UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

KENNETH DEFIORE, Plaintiff, v. CITY RESCUE MISSION OF NEW CASTLE and JAMES HENDERSON, Defendants.	)	Civil Action No. 2:12-cv-01590-CB Electronically filed

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

This case implicates the application and proper interpretation of two federal civil rights statutes: (1) Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 ("Fair Housing Act" or "FHA"), 42 U.S.C. § 3601, *et seq.*, which prohibits discriminatory practices that make housing unavailable to individuals on account of their race or color, religion, sex, national origin, familial status, or disability, *see* 42 U.S.C. § 3604; and (2) Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-12189, which protects the rights of individuals with disabilities in public accommodations and commercial facilities. The United States enforces the FHA and ADA across the country and, given the important civil liberties at stake, has a strong interest in ensuring that the requirements of these statutes are vigorously and uniformly enforced.[1]

Moreover, the United States filed a related case, currently pending before this Court,

[1] The United States Department of Justice ("DOJ") and the United States Department of Housing and Urban Development ("HUD") share enforcement authority of the FHA. 42 U.S.C. §§ 3614(d), 3612(a), and 3612(o). DOJ has enforcement authority of Title III of the ADA. 42 U.S.C. § 12188(b).

enforcing the FHA and ADA on behalf of the Plaintiff against the Defendants for the same discriminatory conduct. Defendants' Motion to Dismiss challenges the very application of the FHA and ADA to homeless shelters and raises other issues of interpretation. An adverse ruling against the Plaintiff in this case would likewise adversely affect the United States in proceeding on its claims in its related case. Thus, the United States files this Statement of Interest pursuant to 28 U.S.C. § 517.[2]

As explained below, Defendants are not immune from liability under the FHA or ADA and the remaining legal and factual issues raised in the Motion to Dismiss are not ripe for adjudication prior to discovery. Plaintiff has alleged concrete and actual injuries caused by the Defendants' discriminatory conduct, which meet the pleading standard articulated in *Iqbal* and *Twombly*. Defendants' arguments are both legally flawed and based on unsupported factual assertions that Plaintiff has not had the opportunity to explore through discovery. Accordingly, the Court should deny the Defendants' Motion to Dismiss.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiff in this case, Kenneth DeFiore, is blind and uses a trained service animal to assist him in performing everyday activities. (2nd Am. Compl., Dkt. No. 26, ¶¶ 8, 10, 11.) On February 16, 2012, Plaintiff filed a complaint of discrimination against the Defendants with the United States Department of Housing and Urban Development ("HUD"), pursuant to 42 U.S.C. § 3610(a). (2nd Amend. Compl. ¶ 25.) Pursuant to 42 U.S.C. § 3610(a) and (b), the Secretary of HUD conducted an investigation of the complaint, attempted conciliation without success, and prepared a final investigative report.

[2] Pursuant to 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or to attend to any other interest of the United States."

While HUD's investigation was ongoing, on November 2, 2012, Plaintiff filed the Complaint in the current case alleging violations related to the same set of facts under investigation by HUD. (Compl., Dkt. No. 2, ¶¶ 8-36.) Plaintiff subsequently filed an Amended Complaint on January 1, 2013, (Am. Compl., Dkt. No. 16), and a Second Amended Complaint on April 24, 2013 (2nd Am. Compl.). The Second Amended Complaint alleges that Defendants' actions violated the FHA, Title III of the ADA, and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §§ 951, *et seq*. (*See id.*)

Shortly before Plaintiff filed the Second Amended Complaint, on April 15, 2013, the Secretary of HUD issued a Charge of Discrimination pursuant to 42 U.S.C. § 3610(g)(2)(A), charging Defendants with engaging in discriminatory practices in violation of the FHA. 42 U.S.C. § 3610(g). On April 30, 2013, Plaintiff elected to have the claim asserted in HUD's Charge of Discrimination resolved in a civil action pursuant to 42 U.S.C. § 3612(a). Thus, the Administrative Law Judge issued a Notice of Election to Proceed in United States Federal District Court and terminated the administrative proceedings on Plaintiff's complaint. Notice of Election to Proceed in United States Federal District Court, *United States Dep't of Housing and Urban Dev. on Behalf of Kenneth DeFiore v. City Rescue Mission of New Castle and James Henderson*, HUDOHA 13-AF-0109-FH-006 (Apr. 30, 2013). Following the Notice of Election, the Secretary of HUD authorized the Attorney General to commence a civil action, pursuant to 42 U.S.C. § 3612(o).

