable to contact his family or friends, to arrange services with health care service providers, to speak with attorneys or advocates, to lodge complaints about conditions in the home with government agencies, to

coordinate transportation to and from the home, and to arrange services with other providers. See A-827. Between when he began living at Lakeside Manor and October 2007, these problems occurred when the one pay telephone was inoperable or being used by residents or staff of Lakeside Manor. See id. After October 2007, this occurred when the two pay telephones were either inoperable or being used by residents or staff of Lakeside Manor. See id. For example, during the first half of November 2008, the pay telephone that is located closer to the front door of the building was inoperable for approximately two weeks. See id. For approximately one month during October-November 2007, Mr. Green experienced problems trying to make toll-free calls using the pay telephones located at Lakeside Manor. See id.; A-61. Mr. Green estimates that he was not able to make telephone calls approximately fifteen to twenty times a week during those periods when there was no operable pay telephone at Lakeside Manor or no pay telephone that allowed for free toll-free telephone calls. See A-179-180. During those periods when at least one pay telephone was operable and did not charge for toll-free telephone calls, he estimates that he was not able to make telephone calls approximately seven to ten times a week. See id. Mr. Green was forced to wait for a time ranging from a few minutes—the time he might wait while another resident or residents used the pay telephone(s)—to several weeks, the time it sometimes took for the pay telephone(s) to be fixed. See id.

Mr. Green had to walk to another pay telephone in the neighborhood when the pay telephones in Lakeside Manor were inoperable or in use. See A-71-72, 827. Mr. Green does not recall the specific date and time of each and every instance in which he had to find a telephone outside Lakeside Manor to use. See A-194-195. However, he estimates that such instances have happened approximately fifty times. See id. Walking several blocks to use that pay telephone was difficult for Mr. Green because he has scoliosis and arthritis. See A-827. Unfortunately, that pay telephone was also unavailable or inoperable approximately three times when he went to use it. See A-194-195.

Sometimes, when the pay telephone(s) were being used by other residents or Lakeside Manor staff, Mr. Green was not able to make telephone calls that he planned to make. See A-79-89, 827. He waited to make telephone calls on multiple occasions. See A-79-89. At various times, he had to use other residents' wireless telephones to make telephone calls and paid them money or bought them a cup of coffee, for example, in return for such use. A-178. During May 2008, Mr. Green ordered telephone service from Verizon because there were not enough telephones that allowed residents to make outgoing telephone calls at Lakeside Manor. See A-827. Mr. Green received and paid numerous bills from Verizon, including an initial bill of $219.26. See A-288-312, 828.

**Harm Suffered by Mr. Noonan**

Because there were not enough telephones for the 200 residents, there were times when Mr. Noonan was not able to make telephone calls to family or friends. See A-856. This occurred from 1991, when he began living at Lakeside Manor, until well after this action was commenced. Mr. Noonan estimates that he was not able to make telephone calls a few times. See A-211-212, 856; see also A-107. Wait times were generally approximately a few minutes while another resident or residents used the pay telephone(s). See A-211-212. More generally, he has seen lines form for residents to use the pay telephones located at Lakeside Manor. See A-108-109. Mr. Noonan had to walk to another pay telephone in the neighborhood when the pay telephone(s) in Lakeside Manor were not working or were being used by other residents. See A-109-110, 221-222.

**Harm Suffered by Mr. Paltzik**

For about one month during October-November 2007, Mr. Paltzik experienced problems trying to make toll-free calls using the pay telephones located at Lakeside Manor. See A-860. More generally, because there were not enough telephones for the 200 residents, Mr. Paltzik was often not able to make telephone calls to family or friends and to contact government agencies to make complaints about conditions in the home. See id., A-227-233. Between when he began living at Lakeside Manor and October 2007, these problems occurred when

the one pay telephone was inoperable or being used by residents or staff of Lakeside Manor. See A-860. After October 2007, this occurred when the two pay telephones were either inoperable or being used by residents or staff of Lakeside Manor. See id.

Mr. Paltzik estimates that he was not able to make telephone calls approximately four times a week during those periods when there has not been an operable pay telephone at Lakeside Manor and/or no pay telephone that allowed for free toll-free telephone calls. See id, A-227-228. During those periods when at least one pay telephone was operable and at least one pay telephone allowed for free toll-free telephone calls, he estimates that such instances happened approximately two times a week. See id. Wait times ranged between a few minutes while another resident or residents have used the pay telephone(s) and the weeks it sometimes took for the pay telephone(s) to be fixed. See id.

Mr. Paltzik had to walk to another pay telephone in the neighborhood when the pay telephone(s) in Lakeside Manor were not working or were being used by other residents. See A-144-145, 234-235, 860. He estimates that such instances happened several times a week during those periods when there was no operable pay telephone at Lakeside Manor Home for Adults and/or no pay telephone that allowed for free toll-free telephone calls. See A-234-235. Mr. Paltzik does not recall the specific date and time of each and every occasion in which those pay

telephones were unavailable or inoperable, but he estimates that he had to wait for a telephone occasionally and that there were times when both telephones were inoperable when he tried to use them. See id. Walking to use those pay telephone was difficult for Mr. Paltzik because he has chronic obstructive pulmonary disease. See A-860.

In or around June 2008, Mr. Paltzik ordered telephone service through Time Warner because there were not enough telephones that allowed residents to make outgoing telephone calls at Lakeside Manor. See id. Mr. Paltzik received and paid numerous bills from Time Warner for telephone service at Lakeside Manor. See A-323-341, 860-861.

**Harm Suffered by Ms. Soto**

For about one month during October-November 2007, Ms. Soto experienced problems trying to make toll-free calls using the pay telephones located at Lakeside Manor. See A-858. More generally, because there have not been enough telephones for the 200 residents, Ms. Soto was often not able to make telephone calls to family, friends, and health service providers. See id.; A-149, 154-155, 157-159, 246-247. These problems occurred between 2004, when she began living at Lakeside Manor, until well after this action was commenced in November 2007. See A-858.

