To Be Argued By:
TONI ANN HOLLIFIELD
Time Requested: Fifteen Minutes

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT X

In the Matter of the Application of the

CLIFTON PARK APARTMENTS, LLC, As Owner of PINE RIDGE II APARTMENTS, and DAVID H. PENTKOWSKI, ESQ.,

Petitioners,

For a Judgment Under Article 78 of the CPLR,

-against-

NEW YORK STATE DIVISION OF HUMAN RIGHTS, CITYVISION SERVICES, INC., LEIGH RENNER,

Respondents.
_____X

Docket No.: 533592

Saratoga Co. Index No.: EF2020-1383

BRIEF ON BEHALF OF RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS

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QUESTIONS PRESENTED

I. Does sufficient evidence in the record as a whole support the Division's finding that both Clifton Park Apartments, LLC as owner of Pine Ridge II Apartments and its attorney, David H. Pentkowski, Esq., are liable for having retaliated against CityVision Services, Inc. and Leigh Renner by sending a letter seeking damages for what it termed the "false, fraudulent and libelous" allegations contained in CityVision and Renner's previously dismissed housing discrimination complaint?

II. Did the Division properly find David H. Pentkowski, Esq., the attorney for Petitioner Clifton Park Apartments, LLC, liable under the Human Rights Law for writing a letter to the Complainants on behalf of his clients describing the complaint they had filed in good faith as "false, fraudulent and libelous" and seeking damages?

III. Was CityVision Services, Inc., as an advocacy group, entitled to an award of damages to compensate the organization for the resources it diverted as a result of Petitioners' unlawful retaliatory actions?

IV. Was the award of attorney's fees permissible in this retaliation case, where the previously filed complaint that was the basis for Petitioners' retaliatory actions was one based upon the reasonable belief that Petitioners were engaged in unlawful housing discrimination, and where the instant retaliation complaint and the underlying housing discrimination complaint were inextricably intertwined?

V. Was the Commissioner's assessment of civil fines and penalties in the amount of $2,500.00 against Clifton Park Apartments, LLC and Pentkowski, due to the nature and circumstances of their discriminatory actions, their degree of

culpability for those actions, and in furtherance of the goal of deterrence, arbitrary and capricious?

STATEMENT OF THE CASE

This Respondent's Brief is submitted in response to the brief in support of the petition brought in accordance with Executive Law § 298, which sought judicial review and vacatur of the Notice and Final Order (*Final Order*) that the New York State Division of Human Rights (Division) rendered on June 1, 2020 on the complaint of CityVision Services, Inc. and Leigh Renner (collectively, CityVision) (R. 20-45[1]).

The Division sustained CityVision's complaint, finding Petitioners liable for retaliating against CityVision for having filed a previously dismissed complaint, when Petitioners sent a letter seeking damages for "false, fraudulent and libelous" allegations (R. 152 [CX-2[2]]. The Division ordered Petitioners to pay CityVision damages for the diversion of resources it suffered as a result of Petitioners' unlawful discrimination and to pay CityVision's attorneys reasonable attorney's fees and expenses. Additionally, the Division assessed a civil fine and penalty against Petitioners, to be paid to the State of New York.

CityVision filed a verified complaint with the Division on August 18, 2017, alleging that Petitioners violated the Human Rights Law when they retaliated for

[1] Numbers following the letter "R." refer to pages of the Petitioners' *Record on Appeal*.
[2] Numbers following the letters "ALJX", "CX", and "RX" refer, respectively, to hearing exhibits designated "Administrative Law Judge's," "Complainants'," and "Respondents'."

CityVision's filing of a previous complaint with the Division (*see* R. 118-129 [ALJX-2]). The Division investigated CityVision's complaint and found that probable cause existed to believe that Petitioners had violated the Human Rights Law. A hearing session, at which an ALJ heard testimony and took other evidence, took place on June 25, 2018. By letter dated August 2, 2018, the ALJ requested that CityVision submit sworn statements pertaining to its diversion of resources and attorney's fees (*see* R. 97). These documents were received and placed into evidence, pursuant to the Division's Rules of Practice (9 NYCRR) § 465.12 (f) (4) (A165-A176) (R. 141-147 [ALJX-5]).

On May 14, 2019, the ALJ issued his Recommended Findings of Fact, Opinion, Decision and Order (*Recommended Order*) (R. 153-164), proposing that Petitioners be found liable for retaliating against CityVision, and that CityVision be awarded damages for the diversion of resources it suffered as a result of Petitioners' discriminatory actions. It was further proposed that a civil fine and penalty payable to the State of New York be assessed against Petitioners. The ALJ opined that CityVision was not entitled to attorney's fees, because the Human Rights Law "does not provide for awards of attorney's fees in retaliation cases" (R. 162 [*Recommended Order* at 6]). CityVision filed objections to the *Recommended Order* with the Division's Commissioner (R. 165-176).

