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SUMMARY OF THE ARGUMENT

The District Court properly held that the Fair Housing Act (and New York Executive Law § 296) should not be extended to hold landlords liable for racial harassment between tenants absent their own intentional discrimination, or a failure to intervene based upon their own racial animus (J.A. 92-105). The District Court further properly found that Francis failed to sufficiently plead claims for racial discrimination under 42 U.S.C. § 1981 or 1982 as no intentional discrimination was pled on the part of KPM or Downing (J.A. 90-91); and that Francis's claim for Negligent Infliction of Emotional Distress failed by reason that KPM and Downing had no common law duty to investigate or intervene in this personal dispute (J.A. 105-16).

The issues presented before this Court are largely a matter of first impression and will have a far-reaching application. Of greatest impact will be whether this Court determines that the Fair Housing Act (and New York Executive Law § 296) is to be extended to hold landlords liable for one tenant's racial harassment of another tenant. This would require the creation of a new cause of action, and standards of liability, for a "hostile living environment" under the FHA and New York law. The District Courts in this Circuit have recognized hostile housing environment claims against landlords under the FHA only where the landlord *created* the conditions of harassment. It is respectfully submitted that the

District Court below properly determined that even if a claim for post-acquisition hostile housing environment could exist under the Fair Housing Act, a question unresolved by this Court at this time, the analysis would require intentional discrimination on the part of the landlord, or at a minimum a failure to intervene based upon the landlord's (or it's agent's) own racial animus (J.A. 102-103). Finally, the District Court properly held that even assuming such a claim is actionable, Francis did not allege any basis to impute the words of Endres to KPM or Downing, or that the KPM Defendants failed to intervene on account of their own racial animus toward Francis (J.A. 103). Thus, the specific facts of the instant case do not warrant an extension of the Fair Housing Act here, even if such an extension were otherwise permissible.

An examination of the legal framework underlying the kinds of FHA claims implicated in this case – "tolerance" or "failure to remedy" claims, interference claims under Section 3617, and hostile environment claims – shows that none are legally appropriate on the facts of this case, simply because there are no allegations that the landlord in this case took any discriminatory action. The FHA was neither intended to be a vehicle for the resolution of neighborhood disputes nor to attach liability to landlords for such disputes. A cause of action for hostile housing environment claims under the FHA is unnecessary because adequate remedies are available to tenants including criminal charges (as in the instant case), various

private rights of action including tort claims, and statutory claims against both the landlord and tenant.

The District Court was correct in finding that the analogy between hostile housing environment claims and hostile work environment claims under Title VII is misplaced (J.A. 95). While employers may be held liable for discriminatory acts of employees, that legal principle is distorted when blindly applied to landlords, because landlords and tenants almost always lack the reciprocal duties of care and control inherent in the employer-employee relationship and that give rise to employer liability for hostile work environments. In the context of the landlord-tenant relationship, the landlord (particularly an out-of-possession landlord or a landlord of a large apartment complex like the one at issue here) is in no position to police communications between tenants. Landlords simply do not have the same control and access over tenants that employers have over employees. Employers exercise immediate control over employees so that it is reasonable to hold them accountable for the known and tolerated hostile acts of employees in the workplace. It is unreasonable to hold lessors to the same level of accountability given the impracticability of both the exercise of such control over renters and the burden of policing "bad neighbors". Furthermore, all of the remedies that an employer has to remedy harassment in the workplace are effective without the need for judicial intervention whereas a landlord is required to seek judicial

intervention; and, even if a complaint is made to a landlord that racial epithets were used toward a tenant by another tenant, the landlord is faced with the impossible standard of proving such uncorroborated statements at trial in an attempt to evict the alleged aggressor.

Rather than finding a new and untenable cause of action under the FHA, this Court should look to existing remedies under both the FHA and landlord-tenant law to redress tenant-on-tenant harassment. Tenants may avail themselves of traditional causes of action against landlords who fail to fulfill contractual and common law obligations and against neighbors who discriminate against and harass them. This Court should also look to the well-settled precedent defining the scope of landlord duties vis-à-vis their tenants, which holds that landlords have no duty to protect tenants from the acts of other tenants.

In the 21st Century, it is reprehensible that racial harassment exists in society. The words of Endres, if stated, were inappropriate. However, the facts of this case do not support an extension of the law to find the landlord and its' managing agent liable. While the alleged derogatory statements of Endres are disgraceful, they were not made *because of* Francis's race, and if they had been, there should not be a recognized cause of action against the landlord since a landlord maintains minimal control, if any, over its' tenants. Realizing there is a notable difference between the employer-employee relationship and the landlord-

tenant relationship, the lower court correctly held that the landlord cannot be liable absent its' own racial animus (J.A. 94). This holding should not be disturbed.

To hold contrary to the lower court and find that an expansion of the FHA is warranted would open the door to judicially legislate against "bad neighbors". Such an expansion of the court dockets is unnecessary and would be fraught with enforcement impracticalities. Landlords, and particularly public housing authorities ("PHAs") do not have the expertise or resources to undertake the function of an investigator. There would be economic disincentives for individuals, companies and other investors to engage in the business of renting residential real estate, thus reducing the supply of available units and harming low-income families.

Further, such an expansion raises issues impacting First, Fourth and Fourteenth Amendment rights of tenants under the U.S. Constitution, and will also lead to unintended consequences jeopardizing the successful operation and viability of low income housing programs. We urge this Court to consider the severe consequences of expansion of the FHA on the realms of federally-assisted and other rental housing when PHAs are already under severe administrative and financial burdens. The requirement that landlords police tenant behaviors and the potential for damage awards under the FHA, where the housing authority/landlord itself has not committed any discrimination, would unjustly divert resources from the most pressing needs of current and future public housing residents. Moreover, a

housing authority that consequently feels compelled to increase evictions to avoid FHA liability would effectively be moving families into homelessness.