Ms. Soto estimates that she was not able to make telephone calls

approximately four times a week during those periods when there was no operable pay telephone at Lakeside Manor and/or no pay telephone that allowed for free toll-free telephone calls. See id.; A-246-247. During those periods when at least one pay telephone was operable and at least one pay telephone allowed for free toll-free telephone calls, she estimates that such instances happened at least six times. See id. Ms. Soto was forced to wait for times ranging from a few minutes—while she waited for another resident or residents to use the pay telephone(s)—to several weeks, the time it sometimes took for the pay telephone(s) to be fixed. See id.

Ms. Soto had to walk to another pay telephone in the neighborhood when the pay telephone(s) in Lakeside Manor were not working or were being used by other residents. See A-160-161, 162-163, 858. Ms. Soto does not recall the specific date and time of each and every instance in which she had to find a telephone outside Lakeside Manor to use. See A-257-258. However, she estimates that such instances have happened approximately six times. See id. She generally used or sought to use the pay telephone located near 480 Castleton Avenue, Staten Island, New York 10301. See id., A-858. Unfortunately, she sometimes had to wait to use that telephone and it was inoperable approximately two times when she tried to use it. See A-257-258.

**Issuance of DOH Violation to Lakeside Manor Regarding Telephone Service**

During an inspection on November 16, 2007, the DOH found that Lakeside Manor was in violation of the regulations governing adult homes because it did not have enough outgoing telephones and it was charging people for toll-free calls. See A-528-531, 597-598. The DOH inspector recorded that he:

> tested the pay telephones in the lobby. The phones required a $0.50 surcharge to make toll free calls. According to the Employee #1, the fee was established by the facility as basic telephone service charge. Additionally, the (2) pay telephones did not satisfy the requirement for the number of telephones available for outside calls.

A-597. Avi Lustig was "Employee #1." See A-602. Defendants-Respondents applied to the DOH for a waiver of the applicable regulations, but its application was denied. See A-528-540, 604-614.

**Resident Complaints About Telephone Service**

The Resident Council made multiple complaints to the administration about the number and operability of pay telephones. Defendants-Respondents have acknowledged that they have received complaints about the pay telephones from the Resident Council. See A-426-427, 512-527, 579-583. Mr. Green complained to management and the front desk regarding the number of telephones, the cost of toll-free calls, and the lack of an operable pay telephone in the home several times during 2007 and occasionally during prior years. See A-63, 90-91, 173-175, 827. In response to one such complaint, Avi Lustig said that they were looking into installing

another telephone and that he would fix the problem with toll-free telephone calls. See A-174-175. However, the problems continued and residents were still being charged for toll-free telephone calls until after this lawsuit was filed. See A-174-175, 827.

## PROCEDURAL HISTORY

On November 15, 2007, Plaintiffs-Appellants initiated this proceeding by filing a verified Complaint by Order to Show Cause. On March 27, 2008, the trial court issued a written order granting Plaintiffs-Appellants' motion for a preliminary injunction and ordering Defendants-Respondents, inter alia, to have additional pay telephones installed. See A-47-52.

Defendants-Respondents failed to install additional telephones as ordered. Accordingly, Plaintiffs-Appellants filed an Order to Show Cause to hold Defendants-Respondents in contempt. The trial court declined to hold Defendants-Respondents in contempt of court, but recognized their noncompliance and ordered them to either install "additional pay telephones and/or other telephone services as approved or required by the New York State Department of Health pursuant to regulation 18 N.Y.C.R.R. § 487.11(l)(15)." See A-54-55.

The trial court then transferred the case to the Civil Court of the City of New York for Richmond County. See A-56. The parties completed discovery in or around October 2008.

On December 3, 2008, Defendants-Respondents moved for summary judgment. Plaintiffs-Appellants opposed the motion and cross-moved for partial summary judgment. In an order entered April 6, 2009, the Civil Court denied both motions. See A-631-634. The Civil Court found that genuine issues of material fact existed as to the viability of all three of Plaintiffs-Appellants' claims. See A-633-634. Defendants-Respondents appealed the denial of their Motion for Summary Judgment and the Appellate Term held that the Civil Court lacked subject matter jurisdiction to grant the declaratory and injunctive relief sought by Plaintiffs-Appellants. See A-635-639. Plaintiffs-Appellants moved to retransfer the case and the trial court granted the motion on January 6, 2011. See A-640.

Defendants-Respondents moved for summary judgment in April 2011. A-643-823. Plaintiffs-Appellants cross-moved for partial summary judgment. A-824-929. The trial court granted Defendants-Respondents' motion, finding that the telephone regulation "has been satisfied by the facility." A-9. The court cited the affidavit of Sander Lustig indicating that Lakeside Manor maintained two pay telephones in the lobby of the facility along with telephones in the first floor offices of the facility, that the building had been rewired in May 2008—approximately six months after this lawsuit was filed—to install telephone service in resident rooms, and that there was a Federal wireless telephone program that provided service to eligible applicants. A-9-10. The court found that these facts

were undisputed and that "there is no competent evidence before the court suggesting that these upgrades and alternatives are insufficient to bring Lakeside Manor into full compliance with the relevant regulation." A-9-10 (emphasis added).

The trial court also cited the affidavit of Amy Chevalier of the New York Coalition for Quality Assisted Living[2] which stated that Lakeside Manor "presently meets the relevant telephone access requirement" because the regulation did not require pay telephones, the building had been rewired for telephone service, the Federal Lifeline Program provided service to residents, and the Department of Health had approved the new telephone system "in operation since November 2008," A-10-11 (emphasis added), which is approximately one year after this lawsuit was filed.

The trial court further found that Plaintiffs-Appellants failed to raise any issues of fact or any other basis to deny Defendants-Respondents' motion. A-11. The trial court did not address whether Defendants-Respondents breached Plaintiffs-Appellants' admission agreements, breached the warranty of habitability, or violated the Fair Housing Act. The trial court also failed to address Plaintiffs-Appellants' requests for declaratory and permanent injunctive relief, damages,

[2] The New York Coalition for Quality Assisted Living is an organization of adult care and assisted living facility operators. It "represents its members before the legislature, regulatory and policy-making bodies in New York State and at the federal level." From the "About NYCQAL" web page found at http://www.nycqal.com/index539a.html?q=node/2.

attorney's fees, and costs.