By letter to the parties dated January 16, 2020, the Division's Adjudication Counsel indicated that, during the relevant period, attorney's fees were available "with respect to cases of housing discrimination only" (Executive Law § 297 [10]); and explained that, because the instant retaliation complaint arose from a previously filed complaint of housing discrimination, the two complaints were inextricably intertwined such that both complaints were matters involving housing discrimination, causing attorney's fees to be available in the instant matter. Adjudication Counsel requested that CityVision's counsel supplement the record with information necessary to render an appropriate award. Petitioners' attorney was granted an opportunity to respond to such a submission. (*See* R. 99-100.)

On June 1, 2020, after considering all the evidence adduced at the public hearing, the *Recommended Order* of the ALJ, the Objections to that *Recommended Order*, and all other relevant submissions, the Division's Commissioner, the agency's final arbiter and statutory fact-finder, issued the *Final Order*, adopting the *Recommended Order* with an amendment awarding attorney's fees and expenses to CityVision's attorneys (R. 20-27 [*Notice and Final Order* at 1-8]).

By Notice of Petition and Petition filed on or about June 29, 2020, Petitioners commenced a proceeding in Supreme Court, Saratoga County (R. 9-65). On or about July 27, 2020, the Division filed its Verified Answer (R. 66-76), as well as a Notice of Cross-Petition and Cross-Petition for judicial review and

enforcement of the *Final Order* (R. 77-100]). On or about August 4, 2020, Petitioners filed their Verified Answer to the Cross-Petition (R. 101-105). By Order entered on January 12, 2021, the Supreme Court, Saratoga County transferred the Petition and Cross-Petition to this Court for disposition, pursuant to Executive Law § 298 and 22 NYCRR § 202.57 (R. 4-5).

STATEMENT OF FACTS

Respondent CityVision Services, Inc. (CityVision), a fair housing advocacy organization, employs testers who pose as potential tenants to identify landlords who may be violating fair housing laws (R. 118-123 [ALJX-2]; R. 39 [FF-1, FF-2][3]). Respondent Leigh Renner (Renner) is affiliated with CityVision (*Id*.).

On December 22, 2016, CityVision filed a complaint against Pine Ridge II Apartments (Petitioner Clifton Park) with the Division, alleging familial status discrimination stemming from a testing call that took place on November 9, 2016. That complaint alleged that Clifton Park steered the tester to another property after she stated that she had three minor children. (R. 40 [FF-4]; R. 118-123 [ALJX-2]; R. 262 [Transcript of Telephone Call, dated November 9, 2016].) After investigating the complaint, on June 30, 2017, the Division found that there as No Probable Cause to believe Clifton Park had engaged in an unlawful discriminatory practice (R. 40 [FF-4]; R. 118-123 [ALJX-2]).

Shortly after this finding of No Probable Cause, Petitioner Pentkowski, Clifton Park's attorney, sent a letter to CityVision and Renner, dated July 25, 2017, alleging that the allegations contained in their complaint were "false, fraudulent

[3] Numbers following the letter "T." refer to the pages of the hearing transcripts of the public hearing session held on June 25, 2018. Numbers following the letters "FF" pertain to the numbered Findings of Fact of the Notice and Final Order.

and libelous" and noting that "Pine Ridge is looking to [CityVision and Renner] for damages they have sustained as a result of this wrongful conduct." Pentkowski's letter further indicated that CityVision's representative should contact him to "discuss a resolution of this claim" and stated that, if he did not hear from anyone within ten days, Petitioners "[would] proceed accordingly." (R. 40 [FF-6, FF-7]; R. 152 [CX-1].) "It is difficult to see how this can be viewed as anything other than a threat." (R. 41 [*Final Order* at 4].)

On August 18, 2017, CityVision and Renner filed the instant complaint with the Division, alleging that Pentkowski's letter constituted unlawful retaliation, in violation of the Human Rights Law (R. 118-123 [ALJX-2]). In furtherance of the instant complaint, CityVision expended $4,775.00 in diverted resources (R. 40 [FF-10]; R. 141-147 [ALJX-5]).