On May 13, 2013, the Defendants filed the pending Motion to Dismiss. (Mot. to Dismiss Pl.'s Second Am. Compl., Dkt. No. 27.) On June 28, 2013, the United States filed a Complaint against the Defendants based upon the same underlying facts as HUD's Charge of Discrimination and the Second Amended Complaint. (Complaint, Dkt. No. 1, *United States v.*

City Rescue Mission of New Castle and James Henderson, Case No. 2:13-cv-00916-CB.) Similar to the Second Amended Complaint, the United States' Complaint contains allegations that Defendants violated the FHA and Title III of the ADA. (*Id.*)

Briefly summarized, Plaintiff alleges that on December 5, 2011, he telephoned Defendants to request a bed at the shelter. (2nd Am. Compl. ¶ 16.) After Plaintiff explained that he is blind and uses a service animal, Defendants denied him housing based on its policy not to accept animals. (*Id.* ¶¶ 17-18.) Plaintiff countered that Gabby is a service animal, not a pet, and that he was requesting a reasonable accommodation to their "no animals" policy. (*Id.* ¶ 19.) Defendants repeated their denial. (*Id.* ¶ 20.) After the telephone call with Defendants, Plaintiff contacted a caseworker for Lawrence County Community Action and described his telephone call with Defendants. (*Id.* ¶ 21.) The caseworker then called Defendants on Plaintiff's behalf and Defendants again refused to accept Plaintiff, citing their "no animals" policy.[3] (*Id.* ¶ 21.)

ARGUMENT

I. STANDARD OF REVIEW

The Court should deny Defendants' Motion to Dismiss. On a motion to dismiss, the court must accept as true all well-pleaded facts and allegations, and must draw all reasonable inferences therefrom in favor of the plaintiff. *See Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir. 2009) (citing *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). A complaint should be dismissed only where it appears that the facts alleged fail to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). A complaint is facially plausible when the pleadings "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability

[3] The United States refers to the Second Amended Complaint for a more complete recitation of the facts and hereby incorporates them by reference.

requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

After *Iqbal*, the Third Circuit set forth a three-prong test to analyze the legal sufficiency of a complaint. First, the Court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.2010) (quoting *Iqbal,* 556 U.S. at 679). Second, it should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* Third, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.*

The purpose of a motion to dismiss is to test the legal sufficiency of a complaint, not to resolve disputed facts or decide the merits of a case. *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993). Raising factual disputes is not proper in a motion to dismiss and, absent an evidentiary hearing, should be ignored. *Adkins v. Rumsfeld*, 450 F. Supp.2d 440 (D. Del. 2006). When a party submits facts outside of the pleadings on a motion to dismiss, the motion should be converted to summary judgment. *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1426 (3d Cir.1997). Summary judgment is appropriate only where there are no genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). An issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Complaint in this case sets forth numerous factual allegations concerning Defendants' violations of the FHA and ADA when they denied Plaintiff housing because they refused to accommodate his service animal. Plaintiff has alleged concrete, actual injuries-in-fact as a result of Defendants' discriminatory conduct, and his injuries would be remedied by a

favorable court decision. By contrast, Defendants' Motion to Dismiss is replete with unsupported factual allegations that conflict with the allegations set forth in the Complaint. Consideration of these new allegations is improper at this juncture, thus the Court should ignore them for purposes of ruling on this motion. Nevertheless, even assuming that the Defendants' factual allegations were properly raised in its motion, they serve only to show that there are issues of material fact, which precludes a final judgment at this time.