## ARGUMENT

The trial court improperly granted Defendants-Respondents summary judgment where there were disputed, material issues of fact regarding each cause of action and Plaintiffs-Appellants' requests for a declaratory judgment, permanent injunctive relief, damages, attorney's fees, and costs. The trial court erroneously determined that Defendants-Respondents have complied with the applicable telephone regulation. Furthermore, the trial court erroneously determined that Plaintiffs-Appellants' claims were moot based on its finding of post-litigation compliance by Defendants-Respondents. Even if Plaintiffs-Appellants' claims were moot, they meet the exception to the mootness doctrine and the trial court should have made determinations on each of those claims.

### I. The trial court erred in granting summary judgment where there were disputed, material issues of fact on each cause of action and on Plaintiffs-Appellants' requests for permanent injunctive relief, damages, attorney's fees and costs

A motion for summary judgment "shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." CPLR § 3212(b); see Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505 (1957). In evaluating a motion for summary judgment, "the facts must be viewed in the light most favorable to the nonmoving party." Forrest v. Jewish

Guild for the Blind, 3 N.Y.3d 295, 315, 786 N.Y.S.2d 382, 398 (2004). "It is . . . well established that issue finding, as opposed to issue determination, is the key to summary judgment." Stretch v.Tedesco, 263 A.D.2d 538, 539, 693 N.Y.S.2d 203 (App. Div. 2d Dep't 1999). Here, the trial court viewed the facts in the light most favorable to the moving party, ignored the evidence presented by Plaintiffs-Appellants and engaged in issue determination to reach the conclusion that Defendants-Respondents were entitled to summary judgment.

### A. There were disputed issues of fact as to whether Defendants-Respondents breached the relevant telephone regulation in violation of Plaintiffs-Appellants' admission agreements and the warranty of habitability

Plaintiffs-Appellants presented triable issues of fact as to whether Defendants-Respondents violated the applicable telephone regulation and thereby breached their admission agreements with Plaintiffs-Appellants. The elements of a breach of contract claim are: (1) the existence of a contract; (2) due performance of the contract by the plaintiff; (3) breach of contract by the defendant; and, (4) damages resulting from the breach. See Palmetto Partners, L.P. v. AJW Qualified Partners, 83 A.D.3d 804, 806, 921 N.Y.S.2d 260, 264 (App. Div. 2d Dep't 2011). Defendants-Respondents have admitted that Plaintiffs-Appellants had admission agreements with Lakeside Manor and that Plaintiffs-Appellants performed in accordance with those agreements. Thus, Plaintiffs-Appellants proved the first two elements or, at minimum, presented issues of fact with respect to those elements.

Additionally, they presented issues of fact as to whether Defendants-Respondents violated the relevant telephone regulation, thereby breaching the admission agreements and causing Plaintiffs-Appellants to suffer damages.

Plaintiffs-Appellants also presented triable issues of fact as to whether Defendants-Respondents breached the implied warranty of habitability. The implied warranty of habitability requires that the premises be "fit for human habitation" and "for the uses reasonably intended by the parties," and that residents not be subjected to conditions that "are dangerous, hazardous or detrimental to their life, health, or safety." See Grammer v. Turits, 271 A.D.2d 644, 646, 706 N.Y.S.2d 453, 456 (App. Div. 2d Dep't 2000). Plaintiffs-Appellants presented issues of fact as to whether Defendants-Respondents violated the telephone regulation and whether the resulting failure to provide required telephone service amounted to a breach of the warranty of habitability by interfering with the use of the premises as reasonably intended by the parties and whether Defendants-Respondents had notice of the breach. See Solow v. Wellner, 150 Misc. 2d 642, 650, 569 N.Y.S.2d 882 (Civ. Ct. N.Y. Cty. 1991) (stating that the warranty of habitability requires that a residence "be maintained in accordance with the reasonable expectations of the tenant" and that "[c]ertain amenities not necessarily life threatening, but consistent with the nature of the bargain—air conditioning would be an example—fall under the protection of this branch of the warranty").

The trial court found that Defendants-Respondents had complied with the telephone regulation based on the affidavit of operator Sander Lustig describing the state of telephone services at Lakeside Manor nearly two years after the lawsuit was filed. The trial court did not determine at what time Defendants-Respondents became compliant, although its order indicates it was some time after the commencement of this action. See A-9-10 ("[T]here is no competent evidence before the court suggesting that these upgrades and alternatives are insufficient to bring Lakeside Manor into full compliance with the relevant regulation") (emphasis added). It listed the following alleged facts from Lustig's affidavit in support of its finding of compliance: (1) the installation of a system offering optional telephone service in residents' rooms; (2) the two pay telephones in the lobby; and (3) the provision of free wireless service with free minutes by Virgin Mobile through a Federal telephone program;[3] and (4) the "numerous other telephones located in various offices on the first floor of the facility." A-9-10. Section II, below, will address the sufficiency of this evidence to support the conclusion that Defendants-Respondents complied with the telephone regulation at any point in time. For the unspecified period of time in which the trial court indicated that Defendants-Respondents had not complied with the telephone

[3] Virgin Mobile was conditionally designated as a provider of Lifeline wireless service in New York State by the Federal Communications Commission in March 2009, about 17 months after this lawsuit was filed. See FCC 09-18, CC Docket No. 96-45 (adopted March 4, 2009).

regulation, the trial court failed to address whether Defendants-Respondents breached Plaintiffs-Appellants' admission agreements or the implied warranty of habitability.

Plaintiffs-Appellants presented evidence that Defendants-Respondents did not install a telephone system until nearly a year after Plaintiffs-Appellants commenced this action and subsequently moved for contempt. Plaintiffs-Appellants also presented evidence that, in November 2007, the DOH found Lakeside Manor in violation of the telephone regulation for failing to provide a sufficient number of outgoing telephones and charging for toll-free calls. The DOH's finding was made when there were already two pay telephones in the lobby as well as telephones in Lakeside Manor's first floor offices. The DOH's finding of a violation of the regulation despite those facts is consistent with Plaintiffs-Appellants' assertions that Defendants-Respondents were in violation of the telephone regulation at the time they brought this lawsuit and that telephones for which residents must ask permission to use are not "available for outside calls" by residents as required by the DOH regulation. See 18 NYCRR § 487.11(l)(15) ("All facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof"). Thus, Plaintiffs-Appellants presented issues of fact as to whether Defendants-Respondents breached the Plaintiffs-Appellants' admission agreements and the

implied warranty of habitability.