ARGUMENT

POINT I

SUFFICIENT EVIDENCE IN THE RECORD AS A WHOLE SUPPORTS THE DIVISION'S FINDING THAT CLIFTON PARK APARTMENTS, LLC AS OWNER OF PINE RIDGE II APARTMENTS AND ITS ATTORNEY, DAVID H. PENTKOWSKI, ESQ., UNLAWFULLY RETALIATED AGAINST CITYVISION SERVICES, INC. AND LEIGH RENNER BY SENDING A LETTER SEEKING DAMAGES FOR WHAT IT TERMED THE "FALSE, FRAUDULENT AND LIBELOUS" ALLEGATIONS CONTAINED IN CITYVISION AND RENNER'S PREVIOUSLY DISMISSED HOUSING DISCRIMINATION COMPLAINT.

Pursuant to Executive Law § 296 (7):

> "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because said person has opposed any practices forbidden under this article or because said person has filed a complaint, testified or assisted in any proceeding under this article."

In order to prove unlawful discrimination, a complainant first has the burden of establishing a *prima facie* case (*Matter of Pace Coll. v Commission on Human Rights of City of N.Y.*, 38 NY2d 28 [1975]; *McDonnell Douglas Corp. v Green*, 411 US 792 [1973]). If that complainant succeeds in establishing a *prima facie* case, the burden shifts to the respondent to show "some independently legitimate reason which was neither a pretext for discrimination nor was substantially influenced by impermissible discrimination" (*Matter of Pace Coll.*, 38 NY2d at 40).

Once the respondent's reasoning is proffered, the fact-finder must "weigh the evidence, make the permissible inferences, and … come to conclusions supported by the evidence" (*Id*.). Where the fact-finder determines that a respondent's witnesses are not credible, "the combination of [a] prima facie case and the 'rejection of the petitioner's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination'" (*Matter of New York State Off. of Mental Health, Rochester Psychiatric Ctr. v New York State Div. of Human Rights*, 273 AD2d 829, 830 [4th Dept 2000] [citations omitted]; *see also Matter of State Div. of Human Rights v County of Onondaga Sheriff's Dept.*, 71 NY2d 623 [1988]).

In *Modiano v Elliman* (262 AD2d 223 [1st Dept 1999]), the First Department made it clear that the dismissal of the underlying discrimination complaint is not necessarily fatal to a claim of retaliation. In *Modiano*, the court held that

> "a claim for retaliatory conduct does not necessarily fail by reason of a subsequent finding that the underlying discrimination complaint, upon which the claim of retaliation is premised, is without merit … there are factual issues as to whether plaintiff's subjectively held belief that she was entitled to the protection of the Human Rights Law was reasonable …"

(*Id*. at 223; *see also Matter of Garba Casting Co., Inc. v Mosquera*, 99 AD3d 600 [1st Dept 2012]). In so holding, the First Department adopted a "reasonable belief" standard for determining whether a person has been discriminated against

due to their opposition to practices forbidden by the Human Rights Law and acknowledged that the issue of whether a person has a reasonable belief that he or she is entitled to the protections of the Human Rights Law is a question of fact.

This Court has also adopted the "reasonable belief" standard, indicating that "Federal courts under comparable Federal legislation … would find discriminatory retaliation if the employee reasonably believed that the employer had engaged in unlawful discriminatory practices" (*Matter of New York State Off. of Mental Retardation & Dev. Disabilities (Staten Is. Dev. Ctr.) v New York State Div. of Human Rights*, 164 AD2d 208, 210 [3d Dept 1990]), and noting that the "reasonable belief standard is appropriate. Considering the remedial nature of the Human Rights Law and an explicit statutory admonition to construe the law liberally, it strikes us that a person who suffers retaliation after reasonably acting to protect others from forbidden discrimination should be protected" (*Id*.).

The filing of a lawsuit seeking damages for libel and malicious prosecution, based solely upon the content of a complaint dismissed by the Division of Human Rights, may constitute retaliation under the Human Rights Law (*Moran v Simpson*, 80 Misc2d 437 [Sup Ct, Livingston County, January 24, 1974]).

> "If [the Human Rights Law] is to be meaningful, a person claiming to be aggrieved by an unlawful discriminatory practice must be in a position to initiate a proceeding without fear that he is embarking upon a perilous course should his complaint not be sustained"

(*Id*. at 438). It logically follows that where, as in the instant complaint, a respondent threatens to file such a lawsuit unless the complainants "take responsibility" for their statements within 10 days (R. 152 [CX-2]), that said respondents are engaging in unlawful retaliation, in violation of the Human Rights Law. The caselaw cited by Petitioners (*see Petitioners' Brief* at 17) recognizes the reasonable belief standard, stating that "statutory provisions prohibiting retaliatory conduct do not confer, *upon bad-faith complainants* making false discriminatory-related charges, absolute immunity from defamation actions that may arise out of those charges" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 257 [1st Dept 1995] [emphasis added]).

