

# 23-397

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In the  
**United States Court of Appeals**  
**For the Second Circuit**

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LYDIA GONZALEZ DIAZ, ON BEHALF OF A CLASS OF SIMILARLY  
SITUATED TENANTS OF THE NEW YORK CITY HOUSING  
AUTHORITY AT HARLEM RIVER HOUSES,

*Plaintiff-Appellant,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
*(See inside cover for continuation of caption)*

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**BRIEF AND SPECIAL APPENDIX FOR  
PLAINTIFFS-APPELLANTS**

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*Plaintiffs-Appellants,*

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,  
NEW YORK CITY HOUSING AUTHORITY, HARLEM RIVER  
PRESERVATION LLC and C+C APARTMENT MANAGEMENT LLC,

*Defendants-Appellees.*

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## **INTRODUCTION**

The underlying action was an Administrative Procedure Act (APA) case brought against the U.S. Department of Housing and Urban Development (HUD) seeking both injunctive and declaratory relief addressed to the propriety of HUD's approval of a NYC Housing Authority (NYCHA) development converting from a Public Housing Authority development funded by Section 9 of the Housing Act of 1937, to a privately owned and managed development corporation, functioning under Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* The development, Harlem River Houses, until a few weeks before the suit was commenced, was owned and managed by NYCHA. NYCHA has turned to a privatization program to address its inability to perform its responsibilities as a property manager under Title 9.

NYCHA has done such a poor job that HUD sued NYCHA in 2018 seeking to have a Federal Monitor installed to run NYCHA. That lawsuit, and a subsequent Consent Decree which the District Court has refused to approve, has not improved the situation at NYCHA. At the beginning of his term in 2022, NYC Mayor Eric Adams stated: "There's a culture of incompetence that has permeated NYCHA. And I think it has a lot to do that people are not respecting the rights of those residents."

HUD approved the conversion, which resulted in tenants at Harlem River Houses being forced to give up their leases with NYCHA and sign new leases with

C&C Apartment Management, LLC (“C&C”) under a privatization program called Permanent Affordability Commitment Together (“PACT”), which is authorized under a Federal program called Rental Assistance Demonstration (“RAD”). Under current HUD Regulations (see H-2019-09 PIH-2019-23(HA), Rental Housing Assistance REV-4—Final Implementation), to be eligible for a RAD conversion a PHA must be “classified as a Standard or High Performer under the Public Housing Assessment System... If classified as ‘troubled’ ... the PHA [Public Housing Authority] may still be eligible if it is making substantial progress under its Recovery Agreement, Action Plan, Corrective Action Plan, or Memorandum of Agreement or proposes a revision to such agreement or plan that incorporates conversion under RAD and that is acceptable to HUD.

In plain English, failing housing authorities are not permitted by Federal law and regulation to participate in the conversion program, presumably because they still own the properties involved, and because they are charged with supervising the new ownership. Congress and HUD itself developed laws and regulations limiting which PHAs could participate in RAD. The requirement was not mere verbiage. It was a requirement intended to benefit the residents of those developments. There is really no question that NYCHA was a “troubled” PHA, and that it hadn’t made “substantial progress” under a Corrective Action Plan.

What is at issue on this appeal, is a decision by HUD either that NYCHA was not a “troubled PHA”, or that it has made “substantial progress under some agreement.

In 2018, in a case titled *United States of America v. NYCHA*, 18 Civ. 5213 (S.D.N.Y.) (A \_\_\_\_), the United States made the following allegations about NYCHA, none of which NYCHA ever denied:

a. “NYCHA violates basic health and safety regulations HUD. These regulations require NYCHA to protect children from the lead paint that is present within apartments in roughly 30% of NYCHA developments to provide residents decent, safe, and sanitary housing. NYCHA has repeatedly made false statements to HUD and the public regarding these issues, and has deceived HUD inspectors.”

b. “The people who suffer as a result of NYCHA’s misconduct are its residents, including lead-poisoned children, elderly residents without heat in winter, asthma sufferers whose condition is worsened by moldy and pest-infested apartments, and disabled residents without functioning elevators.”

c. “Lead is toxic, and there is no safe level of exposure... NYCHA knows that there is lead paint within apartment units in roughly thirty percent of its developments, but has failed—and continues to fail—to protect its residents from that paint when it peels and crumbles. NYCHA has for years failed to follow key HUD lead paint safety regulations ... Beyond HUD’s requirements, NYCHA has

also violated lead paint safety regulations promulgated by the U.S. Environmental Protection Agency (“EPA”).”