### B. There were disputed issues of fact as to whether Defendants-Respondents discriminated against Plaintiffs-Appellants in violation of the Fair Housing Act

Plaintiffs-Appellants presented the trial court with strong evidence that Defendants-Respondents' failure to provide required telephone services was motivated by animus towards residents based on their disabilities. The Fair Housing Act ("FHA") as amended prohibits housing discrimination on the basis of disability. See 42 U.S.C. § 3601 et seq. In order to establish a prima facie case of housing discrimination under the FHA, Plaintiffs-Appellants were required to demonstrate that: (1) Plaintiffs-Appellants are members of a protected class; (2) Lakeside Manor is a "dwelling"; (3) Plaintiffs-Appellants rented units in Lakeside Manor; (4) the service in question is a service or facility in connection with Lakeside Manor; (5) Defendants-Respondents discriminated 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 a dwelling; and (6) Plaintiffs-Appellants have been aggrieved by the discriminatory acts. See 42 U.S.C. § 3604(f)(2).

Plaintiffs-Appellants established for the trial court that the first four elements of their claim were undisputed or that they had presented triable issues of fact. They provided evidence that: Plaintiffs-Appellants are members of a

protected class because they are all "handicapped" within the meaning of 42 U.S.C. § 3602(h); Lakeside Manor is a dwelling as a building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families pursuant to 42 U.S.C. § 3602(b); Plaintiffs-Appellants rented units at Lakeside Manor; and telephone service is a service in connection with residency at Lakeside Manor because it is required by 18 NYCRR § 487.11(l)(15) and Plaintiffs-Appellants' admission agreements. Subpart 1, below, describes how Defendants-Respondents' deposition testimony provides evidence of their intentional discrimination against Plaintiffs-Appellants based on their disabilities in violation of the FHA and subpart 2 describes how Plaintiffs-Appellants were aggrieved by this discrimination.

**1. Plaintiffs-Appellants presented evidence demonstrating issues of fact as to whether Defendants-Respondents intentionally discriminated against them in the provision of telephone service connected with residency at the facility**

To prevail on a claim of intentional discrimination under the FHA, a plaintiff can establish a prima facie case by showing that animus against a protected group was a significant or "motivating factor" behind the challenged action. See LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995); Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs, 257 F. Supp. 2d 208, 225 (D.D.C. 2003) ("It is well settled that a defendant's decision or action constitutes disparate treatment, or intentional discrimination, when a person's disability was a

'motivating factor' behind the challenged action or decision."); Tsombanidis v. City of W. Haven, 129 F. Supp. 2d 136, 151 (D. Conn. 2001). "The discriminatory purpose need not be malicious or invidious, nor need it figure 'solely, primarily, or even predominantly' into the motivation behind the challenged action." Cmty. Servs. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. 2005) (quoting Cmty. Hous. Trust, 257 F. Supp. 2d at 225) (emphasis added); see also Horizon House Developmental Servs. v. Upper Southampton, 804 F. Supp. 683, 696 (E.D. Pa. 1992) ("In order to prove intentional discrimination it is not necessary to show an evil or hostile motive"); Bryant Woods Inn v. Howard County, 911 F. Supp. 918, 929 (D. Md.1996), aff'd, 124 F.3d 597 (4th Cir. 1997) ("An actionable intent to discriminate need not be motivated by dislike for, or animosity against, people with disabilities; the legislative history of the Fair Housing Act shows that Congress intended equally to prohibit discrimination resulting from false and over-protective assumptions about the needs of handicapped people . . .") (internal quotations omitted) (emphasis added). Instead, "[t]he plaintiff is only required to 'show that a protected characteristic played a role in the defendant's decision to treat her differently.'" Cmty. Servs. v. Wind Gap Mun. Auth., 421 F.3d at 177 (quoting Cmty. Hous. Trust, 257 F. Supp. 2d at 225). Thus, "[i]t is a violation of the [FHA] to discriminate even if the motive was benign or paternalistic." Horizon House Developmental Servs, 804 F. Supp. at 696 (emphasis added).

Intentional discrimination claims are evaluated under the McDonnell Douglas burden-shifting framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). A plaintiff's "initial burden of production under the McDonnell Douglas analysis is 'minimal.'" See Regional Econ. Cmty. Action Program, Inc. v. Middleton, 294 F.3d 35, 49 (2d Cir. 2002). If a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to assert a legitimate, nondiscriminatory rationale for the challenged decision. See id. After the defendant asserts such a rationale, the burden shifts back to the plaintiff to demonstrate that the purported rationale is a pretext for discrimination. See Schnabel v. Abramson, 232 F.3d 83, 87 (2d Cir. 2000).

In LeBlanc-Sternberg, the court held that factors to be considered in determining the existence of animus include "contemporary statements by members of the decisionmaking body" and "substantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 67 F.3d 412, 425. In this case, there are both "statements made by the decisionmaking body" and "substantive departures from factors usually considered" that indicate animus toward Plaintiffs-Appellants based on their disabilities. This animus played a significant role in Defendants-Respondents' decisions regarding the number of pay telephones to install and maintain and the charging of residents for toll-free calls.

In explaining why Lakeside Manor had only two pay telephones, operator Sander Lustig stated that "many [residents] have either no capacity to make phone calls because of their disabilities, or no one to call." A-470. He also stated that "[t]he characteristics of adult home residents have changed in a number of other ways over the years. For example, residents today tend to have much fewer family and friend support [sic] than years ago, resulting in less demand for outgoing telephone usage." A-471. During his deposition, Mr. Lustig reiterated his belief that additional telephones were not necessary, because some residents lack the capacity to make telephone calls and others have no one to call. A-414-418. He stated in his sworn affidavit that, "Residents do not have to call out for [ ] services for the additional reason that as part of our case management responsibilities, it is our job to arrange for all needed services. We do that, not the residents." A470-471 (emphasis in the original).