II. DEFENDANTS' DISCRIMINATORY CONDUCT IS PROHIBITED BY THE FHA AND THEY ARE NOT ENTITLED TO AN EXEMPTION

Defendants argue that they are not subject to the FHA for three reasons: (1) as a homeless shelter, CRM is not a covered "dwelling; (2) conduct prohibited by the FHA is limited to sale and lease transactions for cash; and (2) CRM qualifies for exemption from the statute because it provides Christian ministry. (Defs.' Br., Dkt. No. 28, at 5-8, 12-16.) Defendants' arguments are legally flawed and based on unsupported factual allegations well beyond the scope of the pleadings. The Supreme Court held unanimously that the FHA should be given a "generous construction" in *Trafficane v. Metropolitan Life Ins.*, 409 U.S. 205, 212 (1972), and therefore any exemptions to the statute should be construed narrowly. *United States v. Columbus Country Club,* 915 F.2d 877, 882-83 (3d Cir.1990), *cert. denied*, 501 U.S. 1205 (1991); *see also United States v. Hughs Mem. Home*, 396 F. Supp. 544, 550 (W.D.Va. 1975) ("In view of the Supreme Court's holding that the Fair Housing Act must be accorded a generous construction, the general principle requiring the strict reading of exemptions from the Act applies here with even greater force.") In line with this principle, the United States addresses each of Defendants' arguments below for the purpose of setting forth the law as it should be applied going forward in the case. In any event, the resolution of each of these issues will turn on facts that should be developed through discovery.

A. CRM is a "Dwelling" as Defined by the FHA

The Court should reject Defendants' argument that homeless shelters are not "dwellings," and therefore not subject to the FHA. HUD has consistently taken the position that homeless shelters are covered by the FHA, issuing guidance to shelters across the United States to ensure compliance. HUD regulations define "dwelling unit" to include "dormitory rooms and sleeping accommodations in shelters intended for occupancy as a residence for homeless persons." 24 C.F.R. § 100.201. Because HUD is the agency that is primarily responsible for implementing and administering the FHA, courts ordinarily defer to its reasonable interpretations of the statute. *Meyer v. Holley*, 537 U.S. 280, 287-88 (2003) (citing *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

HUD's interpretation is consistent with that of the courts. Section 3604(f)(2) prohibits discrimination in transactions concerning "dwellings." The FHA defines a dwelling as: "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as a residence by one or more families. . . ." 42 U.S.C. § 3602 (b). The FHA does not define the term "residence;" however as multiple courts have noted, the ordinary meaning of the term is: "a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit." *United States v. Hughes Mem. Home*, 396 F.Supp. 544, 549 (W.D. Va. 1975) (quoting *Webster's Third International Dictionary* 1931); *see also Columbus Country Club*, 915 F.2d at 881.

Key factors courts have considered in deciding whether a facility constitutes a "dwelling" are: (1) "whether the facility is intended or designed for occupants who intend to remain in the facility for any significant period of time;" and (2) "whether those occupants would view the facility as place to return to during the period of their stay." *Hughes Mem'l Home*, 396 F. Supp.

at 549. Several district and circuit courts have applied this test and found that a facility was a "dwelling" in similar circumstances. For instance, in *Woods v. Foster*, 884 F. Supp. 1169 (N. D. Ill. 1995), the court held that a homeless shelter constituted a "dwelling" for purposes of the FHA, reasoning that, "the homeless are not visitors or those on a temporary sojourn in the sense of motel guests . . . it cannot be said that the people who live there do not intend to return – they have nowhere else to go." *Woods* at 1174. This reasoning has subsequently been applied to: a community of summer homes occupied annually by members of a Catholic country club, *Columbus Country Club*, 915 F.2d; a nursing home, *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3d Cir. 1996); a proposed drug and alcohol treatment facility intended to accommodate 30-day stays, *Lakeside Resort Enterprises, LP v. Board of Sup'rs of Palmyra Tp.*, 455 F.3d 154 (3d Cir. 2006); a group home for recovering alcoholics, *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); a shelter for the mentally ill, *Anonymous v. Goddard Riverside Community Center, Inc.*, 1997 U.S. Dist. LEXIS 9724 (S.D.N.Y. 1997); and an adult care home for homeless persons with HIV, *Support Ministries for Persons with AIDS, Inc., v. Village of Waterford, NY*, 808 F. Supp. 120 (N.D.N.Y. 1992).