d. “Children have been harmed as a result of NYCHA’s failures. Between 2010 and 2016, at least 19 lead-poisoned children were found to have been exposed to deteriorated lead paint in their NYCHA apartments. But the 19 cases understate the true extent of lead poisoning likely to have been caused by crumbling lead paint at NYCHA. Many hundreds of additional children living at NYCHA have been reported ...as having tested at or above the Centers for Disease Control’s “reference level”—the level at which public health actions should be initiated. But NYC is only able to investigate a fraction of the cases reported to it to determine whether the children’s apartments contain peeling lead paint....There is every reason to believe the true number of children with lead poisoning is materially higher.”

e. “To enable HUD to determine whether public housing meets this basic standard, HUD created an inspection regime—the Public Housing Assessment System—... to determine whether a housing agency is providing decent, safe, and sanitary housing. NYCHA has undermined HUD’s inspections by disguising the true condition of its properties. This deception included turning off water to developments to prevent HUD inspectors from observing leaks; posting “danger” signs to keep inspectors away from troubled areas; and temporarily hiding improperly stored hazardous materials. NYCHA management even included a

document with suggestions for deceiving inspectors in NYCHA’s official training materials.”

f. “NYCHA’s conduct undermined HUD’s inspection regime and HUD’s ability to use that regime to determine whether NYCHA complies with the “decent, safe, and sanitary” requirement. In fact, living conditions at NYCHA are far from “decent, safe, and sanitary.” Mold grows unchecked at many NYCHA developments, often on a large scale. Across the City, residents are provided inadequate heat in winter, leading to frigid apartment temperatures. Pests and vermin infestations are common, and as senior New York City officials have acknowledged, NYCHA “has no idea how to handle rats.” Elevators often fail, leaving elderly or disabled residents trapped in their apartments or sleeping in building lobbies because they cannot return to their homes. Leaks, peeling paint, and other deterioration are commonplace, but go unaddressed.”

g. “NYCHA is well aware that disclosing its failure to protect residents from lead paint and its failure to provide decent, safe, and sanitary housing would lead to unwanted regulatory scrutiny—including potential limitations on future HUD funding. To avoid this, NYCHA hid conditions from inspectors and repeatedly made false statements to HUD.”

NYCHA did enter into a Consent Decree (which Judge Pauley refused to approve after holding a hearing at which over 250 people testified about how horrible

conditions were.) A Monitor was put in place, who by February 2022 had reported very little progress—because there was little progress.

In 2021 Plaintiffs/Appellants raised complaints, extensively, to HUD objecting to HUD’s potential approval of the Harm River Houses deal. Plaintiffs-Appellants complained about how NYCHA had simply handed over management to a Managing Company, C&C, which was part of the RAD takeover, and about how tenants were being asked to sign leases with C&C before HUD approval. They complained that NYCHA was not eligible for the RAD program. They also complained about the takeover agency—Harlem River Houses.

Under PL 112-55 (the Continuing Appropriations Act of 2012) as amended by PL 115-141 (the 2018 Amendments), as well as the aforementioned HUD regulations, the law (and HUD) requires ownership of a “Covered Project” by a public or non-profit entity, unless private ownership is needed to facilitate the use of tax credits and the PHA preserves an interest in the property. Plaintiffs allege that although the purported Section 8 landlord is a “not-for profit” LLC known as Harlem River Preservation LLC (“HRP”), it appears that the long-term RAD/PACT landlord is Defendant/Appellee C&C, which is not a public or non-profit entity, and the agreement HRP has with NYCHA, upon information and belief, leaves little or no genuine interest, supervisory or proprietary in Harlem River Houses with NYCHA.

HUD promised both a “fact-finding investigation,” and a statement of findings. Neither occurred. Instead, without notice HUD approved the project in February 2022, conducted the closing on the date of approval, allowed millions of dollars to change hands—on the same date- and then allowed C&C to notify the residents that the deal had been approved and that they were in charge.

This lawsuit was filed shortly thereafter, but HUD moved to dismiss, asserting that Plaintiffs/Appellants did not have standing because the “bell had rung,” and the deal was impossible to undue. The District Court ruled in HUD’s favor and asserted that Plaintiffs could have filed for a preliminary injunction before HUD acted—citing one District Court case which bore no relationship to the facts here, and dismissed for lack of subject matter jurisdiction, not addressing even the claim seeking declaratory relief.

The issues remain relevant, both at the Harlem River Houses, and NYCHA seeks to apply HUD’s ruling to convert hundreds of thousands of additional apartments.