Petitioners' assertions that *Moran*'s holding is "no longer good law," because it "implicitly establishes an absolute bar against retaliation for an unfounded complaint of discrimination" (*Petitioners' Brief* at 16-17) demonstrates a misunderstanding of the court's holding. There is no indication that the court in *Moran* considered the question of whether there was an "absolute bar", and the Division's Commissioner did not determine liability in the instant matter based upon an assumption that such a bar existed, instead referring to CityVision and Renner as "Complainants making a good faith Division claim" (R. 42 [*Final Order* at 5]).

Petitioners contend that, in order to prevail on their retaliation claim, Complainants "must establish that they had a good faith, reasonable belief that the rental agent from Pine Ridge committed a discriminatory 'steering' violation…" (*Petitioners' Brief* at 11-12, 13). In fact, the Commissioner determined that CityVision made a "good faith Division claim" (*Id*.) based upon CityVision's tester's experience of being told there was an apartment available, and then, after informing Clifton Park's representative that she had three minor children, immediately being told that there were actually no apartments available, and being offered the telephone number for another apartment complex (R. 118-123 [ALJX-2]; R. 262 [Transcript of Telephone Call, dated November 9, 2016]). After making an initial finding that CityVision's original complaint of discrimination was made in good faith, the Commissioner then determined that Petitioners had failed to offer evidence to rebut that finding, stating that Petitioners "have not shown that Complainants' allegations were made in bad faith and, therefore, Complainants should prevail" (R. 42 [*Final Order* at 5]).

Petitioners did not meet their burden "to show that [Complainants] did not reasonably believe these practices forbidden" (*New York State Off. of Mental Retardation & Dev. Disabilities (Staten Is. Dev. Ctr.)*, 164 AD2d at 210). Despite Petitioners' claims (*Petitioners' Brief* at 17), the Commissioner acted in accordance

with caselaw, when he looked to Petitioners to rebut Complainants' *prima facie* case of retaliation.

Petitioners cite to the First Department's decision in *Herlihy* (214 AD2d 250) for the proposition that their threatening letter "cannot be viewed as impermissible retaliation as it references, properly, legal actions that may be available to Pine Ridge to recover its damages" (*Petitioners' Brief* at 19). *Herlihy* was a defamation case in which a former employee alleged that volunteers she supervised falsely reported to her employers' Human Resource Office that she had made anti-Semitic comments (*Id.* at 254). The First Department recognized that the Human Rights Law bars "[r]etaliation by employers against individuals for complaining of or opposing actions that they believe are discriminatory…" (*Id.* at 256, *citing* Executive Law §§ 296 [1][e] and [3-a][c]), and that the law "exist[s] to encourage victims of work place discrimination to come forward and report discriminatory incidents…" (*Id.* [internal citations omitted]). However, the court found, the *Herlihy* defendants' accusations were not privileged as they did not occur within a "quasi-judiciary proceeding" (*Id.*). Here, by contrast, the Complainants' initial claims of housing discrimination – claims, the Division found upon the record of an evidentiary hearing were made in good faith – were presented through a quasi-judicial administrative process.

Petitioners note that Executive Law §297 (10) "authorizes that recovery of attorney's fees against a party who files a frivolous complaint starting a procedure

before the SDHR" (*Petitioners' Brief* at 19). That subsection authorizes the award of attorney's fees to a prevailing respondent or defendant only after a showing by that party that the action or proceeding was "frivolous" (Executive Law §297 [10]). At the Division, such an award may only be made after a public hearing. The subsection specifies that in order for an action or proceeding to be frivolous, there must be a finding either that such "action or proceeding was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another…" or that it was brought in bad faith and "could not be supported by a good faith argument for an extension, modification or reversal of existing law." (*Id*.) Here, the Division dismissed the initial complaint alleging housing discrimination; therefore, no hearing was held and no attorney's fees could have been awarded under Executive Law §297 (10).

Pentkowski's Liability

While Petitioners correctly assert that "'[t]he public interest … demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts *when performed in good faith* and for the honest purpose of protecting the interests of their clients'" (*Hahn v Wylie*, 54 AD2d 629, 629 [1st Dept 1976] [internal citations omitted] [emphasis added]; *see Petitioner's Brief* at 30]), Petitioner Pentkowski cannot be said to have acted in good faith in the instant

matter, and he is; therefore, not immune from liability under the Human Rights Law.