Courts have not defined "a significant period of time" for purposes of determining whether a place constitutes a "dwelling," however the Third Circuit held that the statute requires courts to consider the length of time which the facility is *intended* to be occupied as a residence. *Lakeside*, 455 F.3d at 159 ("Congress considered a dwelling to be a facility 'which is occupied as, or designed or *intended for occupancy as, a residence* by one or more families.'" (citing 42 U.S.C § 3602(b))). Accordingly, in finding that a proposed drug and alcohol treatment facility was a dwelling, in part, because it intended to accommodate residents for 30 days, it rejected the argument that the determination should be based on the average length of stay at the treatment

center, which was 14.8 days. As to the second factor—whether the residents view the facility as a place to return to each day—the court relied on the following facts to determine that it was satisfied: the residents of the treatment center "would eat meals together (separated by gender), return to their rooms in the evening, receive mail at the facility, and make it their 'residence' while they were there." *Id.* at 160.

CRM meets the statutory definition of "dwelling." Individuals are permitted to stay at the facility for 90 days – a period of time which indicates that homeless individuals use the facility as their residence and expect to return to it each night. Given that this is a fact-based inquiry, to the extent that there is any doubt, Plaintiff should be entitled to discovery on whether individuals eat meals together, whether they are permitted to receive mail there, whether they are responsible for keeping the area clean and making the bed each day, and whether the individuals return to the same area on each subsequent night of their stay, all of which would further suggest that CRM meets the definition of "dwelling."

B. Conduct Prohibited by Sections 3604(f)(1) and (f)(2) is Not Limited Only to Sale or Lease Transactions

The Court should reject Defendants' argument that their conduct is not covered by the FHA because it did not involve the sale or lease of a dwelling. Conduct that is prohibited by the FHA is not limited to only those circumstances. Section 3604(f)(1) states that it is unlawful: "To discriminate in the sale or rental, or to *otherwise make unavailable or deny*, a dwelling to any buyer or renter because of a handicap . . ." (emphasis added). Section 3602(e) defines "to rent" to include "to lease, to sublease, to let and *otherwise to grant for a consideration* the right to occupy premises not owned by the occupant." (emphasis added). Taken together, the FHA is intended to prohibit discriminatory conduct in all situations where consideration is exchanged for the right to occupy a premises, rather than only those transactions that involve an exchange of

cash. *See Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1099 (9th Cir. 2004) (holding that "testers" – individuals with no intent to purchase or rent property – had standing to bring a section 3604 (f) claim); *but see Jenkins v. New York City Department of Homeless Services*, 643 F. Supp. 2d 507 (S.D.N.Y. 2009) (holding that section 3604 (f) only applies to "renters and buyers" and the term "renters" should be given its "plain meaning").

Many courts have broadly construed the requirement for consideration under the FHA. *See, e.g., Woods*, 884 F. Supp. (finding receipt of $125,000 federal HUD grant to be sufficient consideration); *Villegas v. Sandy Farms, Inc.*, 929 F. Supp. 1324 (D. Or. 1996) (finding migrant workers' payment of $1.50 per day to occupy cabins to be sufficient consideration); *Anonymous v. Goddard Riverside Cmty. Ctr., Inc.*, 1997 WL 475165 (S.D.N.Y. July 18, 1997) (finding receipt of federal funds to be sufficient consideration); Brief for Secretary of the United States Department of Housing and Urban Development as Amicus Curiae, *Intermountain Fair Housing Council v. Boise Rescue Mission*, No. 10-35519 (9th Cir. Sept. 19, 2011) (arguing that performance of daily chores as a condition of occupancy is sufficient consideration); *but see Jenkins*, 643 F. Supp. 2d 507 (holding that homeless shelter's receipt of federal funds did not constitute consideration for purposes of FHA).