In discussing complaints, like those made by Mr. Green and by Plaintiffs-Appellants' attorney on behalf of Plaintiffs-Appellants, Mr. Lustig stated:

> Our residents are for the most part mentally ill, and a [sic] dually diagnosed with substance abuse issues. That is why they are in the Home. Mentally ill residents often complain about things that have no foundation or substance. Residents routinely withdraw their complaints, not because they have been threatened or abused, but because the complaint is without any basis.

A-474. During his deposition, Mr. Lustig reiterated his belief that people who have

psychiatric disabilities often complain about things that have no foundation or substance. A- 411-412, 419. He added that he believes that people who are mentally ill tend to lie because "lying is part of the disease." A-412.

These statements and explanations by Defendants-Respondents demonstrate unequivocally that a discriminatory purpose was a "motivating factor" behind the challenged action. It is important to reiterate that "[t]he discriminatory purpose need not be malicious or invidious, nor need it figure in 'solely, primarily, or even predominantly' into the motivation behind the challenged action." Cmty. Servs. v. Wind Gap Mun. Auth., 421 F.3d 170, 177 (3d Cir. Pa. 2005) (quoting Cmty. Hous. Trust, 257 F. Supp. 2d at 225). Moreover, "[i]t is a violation of the FHAA to discriminate even if the motive was benign or paternalistic," Horizon House Developmental Servs. v. Upper Southampton, 804 F. Supp. at 696 (emphasis added), or resulted from "false and over-protective assumptions about the needs of handicapped people," Bryant Woods Inn v. Howard County, 911 F. Supp. at 929 (emphasis added).

In this case, there is also incontrovertible evidence that Lakeside Manor made a substantive departure from normal procedure as an entity that is licensed and regulated by the DOH. The DOH's regulations are "factors usually considered important" by Lakeside Manor in its general course of business. See LeBlanc-Sternberg v. Fletcher, 67 F.3d at 425. Lakeside Manor is required to have at least

one telephone available for outside calls for every 40 residents or portion thereof. However, as detailed above, Sander Lustig believes that people with mental illness either lack the capacity to use telephones or have no one to call and that they are liars. Because of these assumptions about people with disabilities, Defendants-Respondents decided to ignore regulatory requirements and provide only one or two pay telephones to 200 residents for more than 26 years. Defendants-Respondents failed to provide any evidence of a non-discriminatory rationale for their decisions to make available only one to two pay telephones and to charge for toll-free calls.

### 2. Plaintiffs-Appellants presented evidence demonstrating issues of fact as to whether they were aggrieved by Defendants-Respondents' discriminatory acts

As a result of Defendants-Respondents' discriminatory housing practices, Plaintiffs-Appellants have been injured and suffered damages. As detailed in the above Statement of Facts, because there have not been enough pay telephones at Lakeside Manor for its 200 residents to share, Plaintiffs-Appellants have often not been able to make telephone calls that they wanted or needed to make, have had to walk distances to another pay telephone in the neighborhood and, in some instances, have incurred costs by having to order private telephone services. Moreover, Plaintiffs-Appellants experienced problems making toll-free calls during October-November 2007, when the two pay telephones charged $.50 for

toll-free telephone calls. Furthermore, the lack of access to telephones and the lack of ability to make toll-free calls interfered with Plaintiffs-Appellants' basic rights pursuant to the Social Services Law to, inter alia, have private communications with persons of their choosing, manage their financial affairs, and care for their personal needs. Thus, Plaintiffs-Appellants established issues of fact as to whether they are "aggrieved persons" within the meaning of the FHA.

### C. There were disputed issues of fact as to whether Plaintiffs-Appellants were entitled to injunctive relief

Plaintiffs-Appellants presented evidence to the trial court that Defendants-Respondents' violations of the telephone regulations continued for more than 25 years and that they did not install a telephone system until after this action was filed and a motions for a preliminary injunction and contempt were made. The trial court erroneously stated that, "it is undisputed that as a result of [the March 28, 2008] order, defendants installed a new pay phone and stopped charging for toll-free calls." A-8. This flawed account of this action's procedural history ignores the subsequent motion for contempt by Plaintiffs-Appellants in June 2008 after Defendants-Respondents failed to comply with the March 2008 order.[4] See

[4] It should be noted that, in Plaintiffs-Appellants' brief in support of their motion to retransfer this action from the Civil Court back to the Supreme Court, Plaintiffs-Appellants mistakenly stated that Defendants installed a new pay telephone as a result of the March 2008 order. See A-653. This brief was used as an exhibit by Lakeside Manor in its motion for summary judgment. See A-646. However, in Plaintiffs-Appellants' brief in support of their cross motion for summary judgment and in opposition to Lakeside Manor's motion for summary judgment, Plaintiffs-Appellants provided a detailed procedural history, including Lakeside Manor's failure

A-54-55.

Plaintiffs-Appellants have also shown that the telephone system installed by Defendants-Respondents was part of a temporary program that was never made permanent by Lakeside Manor or the DOH. See A-738-739. Defendants-Respondents' longstanding recalcitrant conduct warrants permanent injunctive relief. See Inc. Vil. of Freeport v. Jefferson Indoor Marina, Inc., 162 A.D.2d 434, 436-37, 556 N.Y.S.2d 150, 152 (App. Div. 2d Dep't 1990) (granting permanent injunctive relief in light of the plaintiff's evidence that defendants continued to violate the zoning ordinance despite a cease and desist order and revocation of permit).

### D. There were disputed issues of fact as to whether Plaintiffs-Appellants were entitled to damages

At the very least, Plaintiffs-Appellants have presented evidence establishing triable issues of fact on their entitlement to damages. The trial court erred when it granted Defendants-Respondents summary judgment and dismissed the complaint. See Hirsch Elec. Co., Inc. v. Cmty. Servs., Inc., 145 A.D.2d 603, 604, 536 N.Y.S.2d 141, 142 (App. Div. 2d Dep't 1988) (holding that the trial court improperly granted summary judgment where "substantial questions of fact exist which entitle the plaintiff to a trial with respect to its claim of $1,552,563 for delay damages"); Belgian Endive Mktg. Bd., Inc. v. Am. Airlines, Inc., 176 Misc.2d 206,

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to comply with the March 2008 Order. See A-890.