In his July 25, 2017 letter to CityVision and Renner, which is the basis for the retaliation complaint, Pentkowski stated that his clients considered CityVision's allegations to be "false, fraudulent and libelous," and further indicated they were "looking to City Vision and [Renner] personally for the damages that they have sustained as a result of this wrongful conduct." Pentkowski went on to threaten that they would "proceed accordingly" if CityVision and Renner did not "take responsibility for these actions." (R. 152 [CX-2]; R. 41 [*Final Order* at 4].)

The Division's Commissioner specifically found Pentkowski's argument that the letter was neither retaliatory nor threatening to be "without merit" (R. 41 [*Final Order* at 4]), finding that the letter "clearly sought damages for the money [Petitioners] spent 'as a result of' Complainants' complaint … It is difficult to see how this can be viewed as anything other than a threat" (*Id*.).

The allegations Pentkowski's letter refers to were made in a Verified Complaint filed with the Division and were duly investigated.

> "Statements made during or for judicial proceedings, if pertinent, are absolutely privileged and cannot be used later in an action alleging defamation. This rule also encompasses communications made in the course of quasijudicial or administrative proceedings … The requisite criteria are present for applying this rule to the proceedings before the State Division of Human Rights … any statements made during or in

> preparation for said proceedings are protected by an absolute privilege"

(*Missick v Big V Supermarkets*, 115 AD2d 808, 811 [3d Dept 1985], *appeal dismissed* 67 NY2d 938 [1986]; *see also Wellsville Manor, LLC v Campbell*, 2020 WL 7180987 [WD NY 2020, Dec. 7, 2020, No. 20-CV-000621]). Given this absolute privilege, Pentkowski's threat to "look[] to" CityVision and Renner, personally, to recoup "damages" (R. 152 [CX-2]) had no basis in law and cannot be said to have been made in good faith. Pentkowski's letter was a retaliatory action, in violation of the Human Rights Law.

Standard of Review

Executive Law § 298 provides that "[t]he findings of facts on which [a Final Order] is based shall be conclusive if supported by sufficient evidence on the record considered as a whole." "Judicial review of the determination made by an administrative agency, such as the State Division of Human Rights, is limited to a consideration of whether that resolution was supported by substantial evidence upon the whole record…" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978] [citations omitted]). Substantial evidence is defined as

> such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Essential attributes are relevance and a probative character. Marked by its substance – its

> solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt

(*Id.* at 180-181 [citations omitted]).

The determination of the Commissioner may not be set aside "merely because the opposite decision would have been reasonable and also sustainable" (*Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56 [1973]). Furthermore, "courts 'may not weigh the evidence or reject [DHR's] choice where the evidence is conflicting and room for a choice exists' (*Matter of CUNY – Hostos Community Coll. v. State Human Rights Appeal Bd., 59 N.Y.2d 69, 75, 463 N.Y.S.2d 173, 449 N.E.2d 1251 [1983]*)" (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]). "It is peculiarly within the domain of the Commissioner, who is presumed to have special expertise in the matter, to assess whether the facts and the law support a finding of unlawful discrimination" (*Matter of Club Swamp Annex v White*, 167 AD2d 400, 401 [2d Dept 1990], *lv denied* 77 NY2d 809 [1991]).

Case law is clear that the credibility determinations of the Division's Commissioner are entitled to deference. In *State Division of Human Rights v Rochester Products Division of General Motors Corp.* (112 AD2d 785 [4th Dept 1985]), the Fourth Department stated that:

> [i]n reviewing an administrative decision, this court may not substitute its judgment for that of the agency and where conflicting evidence exists, it is for the administrative board or agency to pass upon the credibility of witnesses and to base its inferences on what it accepts as the truth (*Matter of CUNY-Hostos Community Coll. v. State Human Rights Appeal Bd.*, 59 NY2d 69, 75)

(*Id*. at 785; *see also Matter of State Div. of Human Rights v Muia*, 176 AD2d 1142 [3d Dept 1991]; *State Div. of Human Rights v Dynasty Hotel*, 222 AD2d 263 [1st Dept 1995]; *Matter of Mack Markowitz Oldsmobile v State Div. of Human Rights*, 271 AD2d 690 [2d Dept 2000]).