Resolution of this issue will turn on whether CRM receives federal or other funding directed to subsidizing the costs of providing housing to the homeless, whether shelter residents are required to perform chores (at the facility or that benefit the facility in the community), provide a certain portion of their wages, commit to anything in the future (such as donating a portion of their wages), etc., all of which might constitute consideration for shelter services. Dismissal, therefore, is improper without the opportunity for discovery on these subjects.

C. The FHA's Religious Exemption Does Not Shield the Defendants from Liability for Conduct that Makes Housing Unavailable to an Individual on Account of a Disability

Defendants' argument that they did not violate the FHA when they denied housing to Plaintiff because CRM is a Christian ministry is based on a gross misinterpretation of the statute. The religious exemption that Defendants refer to does not shield housing providers from liability for all types of discriminatory conduct. Section 3607 states:

> Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religions, or from giving preference to such persons, unless membership in such religions is restricted on account of race, color, or national origin.

It is clear from the plain language of the provision that its purpose is to allow religious entities to limit occupancy to members of the same religion. As the FHA is given a "generous construction," any exemptions to it are construed narrowly. *Columbus Country Club*, 915 F.2d at 882-83. Congress intended to shield religious organizations from liability under the FHA for favoring their own members; however this shield does not expand to cover other forms of discrimination independent of religious affiliation. *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037 (N.D. Ohio 1998) (holding religiously-affiliated nursing home did not qualify for FHA religious exemption where evidence indicated they specifically discriminated against black applicants without any consideration of religious affiliation).

Defendants' citation to *Lorantffy* with little explanation is misleading (Defs' Br. at 6), given that the holding in that case undercuts Defendants' argument. In *Lorantffy*, the United States brought suit against the operator of a nursing home, a minister of the Free Hungarian Reformed Church, that sought to serve elderly Hungarian immigrants. *Id.* at 1040. The United

States alleged that not only did the nursing home discriminate based on membership in the same religion, but it also discriminated against applicants who were black. *Id.* at 1041. The defendant claimed that it qualified for the religious exemption. The court agreed with the United States, finding that it was irrelevant whether the religious exemption applied to the defendant because the exemption is limited to conduct that was not the subject of the United States' complaint. *Id.* at 1044.

Defendants rejected Plaintiff from the shelter because he requested a reasonable accommodation for his service animal, which they were unwilling to make. (2nd Amend. Compl. ¶¶ 17-21.) There is no indication that Plaintiff's religious affiliation even arose during the phone call with Plaintiff or his advocate. Defendants seem to suggest that they might have accepted Plaintiff if he had made his request in person and proved that he was amenable to Christian ministry.[4] This contention is a red herring since, once again, the only issue that was discussed during the phone calls was Plaintiff's service animal. Nevertheless, even if Plaintiff's amenability to Christian ministry was a factor in rejecting him, in order to state a valid claim, his disability need not be the only factor that motivated Defendants to reject him. In discrimination cases, it is sufficient that the plaintiff's disability "made a difference." *See Lorantffy*, 999 F. Supp. 1037, 1042 (race need only be one effective reason in FHA case, not the only reason); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 (3d Cir. 1984) (age need not be sole reason for termination in establishing prima facie case under Age Discrimination in Employment Act); *see also Lewis v. University of Pittsburgh*, 725 F.2d 910, 915 (3d Cir. 1983)

[4] "No person is turned away due to race, color, national origin, or even disability, as City Rescue has always made efforts to accommodate the struggling and destitute who walk through their doors. The only barrier to entry has always been an individual's amenability to Christian ministry, which cannot be discerned over the phone, but only through their face-to-face intake process." (Defs.' Br. at 7.)

(applying the same principle in a Title VII case). Moreover, if Defendants wish to rely on this alternative explanation for rejecting Plaintiff, which is completely contrary to the Complaint, Plaintiff should be given the opportunity for discovery on the issue.