209, 673 N.Y.S.2d 817 (App. Term 2d Dep't 1998) (finding issues of fact were raised by parties' moving papers as to whether damages to shipment of imported produce occurred during international transportation). Subpart 1, below, details the triable issues of fact presented on Plaintiffs-Appellants' claims for damages for breach of contract and breach of the warranty of habitability. Subpart 2, below, details the triable issues of fact presented on Plaintiffs-Appellants' claims for compensatory and punitive damages under the FHA.

### 1. Plaintiffs-Appellants established triable issues of fact as to whether they suffered damages on their claims for breach of contract and breach of the warranty of habitability

Plaintiffs-Appellants presented concrete evidence that they have been injured and suffered damages. As detailed in the above Statement of Facts, because there have not been enough pay telephones at Lakeside Manor for its approximately 200 residents to share: (1) Plaintiffs-Appellants have often not been able to make telephone calls that they wanted or needed to make; (2) Plaintiffs-Appellants – including those who have scoliosis and arthritis or chronic obstructive pulmonary disease – have had to walk to another pay telephone in the neighborhood when the pay telephone(s) in Lakeside Manor were not working or were being used by other residents; and (3) Mr. Green and Mr. Paltzik incurred costs by having to order private telephone services and provided documentation of those costs. Moreover, Plaintiffs-Appellants experienced problems making toll-

free calls for approximately one month during October-November 2007, when the two pay telephones located within Lakeside Manor charged $.50 for toll-free telephone calls. This evidence presents triable issues of fact regarding Plaintiffs-Appellants' damages.

### 2. Plaintiffs-Appellants established triable issues of fact on compensatory and punitive damages under the Fair Housing Act

By establishing issues of fact as to whether they are aggrieved by Defendants-Respondents' discriminatory acts, Plaintiffs-Appellants presented triable issues of fact as to their entitlement to actual damages, punitive damages, injunctive relief, and reasonable attorney's fees and costs pursuant to 42 U.S.C. § 3613(c). For the reasons set forth in subpart D.1., above, Plaintiffs-Appellants established triable issues of fact regarding whether they are entitled to compensatory damages.

"The Fair Housing Act provides for the recovery of punitive damages by victims of discriminatory housing practices." Badami v. Flood, 214 F.3d 994, 997 (8th Cir. 2000) (citing 42 U.S.C. § 3613[c][1]). The awarding of punitive damages pursuant to the FHA "is governed by federal rather than state law." United States v. Big D Enterprises, Inc., 184 F.3d 924, 932 (8th Cir. 1999), cert. denied, 146 L. Ed. 2d 311 (2000).

Federal courts have consistently held that punitive damages are recoverable

in actions under the FHA "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Asbury v. Brougham, 866 F.2d 1276, 1282 (10th Cir. 1989) (quoting Smith v. Wade, 461 U.S. 30, 56 [1983][internal quotation marks omitted]); see United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992); see also Fountila v. Carter, 571 F.2d 487, 491 (9th Cir. 1978) (explaining that actual malice is not a prerequisite to the recovery of punitive damages for discriminatory housing practices). Here, Plaintiffs-Appellants presented triable issues of fact as to whether Defendants-Respondents, by denying Plaintiffs-Appellants access to the required number of telephones and the ability to make toll-free telephone calls based on false assumptions about people with disabilities, demonstrated a reckless or callous indifference to the rights of Lakeside Manor's disabled residents.

### E. There were disputed issues of fact as to whether Plaintiffs-Appellants were entitled to attorney's fees and costs

Plaintiffs-Appellants' complaint includes claims for attorney's fees and costs pursuant to the FHA, which may be awarded to the prevailing party. See 42 U.S.C. § 3613(c)(2). A plaintiff is a prevailing party where he "succeeds on any significant issue in litigation which achieves some of the benefit sought in the lawsuit." Rozell v. Ross-Holst, 576 F. Supp 2d 527, 536 (S.D.N.Y. 2008) (internal quotations omitted). "Success is defined as a change in the legal relationship

between the parties that materially benefits the plaintiff." Id. Even where the financial recovery of a plaintiff may be small, the purpose of fee-shifting statutes like the FHA is to "assur[e] that civil rights claims of modest cash value can attract competent counsel." Davis v. City of New York, 10 Civ. 699 SAS, 2011 WL 4946243 at *3 (S.D.N.Y. Oct. 18, 2011).

Although the trial court, as described above, did not present an accurate account of this action's procedural history, it did acknowledge that Defendants-Respondents took action in response to this litigation. See A-8 ("as a result of [the March 28, 2008] order, defendants installed a new pay phone and stopped charging for toll-free calls"). Thereafter, as Defendants-Respondents have admitted, they installed a new telephone system in the home. See A-662-663; see also A-811-812 (Defendants-Respondents' brief in support of their motion for summary judgment, which stated that "since this case was filed, Lakeside has resolved each and every one of Plaintiffs' complaints regarding telephone access at Lakeside"). Although Plaintiffs-Appellants dispute that Defendants-Respondents thereby met the applicable regulation, increased telephone service was the type of relief sought by Plaintiffs-Appellants, and it would not have been obtained but for Plaintiffs-Appellants bringing this action and moving for both preliminary injunctive relief and an order of contempt against Defendants-Respondents. Thus, there are material issues of fact as to whether Plaintiffs-Appellants are entitled to attorney's

fees and costs related to this litigation.