The Court of Appeals has held that "[c]ourts may not weigh the evidence or reject the Division's determination where the evidence is conflicting and room for choice exists" (*Matter of State Div. of Human Rights (Granelle)*, 70 NY2d 100, 106 [1987]), and that "[e]ven where conflicting inferences may be rationally drawn from the record, those inferences are for the Commissioner, and not for this court, to draw" (*County of Onondaga Sheriff's Dept.*, 71 NY2d at 631).

The Commissioner – and the ALJ who heard the case – had before them the record of testimony and other evidence. From that record, the Commissioner ascertained that Complainants filed a complaint against parties they in good faith believed had violated the Human Rights Law, even if the Division ultimately disagreed. In retaliation for their efforts, Petitioners, calling Complainants' allegations "false, fraudulent and libelous" threatened Complainants with "damages" if Complainants did not contact them to "discuss a resolution to this

claim." (R. 40 [FF-6; FF-7].) Finding that Complainants were victims of illegal retaliation, the Commissioner recognized the importance of ensuring an environment in which persons may in good faith report discrimination even if their claims are ultimately not sustained. (*See Herlihy*, 214 AD2d 250, 256, n. 1.)

There is sufficient evidence on the record as a whole to support the Commissioner's conclusions that Petitioners violated the Human Rights Law, and those conclusions must not be disturbed.

POINT II

CITYVISION SERVICES, INC., AS AN ADVOCACY GROUP, IS ENTITLED TO AN AWARD OF DAMAGES TO COMPENSATE THE ORGANIZATION FOR THE RESOURCES IT DIVERTED AS A RESULT OF PETITIONERS' UNLAWFUL RETALIATORY ACTIONS.

Petitioners argue that the Commissioner's award for damages incurred by CityVision due to the diversion of its resources must be vacated, because it compensates CityVision for costs not authorized by the Human Rights Law (*Petitioners' Brief* at 23-27). This argument ignores longstanding precedent permitting an advocacy organization to recoup damages for the monetary injuries it sustained due to the diversion of its resources from its stated mission to address discriminatory actions.

Where a petitioner's discriminatory practices have "perceptibly impaired" an organization's ability to provide services,

> "there can be no question that the organization has suffered an injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests"

(*Havens Realty Corp. v Coleman*, 455 US 363, 379 [1982]; *see also Mixon v Grinker*, 157 AD2d 423 [1st Dept 1990]).

Petitioners urge this Court to break with the Fourth Department's precedent in *Matter of Sherwood Terrace Apts. v New York State Div. of Human Rights* (61

AD3d 1333 [4th Dept 2009]), which states that the Division's Commissioner "properly exercised her discretion in awarding economic damages … for resources expended by [an advocacy organization]" (*Id*. at 1334) (*see Petitioners' Brief* at 25-26); however, that decision was in line with others confirming awards based upon the diversion of resources.

> "To determine a value for the diversion of resources … the Court may consider … records of time and overhead costs attributable to pursuing such claim … In addition [the advocacy organization] is entitled to compensation or damages to its fair housing goals resulting from the instant claim"

(*Saunders v General Servs. Corp.*, 659 FSupp 1042, 1060 [ED VA 1987]; *see also Ragin v Harry Macklowe Real Estate Co., Inc.*, 801 FSupp 1213 [SD NY 1992] [Awarding compensatory damages to an advocacy organization for the diversion of its resources resulting from defendants' discriminatory practices.]; *Fair Housing of Marin v Combs*, 285 F3d 899 [9th Cir 2002] [Finding that the record supported the district court's findings that the organization's resources were diverted and its mission was frustrated by the defendant's discriminatory actions, and upholding the monetary damages awarded to address both of those losses.]).

The Division's Commissioner cited both Federal and New York State case law in finding that CityVision, as an advocacy organization, is entitled to monetary compensation for the resources it diverted as a result of Petitioners' discriminatory actions (R. 42 [*Final Order* at 5]). Specifically, the Commissioner awarded

CityVision $4,775.00, plus interest. Said sum is based upon "the time and resources [CityVision's] members expended with respect to this matter." (R. 40 [FF-10]; R. 141-147 [ALJX-5].)

POINT III

THE COMMISSIONER'S AWARD OF ATTORNEY'S FEES WAS PERMISSIBLE IN THIS RETALIATION CASE, WHERE THE PREVIOUSLY FILED COMPLAINT THAT WAS THE BASIS FOR PETITIONERS' RETALIATORY ACTIONS WAS ONE BASED UPON THE REASONABLE BELIEF THAT PETITIONERS WERE ENGAGED IN UNLAWFUL HOUSING DISCRIMINATION, AND WHERE THE INSTANT RETALIATION COMPLAINT AND THE UNDERLYING HOUSING DISCRIMINATION COMPLAINT WERE INEXTRICABLY INTERTWINED.