D. Even if the Court Determines that the FHA's Religious Exemption Applies to the Claims Asserted, Defendants Have Not Met the Burden of Proof that CRM Meets the Criteria for the Exemption

Even if the Court finds that the exemption applies to the claims in this case, Defendants have not met the burden of proving that CRM qualifies for the exemption. This determination turns on facts that should be developed through discovery and therefore this issue should not be decided on a motion to dismiss. Nevertheless, to qualify for the exemption, the Defendants bear the burden to show that CRM is either: "(1) a religious organization, or (2) a non-profit organization sufficiently affiliated with a religious organization." *Lorantffy*, 999 F. Supp. 1037, 1044; *see also Columbus Country Club*, 915 F.2d 877, 882 (defendant bears burden of proving it falls within exemption to FHA).

In *Columbus Country Club*, the Third Circuit denied application of the exemption to a country club that allowed only Catholics to lease its summer bungalows. *Id.* Even though the Catholic Church provided the club with the services of a priest to celebrate the weekly mass and lead other religious ceremonies, family members met in the chapel each evening to pray the rosary, a consecrated statue of the Blessed Mother stood on the grounds and club members took an offering every Sunday and remitted it to the local parish, the two-to-one majority held that the religious exemption did not apply. *Id.* at 882-83. The court found that the Catholic Church did not operate, supervise or control the defendant: "Without further evidence of interaction or involvement by the Church, we cannot conclude that as a matter of law the Church controlled the defendant or that the defendant was operated 'in conjunction with' the Church." *Id.*

Similarly, while CRM may hold itself out as a Christian ministry and require that residents take part in religious services, there are still critical, unanswered questions that bear on whether CRM is "sufficiently affiliated" with a religious organization. Plaintiffs should be afforded the opportunity to discovery on subjects such as which church(es) CRM is affiliated with; the source(s) of CRM's funding (individual donors, organizations, etc.), including the proportion of funds received from each source; whether CRM is required to follow any policies or practices to receive funding; the degree to which residents are required to participate in religious services; and what criteria are used to determine whether a resident is amenable to Christian ministry. As such, it is improper to dismiss the Complaint on these grounds without permitting discovery on these outstanding issues.

II. DEFENDANTS' DISCRIMINATORY CONDUCT IS PROHIBITED BY TITLE III OF THE ADA AND THEY ARE NOT ENTITLED TO AN EXEMPTION

The Motion to Dismiss challenges the Plaintiff's ADA claims on the grounds that: (1) the Plaintiff failed to make his request for a reasonable accommodation in person; (2) accommodating Plaintiff's service animal would cause an undue burden; and (3) as a provider of Christian ministry, CRM is exempt from application of the statute. (Defs. Br. at 5-12.) Congress enacted the ADA to remedy widespread discrimination against individuals with disabilities. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress also noted that discrimination takes many forms including "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices." 42 U.S.C. § 12101(a)(5). In light of

this mandate, the United States addresses each of Defendants' legal arguments, without conceding that they were properly raised on a motion to dismiss.

A. Plaintiff is Not Required to Prove He Has a Disability by Appearing in Person to Request an Accommodation

The Court should reject Defendants' argument that Plaintiff cannot request a reasonable accommodation under the ADA over the phone. The statute does not require that individuals prove their disability in person and, in fact, permits only a limited inquiry. Once again, this issue cannot be addressed properly without discovery since it is a fact-based determination. *See Colwell v. Rite Aid Corp*, 602 F.3d 495, 506 (3d Cir. 2010) (holding there was a genuine issue of material fact as to whether parties engaged in good faith in interactive context).

Plaintiff's reasonable accommodation claims arise under the FHA, Title III of the ADA, and the Pennsylvania Human Relations Act. (2nd Amend. Compl.) All three statutes provide that, in certain instances, the policies and practices of covered entities must be modified to accommodate the needs of individuals with disabilities. *Cf. Wisconsin Community Services, Inc. v. City of Milwaukee*, 465 F.3d 737, 746 (7th Cir.2006) (similar analyses for ADA and FHA reasonable accommodation claims). The framework to evaluate FHA claims can typically be employed to analyze parallel claims under the ADA. *Dr. Gertrude A. Barber Center, Inc. v. Peters Township*, 273 F.Supp.2d 643, 652 (W.D. Pa. 2003). To prove a prima facie case that a housing provider failed to provide a reasonable accommodation, the plaintiff must show that: (1) the plaintiff is disabled or is a person associated with a disabled person; (2) the defendant knows of the disability or should be reasonably expected to know of it; (3) accommodation of the disability may be necessary to afford the plaintiff an equal opportunity to use and enjoy the dwelling; and (4) the defendant refused to make such accommodation. *DuBois v. Ass'n of Apart. Owners of 2987 Kalahaua*, 453 F.3d 1175, 1179 (9th Cir. 2006); *Bryant Woods Inn, Inc., v.*