## II. The trial court erroneously determined that Defendants-Respondents came into compliance with the telephone regulation

The trial court erroneously determined that Defendants-Respondents had complied with the telephone regulation which provides that "[a]ll facilities shall, with the cooperation of the telephone company, have at least one telephone available for outside calls for every 40 residents or portion thereof." 18 NYCRR § 487.11(l)(15). Defendants-Respondents failed to present sufficient evidence to support a determination that there has ever been one telephone available for outside calls for every 40 residents. Defendants-Respondents presented evidence in their motion for summary judgment that they had installed a telephone system whereby "[r]esidents can voluntarily purchase the ability to make phone calls from their indivual room [sic] . . . ." A-731. This evidence indicated that residents could make outgoing telephone calls by signing up for this system or using the pay telephones in the lobby. A-731. Defendants-Respondents submitted evidence that this proposal for telephone service was approved by the DOH for a six-month pilot period beginning in August 2008 with several specific qualifications. See A-738-739. Defendants-Respondents failed to submit any evidence regarding the number of residents who had signed up for in-room telephone service. They also failed to submit any evidence as to whether they met the DOH's qualifications for the pilot program. See id.

Defendants-Respondents also submitted documentation regarding the Lifeline Program, which is a Federal program to provide telephone service to low-income individuals. See A-673-675. Defendants-Respondents did not provide any evidence indicating the number of residents at Lakeside Manor who participate in this program. To the extent that the trial court's finding of compliance is based on assertions regarding Virgin Mobile's provision of wireless service as part of the Lifeline program, these assertions cannot properly be considered evidence of Defendants-Respondents' compliance with their own obligations to provide telephone service to residents. Even if this were a proper consideration, "unsupported allegations in affidavits are no substitute for proof." Freeze Right Refrigeration & Air Conditioning Services, Inc. v. City of New York, 101 A.D.2d 175, 186, 475 N.Y.S.2d 383, 391 (App. Div. 1st Dep't 1984). In any event, the affidavit fails to state how the existence of a Federal program for free wireless telephone service helps Lakeside Manor meet its obligations to provide telephone service to its residents.

Defendants-Respondents submitted evidence that there are telephones in offices on the first floor of Lakeside Manor. As stated in Section I.A. above , this evidence is insufficient to establish compliance with the applicable regulation, because, as found by the DOH, telephones for which residents must ask permission to use are not "available for outgoing telephone calls" within the meaning of the

regulation. Because Defendants-Respondents failed to submit evidence showing they had ever provided the required level of telephone service, the trial court's determination that Defendants-Respondents were "brought into full compliance" with the regulation was erroneous.

## III. Post-litigation compliance would not render any of Plaintiffs-Appellants' claims moot

Plaintiffs-Appellants have rights and interests that remain undetermined; thus, their claims have not been rendered moot. Plaintiffs-Appellants sought declaratory and injunctive relief to end violations of their rights and monetary relief to compensate them for the harm they have suffered. No determination has been made regarding their requests for declaratory or permanent injunctive relief nor has a determination been made on their claims for compensatory and punitive damages, attorney's fees, and costs. Furthermore, Defendants-Respondents' alleged voluntary cessation of an unlawful activity does not render Plaintiffs-Appellants' claims for declaratory, injunctive relief, damages, attorney's fees and costs moot. Punitive damages under the Fair Housing Act are appropriate to deter future violations and help redress Plaintiffs-Appellants' injuries. Finally, attorney's fees and costs are warranted where Plaintiffs-Appellants obtained at least part of the relief they sought by bringing this action and obtaining preliminary injunctive relief requiring the installation of more telephones at Lakeside Manor.

### A. Plaintiffs-Appellants' claims present undetermined rights and interests despite any post-litigation compliance

A case is not moot if there are undetermined rights or interests that a party is entitled to assert. See Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Bhd. of Carpenters and Joiners of Am., AFL-CIO, 72 N.Y.2d 307, 311; 532 N.Y.S.2d 722, 725 (1988); Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876, 878 (1980); Cisse v. Graham, 87 A.D.3d 1008, 1010, 929 N.Y.S.2d 628, 629 (App. Div. 2d Dep't 2011). A change in circumstances will render a case moot only where it prevents the court "from rendering a decision which would effectually determine an actual controversy between the parties involved." Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 810-11, 798 N.E.2d 1047, 1051 (2003) (quoting Karger, Powers of the New York Court of Appeals § 71[a], at 426 [3d ed.]). Appellate courts will review matters where "the controversy is of a character which is likely to recur not only with respect to the parties before the court but with respect to others as well." E. Meadow Community Concerts Ass'n v. Bd. of Ed. of Union Free Sch. Dist. No. 3, Nassau County, 18 N.Y.2d 129, 135 (1966); see Mitchell v. Kemp, 176 A.D.2d 859, 859-60, 575 N.Y.S.2d 337, 338 (App. Div. 2d Dep't 1991) (issue was not academic where petitioner was forced to reapply for variance each time defendant town passed a new moratorium law and petitioner's delay in receiving a building permit was caused by town's failure to enact a zoning ordinance).

Assuming arguendo that Defendants-Respondents came into compliance with the applicable regulation by their installation of a telephone system pursuant to the trial court's order to install additional pay telephones, Plaintiffs-Appellants continue to have justiciable claims based on Defendants-Respondents' past violations and for their litigation costs that helped end those violations. The parties would still be directly affected by the court's determinations as to whether Defendants-Respondents breached their admission agreements with Plaintiffs-Appellants and the warranty of habitability, whether they violated the Fair Housing Act by discriminating against Plaintiffs-Appellants in deciding not to provide required telephone services, and whether Plaintiffs-Appellants are entitled to compensatory and punitive damages, attorney's fees, and costs as a result of those breaches and violations. These determinations would affect the parties' future actions and their financial positions relative to each other.

This case is similar to Intl. Ass'n of Machinists and Aerospace Workers (IAM) by Winpisinger v. Allegis Corp., 144 Misc 2d 983, 545 N.Y.S.2d 638 (Sup. Ct. N.Y. Cty. 1989). In that case, the plaintiff union sought declaratory and injunctive relief to set aside an alleged fraudulent conveyance by which all of the employer's assets were allegedly encumbered to finance a cash distribution to the shareholders of the defendant parent company of the employer. Id. at 984-985. The plaintiff alleged standing based on its members' claims for wages and benefits.