When the instant complaint was filed, an award of attorney's fees was available in "all cases of housing discrimination and housing related credit discrimination … and with respect to a claim of employment or credit discrimination where sex is a basis of such discrimination" (Executive Law § 297 [10] [language effective until October 11, 2019]).

The Commissioner determined that, because it was necessary for Complainants to demonstrate that the underlying housing discrimination complaint was based upon a reasonable belief that discrimination occurred in order to prove a *prima facie* case of retaliation, it follows that the instant retaliation complaint and the underlying housing complaint are "inextricably intertwined such that both complaints are matters involving housing discrimination" (R. 21 [*Notice and Final Order* at 2]; *see Dominic v Consolidated Edison Co. of New York, Inc.*, 822 F2d 1249 [2d Cir 1987] ["factual and legal theories underlying [the] age discrimination claim were inextricably intertwined with those underlying [the] retaliatory

discharge claim … although the merits of [the] retaliation claim did not depend on the validity of his complaints of age discrimination … there is authority that [complainant] could recover on his retaliation claim only if his complaints of age discrimination had a reasonable foundation" (*Id.* at 1259-60]). The Commissioner found that, because the retaliation in the instant matter was based upon CityVision and Renner's "filing of a housing discrimination complaint, the instant case is grounded in the housing context and thus attorney's fees are available" (R. 21-22 [*Notice and Final Order* at 2-3]).

As the Human Rights Law's provision for attorney's fees is substantially and textually similar to federal law, the Court of Appeals has generally interpreted it consistently with federal precedent. Therefore, attorney's fees awarded pursuant to the Human Rights Law are calculated using the "lodestar" method, under which the "award is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate …" (*McGrath v Toys "R" Us, Inc.*, 3 NY3d 421, 430 [2004]; R. 22 [*Notice and Final Order* at 3).

After reviewing CityVision's counsel's fee request (R. 141-147 [ALJX-5]), the Commissioner determined that the total lodestar amount was $10,933.50. In addition, the Commissioner determined that CityVision was entitled to recover $54.50 for out-of-pocket expenses, causing the total award of attorney's fees to be

$10,988.00. (*see* R. 25 [*Notice and Final Order* at 6.) This award is supported by the record.

POINT IV

THE COMMISSIONER'S ASSESSMENT OF CIVIL FINES AND PENALTIES AGAINST PETITIONERS WAS PROPERLY DESIGNED TO DETER FUTURE WRONGDOING.

Once the Commissioner has made a finding of unlawful discrimination, the Division may assess "civil fines and penalties in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act …" (Executive Law § 297 [4] [c] [vi]).

Executive Law § 297 (4) (c) (vi) expressly allows the Division to assess civil fines and penalties against a respondent that has committed an unlawful discriminatory act (*see Matter of Sherwood Terrace Apts.*, 61 AD3d 1333 [civil fine and penalty of $8,000.00 upheld where a landlord refused to rent to a complainant and her children on the basis of familial status]; *Matter of New York State Div. of Human Rights v Stennett*, 98 AD3d 512 [2d Dept 2012][civil fine and penalty of $25,000.00 upheld where a landlord discriminated against a complainant on the basis of her sexual orientation]).

There are several factors that the Division assesses in determining an appropriate civil fine and penalty in a particular case. These factors are: "the nature and circumstances of the violation; whether respondent had previously been adjudged to have committed unlawful … discrimination; respondent's financial

resources; the degree of respondent's culpability; and the goal of deterrence" (*see Gostomski, et al. v Sherwood Terrace Apts., et al.*, DHR Case Nos.: 10107538 and 10107540, pp 12 [November 15, 2007]]), *confirmed by Matter of Sherwood Terrace Apts.*, 61 AD3d 1333).

A civil fine and penalty may be overturned only if found to be "an abuse of discretion as a matter of law" (*County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]). Under this arbitrary and capricious standard, the reviewing court may only set aside a determination by an administrative agency "if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [citations omitted]). A result is shocking to one's sense of fairness

> "if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved"

(*Id*. at 234).

A court's role "is to determine whether there is any basis in the record for the conclusion reached by the agency" (*Matter of Adirondack Wild Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 197 [2019] [emphasis added]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts … If a determination is rational it must be sustained even if the court concludes that another result would also have been rational" (*Id*. at 195; *see Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]). The Court of Appeals stated, "[i]f we conclude 'that the determination is supported by a rational basis, [we] must sustain the determination even if [this C]ourt concludes that it would have reached a different result than the one reached by the agency'" (*Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 281 [2010] [internal citations omitted] [emphasis added]).