Howard County, Md., 124 F.3d 597, 603 (4th Cir. 1997); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 336 (2d Cir. 1995). The burden to establish that a request has been made rests with the plaintiff. *See Lapid Laurel*, 284 F.3d at 458–459; *Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 898 (7th Cir.1996) ("While the law requires accommodation, when a disability is not otherwise visible it is incumbent on the person seeking the accommodation to alert those from whom he seeks it of the conditions that require accommodation."). A plaintiff must give notice of a condition, and of a "causal connection between the major life activity that is limited and the accommodation sought." *Jankowski Lee*, 91 F.3d at 880 (quoting *Wood v. Crown Redi–Mix, Inc.*, 339 F.3d 682, 687 (8th Cir. 2003)).

Defendants argue that Plaintiff failed to engage in the interactive process through his failure to appear in person, presumably to prove that he was, in fact, blind. Defendants cite to ADA cases in the employment context, however fail to cite to authority that this standard is applicable in the FHA or Title III context. (Defs.' Br. at 11.) If individuals were subject to the same burden of establishing the need for an accommodation by every Title III entity as in the workplace, they would need to carry medical documentation every time they went to the movies, out to dinner at a restaurant, or boarded a train operated by a private company, since many disabilities are not readily apparent.

Indeed, the Department of Justice, which has primary authority for enforcing the ADA, has issued guidance on the subject of service animals and Title III entities. Generally, Title III entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go. 28 C.F.R. § 36.302(c)(1). The Department takes the position that a service animal is not a pet and is therefore exempt from "no pets" policies. The Department also takes the position that a public accommodation may not ask details about the

individual's disability, require medical documentation, or require any type of certification or documentation reflecting the animal's training. Rather, when it is not obvious what service an animal provides, only limited inquiries are allowed. Staff may ask two questions: (1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform. *See* Service Animals (technical assistance provided by Civil Rights Division, Disability Rights Section) (Jul. 2011) *available at* http://www.ada.gov/service_animals_2010.htm. The Complaint plead specifically that Plaintiff was blind, used a service animal, and was requesting a reasonable accommodation to stay at the shelter. (2d Amend. Compl. ¶¶ 17, 19, 21.) The Court should reject Defendants' argument and permit discovery on evidence which would, at a minimum, likely include sworn statements from both parties as to the content of the phone conversation.

B. Defendants' "Undue Burden"Argument is Not the Proper Subject for a Motion to Dismiss, Nevertheless They Have Not Met the Burden of Proof that it Applies

The Court should reject Defendants' argument that accommodating Plaintiff's service animal created an undue burden. This defense, like the others, is not the proper subject for a motion to dismiss since it turns on facts that have not been developed yet through discovery. Typically, under both the FHA and ADA, this defense is raised once the plaintiff has made its prima facie case of discrimination. To pursue a claim under the ADA, the plaintiff has the burden of proving that a modification was requested and that the requested modification is reasonable. *See, e.g., Booker*, 2013 WL 2896814, at *12 (citing *Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 233-35 (3d Cir. 2000)). Once the plaintiff set forth its prima facie case, the defendant may show that it is was not required to make the modification because the proposed modification would "fundamentally alter the nature of such goods, services, facilities, privileges,

advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). Likewise, under the FHA, the "plaintiff bears the initial burden of showing that the requested accommodation is necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling, at which point the burden shifts to the defendant to show that the requested accommodation is unreasonable." *Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment of Twp. of Scotch Plains*, 284 F.3d 442, 456-59 (3d Cir. 2002).