Id. at 985. The court rejected the defendants' argument that the claim was moot based on the fact that the corporate restructuring of the defendant parent company of the employer had already taken place. Id. at 989. The court noted that the mootness argument "would reward the perpetrator of a fraudulent conveyance by ousting the court of its longstanding equitable power to set aside such transactions." Id. Likewise, in the instant case, the trial court's grant of summary judgment based on mootness rewards Defendants-Respondents for their violations of the law and defeats the purpose of permanent injunctive relief to prevent a longstanding violator of the law from resuming those violations. Just like the plaintiff union's members, Plaintiffs-Appellants have undetermined monetary claims.

### B. Defendants-Respondents' alleged voluntary cessation of unlawful activity would not render Plaintiffs-Appellants' claims for injunctive relief and damages moot

Even if Defendants-Respondents met the regulatory requirements by their installation of a telephone system serving an unknown number of residents, this action would not render Plaintiffs-Appellants' claims for permanent injunctive relief moot "because even the voluntary cessation of unlawful activity does not obviate the need for, or the propriety of, an injunction." People ex rel. Spitzer v. ELRAC, Inc., 192 Misc. 2d 78, 84-85, 745 N.Y.S.2d 671, 677 (N.Y. Cty. Sup. Ct. 2002); see Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.,

528 U.S. 167, 174 (2000) (A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case"). The installation of the telephone system does not meet the "formidable burden of making absolutely clear that the problems identified . . . could not reasonably be expected to recur." New York Pub. Interest Research Group v. Whitman, 321 F.3d 316, 327 (2d Cir. 2003) (internal quotations omitted) (holding that the State's letter of commitment identifying both the actual and intended future changes was insufficient to moot the plaintiff's claims regarding deficiencies in the State's program). Since Defendants-Respondents have never acknowledged that they were in violation of the telephone regulation at any time, there is a possibility that violations will recur. See Adams v. Bowater Inc., 313 F.3d 611, 612-15 (1st Cir. 2002) (finding that, because defendant employer had been unwilling to admit that its amendment to its retirement plan was unlawful, defendants' wrongful behavior might recur and, therefore, plaintiffs' claim was not moot).

At issue in Spitzer v. ELRAC was the scope of the duty of a self-insured rental car company to provide legal defense to permitted users of rental cars when a claim was made after a car accident. 192 Misc. 2d at 78. The Court of Appeals had previously ruled that the relevant section of the Vehicle and Traffic Law imposed upon the self-insured a "duty to defend." Id. at 78-79. The court held that a self-insured rental car provider's duty to defend included assigning an attorney to

provide a defense. Id. at 84. Upon the issuance of the Court of Appeals' decision, the defendant had stopped advising its car renters and authorized users that it would not provide legal defense in the event of an accident. Id. Nonetheless, the court determined that an injunction was appropriate despite the voluntary cessation of the unlawful activity because prior to the decision of the Court of Appeals, the defendant had engaged in that unlawful activity. Id.

In Friends of the Earth, Inc. v. Laidlaw Environmental Services, the U.S. Supreme Court held that a citizen suitor's claim for civil penalties was improperly dismissed as moot based on the defendant's post-litigation compliance. See 528 U.S. at 173-174. The Court stated that a case will not be rendered moot unless "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 528 U.S. at 189 (quoting United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 [1968]). The Court also emphasized that the burden of showing that this conduct would not resume "lies with the party asserting mootness." Id.

Plaintiffs-Appellants have requested permanent injunctive relief as well as punitive damages under the Fair Housing Act to deter future violations of their rights. Defendants-Respondents have failed to make any showing that their illegal conduct will not resume. Since Defendants-Respondents have failed to make this showing, Plaintiffs-Appellants' request for permanent injunctive relief is not moot.

## IV. Even if Plaintiffs-Appellants' claims are moot, they meet the exception to the mootness doctrine

If this Court determines that Plaintiffs-Appellants' claims are moot, Plaintiffs-Appellants argue in the alternative that this case meets the exception to the mootness doctrine, "which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable." Hearst Corp. v. Clyne, 50 N.Y.2d at 714. This exception is met where a case possesses three common factors: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues." Id. at 714-15; see In re Melinda D., 31 AD3d 24, 28, 815 N.Y.S.2d 644, 646-647 (App. Div. 2d Dep't 2006).

First, this case presents a likelihood of repetition with respect to the parties and other members of the public because, as described above, Defendants-Respondents violated the telephone regulation for many years. They continued to do so even after the court ordered it to stop and Lakeside Manor has never acknowledged that it violated the regulation. Second, the issues presented will evade review if Lakeside Manor is allowed to violate the law, and then come into compliance after significant litigation and motion practice, without a determination on issues of liability or damages. Finally, the action presents important issues,

such as the "obvious and important public need of having buildings in compliance with housing standards." See Independence Sav. Bank v. Triz Realty Corp., 100 AD2d 613, 614 (App. Div. 2d Dep't 1984). The trial court itself found these issues to be important in its first order granting a preliminary injunction. The trial court noted that Plaintiffs-Appellants and other residents of Lakeside Manor "may be severely affected" by the failure to provide more telephones and that "[m]any of these residents are mentally challenged and/or disabled and their need to communicate with their families, advisors, healthcare providers, etc. is essential to their well-being, the lack of which could cause irreparable harm." A-51-52.

Furthermore, because Plaintiffs-Appellants' rights with respect to telephone service at the home have not been determined, nor have their claims for injunctive relief, damages, attorney's fees, and costs been decided, rendering a decision in this instance will not result in a purely advisory opinion. See Cisse v. Graham, 87 A.D.3d at 1010; Crowell v. Mader, 444 U.S. 505, 506 (1980) (finding that passage of legislation did not moot the entire case and plaintiffs could apply for attorney's fees with the trial court).

## CONCLUSION

For all of the reasons set forth above, Plaintiffs-Appellants respectfully request that this Court reverse the order of the trial court and remand the case for trial.

Dated: January 3, 2012
New York, NY

Jota Borgmann, of counsel to
Jeanette Zelhof, Esq.
MFY LEGAL SERVICES, INC.
Attorneys for Plaintiffs-Appellants
299 Broadway, 4th Floor
New York, NY 10007
(212) 417-3717

## CERTIFICATE OF COMPLIANCE PURSUANT TO 22 NYCRR § 670.10-c

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