After evaluating the evidence on the record, the Division's Commissioner determined that a penalty of $2,500.00 was appropriate "given the nature of the violation and the goal of deterrence" (R. 43 [*Final Order* at 6]). In making this determination, the Commissioner pointed to the fact that is undisputed that Petitioners "sent Complainants a letter that alleged 'wrongful acts' and contained threats that [Petitioners] would 'proceed accordingly'" (*Id*.).

The Commissioner determined that "a civil fine and penalty was appropriate in this matter", given the "State of New York's goal of deterrence" (R. 43 [*Final Order* at 6]). The assessment of a civil fine and penalty of $2,500.00 cannot be said to be arbitrary and capricious.

CONCLUSION

THAT THE PETITION FILED BY CLIFTON PARK APARTMENTS, LLC as owner of PINE RIDGE II APARTMENTS AND DAVID H. PENTKOWSKI, ESQ. BE DENIED IN ITS ENTIRETY; THAT THE CROSS-PETITION BE GRANTED IN ITS ENTIRETY; THAT THE COMMISSIONER'S NOTICE AND FINAL ORDER ON THE COMPLAINT OF CITYVISION SERVICES, INC. AND LEIGH RENNER BE CONFIRMED IN ITS ENTIRETY; THAT THIS COURT:

(1) AWARD JUDGMENT IN FAVOR OF CITYVISION SERVICES, INC. AND LEIGH RENNER AS AGAINST CLIFTON PARK APARTMENTS, LLC as owner of PINE RIDGE II APARTMENTS AND DAVID H. PENTKOWSKI, ESQ. FOR THE SUM OF FOUR THOUSAND, SEVEN HUNDRED AND SEVENTY-FIVE DOLLARS AND ZERO CENTS ($4,775.00) AS DAMAGES FOR THE DIVERSION OF RESOURCES SUFFERED AS A RESULT OF PETITIONERS' UNLAWFUL DISCRIMINATION, WITH INTEREST ACCRUING ON SAID SUM AT THE RATE OF NINE PERCENT (9%) PER ANNUM FROM JUNE 1, 2020, THE DATE OF THE FINAL ORDER, UNTIL THE DATE OF PAYMENT;

(2) AWARD JUDGMENT IN FAVOR OF CITYVISION SERVICES, INC.'S ATTORNEYS, THE LAW OFFICES OF ANDY WINCHELL, P.C., AS AGAINST CLIFTON PARK APARTMENTS, LLC as owner of PINE RIDGE II APARTMENTS AND DAVID H. PENTKOWSKI, ESQ. FOR THE SUM OF TEN THOUSAND, NINE HUNDRED AND EIGHTY-EIGHT DOLLARS AND ZERO CENTS ($10,988.00), IN REASONABLE ATTORNEY'S FEES AND EXPENSES, WITH INTEREST ACCRUING ON SAID SUM AT THE RATE OF NINE PERCENT (9%) PER ANNUM FROM JUNE 1, 2020, THE DATE OF THE FINAL ORDER, UNTIL THE DATE OF PAYMENT;

(3) AWARD JUDGMENT IN FAVOR OF THE STATE OF NEW YORK AS AGAINST AS AGAINST CLIFTON PARK APARTMENTS, LLC as owner of PINE RIDGE II APARTMENTS AND DAVID H. PENTKOWSKI, ESQ. FOR THE SUM OF TWO THOUSAND, FIVE HUNDRED DOLLARS AND ZERO CENTS ($2,500.00), WITH INTEREST ACCRUING ON SAID AMOUNT AT THE RATE OF NINE PERCENT (9%) PER ANNUM FROM JUNE 1, 2020, THE

DATE OF THE FINAL ORDER, UNTIL THE DATE OF PAYMENT; AND

(4) FOR SUCH OTHER AND FURTHER RELIEF THAT THIS COURT DEEMS JUST AND PROPER.

Dated: Bronx, New York
December 13, 2021

Respectfully submitted,

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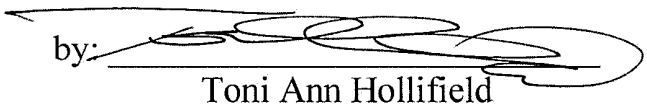
by: 
Toni Ann Hollifield
of Counsel.

CERTIFICATION OF COMPLIANCE

This brief was prepared on a computer, using a Microsoft Word program. The type is Times New Roman, Fourteen Point and it is double-spaced. It contains 6,125 words.