There appears to be one point on which the Defendants and the United States can agree—that a determination of whether a proposed modification is reasonable under the ADA and FHA requires a highly fact-specific inquiry. As Defendants state in their brief, "In short, a highly fact-specific inquiry is required in determining not only what accommodations are needed but whether they are required in the first place." (Defs.' Br., at 8.); *see Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996) (FHA reasonable accommodation inquiry is highly fact-specific); *see Buskirk v. Appollo Metals*, 307 F.3d 160, 170-171 (3d Cir. 2002) (whether accommodation is reasonable under ADA is question of fact). Defendants' argument is premature since Plaintiff has not had the opportunity for discovery on issues that are germane to this inquiry. For instance, Plaintiff may request discovery on the layout of the shelter, where the beds are located, the space between each of the beds, etc. Moreover, since the ADA does not permit facilities to offer separate accommodations "unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others," 42 U.S.C. § 12182(b)(1)(A)(iii), Plaintiff may also request discovery on the conditions of the infirmary, its proximity to necessary services, etc. *See Lockett v. Catalina Channel Exp., Inc.*, 496 F.3d 1061, 1065 (9th Cir. 2007). As such, the Court should reject Defendants' argument that

accommodating Plaintiff's service animal would create an undue burden and permit discovery on the relevant issues.

C. The Court Cannot Determine Whether the ADA's Religious Exemption Applies Without Conducting a Fact-Based Inquiry

The Court cannot determine whether CRM is entitled to the ADA's religious exemption without conducting a fact-based inquiry. The Court should therefore reject Defendants' argument until the Plaintiff has had the opportunity for discovery. The religious exemption to the ADA provides: "The provisions of this subchapter shall not apply . . . to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C.A. § 12187. The Third Circuit held that a determination of the applicability of the religious exemption should not be made prior to discovery. *Doe v. Abington Friends School*, 480 F.3d 252 (3d Cir. 2007) (holding that district court erred in finding that school was a "religious organization" prior to discovery and based only on affidavit submitted by the Head of the School).

The inquiry into whether an entity is a religious organization or controlled by one is a mixed question of law and fact that will require weighing various factors. *Id.* at 258. The applicable factors will be specific to the circumstances, however in *Doe* the court considered the plaintiff's request for discovery on the following issues to be relevant to the district court's determination of whether the exemption should apply: the religious training received by the faculty and staff; the religious make-up of the students, faculty and staff; how the religion is represented in the school's curriculum; and whether a religious organization owns the school or oversees its day-to-day operations, policy, finances, curriculum and advising. *Id.* at 258.

Defendants' argument is based on unsupported allegations that Plaintiff has not had the opportunity to explore in discovery. There are a multitude of unanswered questions that bear on

whether CRM is controlled by a religious organization to merit application of the exemption. For instance, the Plaintiff should be entitled to discovery on, at a minimum, the training received by staff, the religious affiliation of the residents and staff, and whether the shelter is owned or overseen by a religious organization. Thus, in the absence of discovery, there is insufficient evidence to weigh the merits of Defendants' claim and the Court should reject this argument.

CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint Pursuant to F.R.C.P. 12(b)(6) should be denied.

Respectfully submitted,

ERIC H. HOLDER, JR.
Attorney General

DAVID J. HICKTON
United States Attorney
Western District of Pennsylvania

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Housing and Civil Enforcement Section
Civil Rights Division

ELIZABETH A. SINGER
Director, U.S. Attorneys' Fair Housing Program
Housing and Civil Enforcement Section
Civil Rights Division

/s/ Amie S. Murphy
AMIE S. MURPHY
Assistant United States Attorney
Western District of Pennsylvania
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
Telephone: (412) 894-7379
Fax: (412) 644-6995
Email: Amie.Murphy@usdoj.gov
New York Bar No. 4147401

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a true and correct copy of the within *Statement of Interest of the United States of America* has been served electronically to all parties indicated on the electronic filing receipt. All other parties will be served by U.S. mail.

/s/ Amie S. Murphy
AMIE S. MURPHY
Assistant U.S. Attorney

Date: July 19, 2013