### **JURISDICTIONAL STATEMENT**

Jurisdiction was asserted in the District Court pursuant 28 U.S.C. § 1331 because Plaintiffs allege claims under 5 U.S.C. § 704 and 706 because Plaintiffs alleged the government’s actions are arbitrary and capricious.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1129 since Plaintiffs appeal from a Judgment dismissing a case. The appeal is timely, having been filed (March 16, 2023 (A1550) less than 30 days after the entry of Judgment (February 21, 2023 (A1539-1549)).

### **STANDARD OF REVIEW**

Plaintiffs/Appellants assert that the District Court made an error of law. Review is de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

### **THE PROCEEDINGS BELOW**

In 2021 Plaintiffs filed a lawsuit titled *Walsh v. Russ*, 21 civ 04872 (AP) (S.D.N.Y.), against NYCHA, & C&C Apartment Management (C&C), where they sought injunctive relief against C&C unlawfully taking over as the landlord at Harlem River Houses without having been approved by HUD. In that case plaintiffs asserted that NYCHA was a “troubled public housing authority,” not eligible to participate in the RAD privatization program. After oral argument on NYCHA’s Motion to Dismiss, where the District Court suggested that Plaintiffs had not yet suffered an injury, the lawsuit was voluntarily dismissed.

On March 13, 2022, the Appellants filed this class action lawsuit seeking an injunction and declaratory relief that NYCHA was not eligible to participate in the RAD program. The First Amended Complaint (13-83) was filed several days later. HUD then filed a Motion to Dismiss, which NYCHA and the other necessary parties

joined. On February 21, 2023 the District Court, (Preska, J) granted the motion. The District Court premised the dismissal on “standing,” holding that Plaintiffs/Appellants lacked standing because the “conversion has closed, and the Court can no longer redress any alleged injuries that may have.” (A1539-1549). The Court held that Plaintiff’ should have moved for a Preliminary Injunction. The decision held, in relevant part.

Plaintiffs respond that “[i]f HUD is right here, then an APA case could never be brought concerning a RAD conversion approval” because there was no waiting period between when HUD announced its approval of the RAD conversion and when the conversion closed. Plaintiffs further argue that HUD has not made any showing that relief is impossible because “the key parties are all before the Court, and all of the matter[s] undertaken (mortgages and repairs) involve money...” Plaintiffs write that “the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.” (*Id.* (citing *Savoie v. Merchants Bank*, 84 F.3d 52, 58–59 (C.A.2 1996), and in *Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 509–10 (2nd Cir 2005)...

HUD replies that Plaintiffs never sought to enjoin the conversion of Harlem River Houses... HUD writes that “Plaintiffs seek to ‘revers[e]’ HUD’s approval of the conversion of Harlem River Houses, and presumably have the Court restore the Harlem River Houses to the Section 9 program. Nowhere in plaintiffs’ opposition brief do they explain how this would be accomplished...”

The Court agrees with HUD’s analysis. Plaintiffs bear the burden of establishing the elements of constitutional standing, *Lujan*, 504 U.S. at 561, and the Court “need not credit a complaint’s conclusory statements without reference to its

factual context”... Here, Plaintiffs did not meet their burden because they failed to establish that the injuries they alleged were likely to be redressed by a favorable decision from this Court.

Plaintiffs ask the Court to enjoin the RAD conversion of Harlem River Houses. However, the conversion is already complete and has been effected through multiple transactions that have changed Harlem River Houses’ corporate structure, generated debt greater than \$209 million, and released the project’s original declarations of trust. There has been a “commingling of assets and other substantial changes in the structures of the enterprise involved.” *Bank of N.Y. Co.*, 9 F.3d at 1067. In like circumstances, the Court of Appeals has held that courts “lack the power, once a bell has been rung, to unring it.” *Presidential Gardens*, 175 F.3d at 143. Thus, Plaintiffs’ alleged injuries are not likely to be redressed by a favorable judicial decision, Plaintiffs lack standing to bring their suit, and their Amended Complaint is dismissed for lack of subject matter jurisdiction.

Plaintiffs are incorrect when they argue that a ruling for HUD would mean it is impossible to challenge a RAD conversion that does not include a waiting period between HUD’s approval and the closing of the conversion... Plaintiffs were aware of NYCHA’s prospective application for a RAD conversion as early as June 2021, roughly eight months before the conversion closed on February 17, 2022... Even though agency action must be final before it can be challenged under the APA,...and HUD’s action became final the same day the conversion closed ...before HUD approved the conversion, Plaintiffs could have brought suit and moved for a preliminary injunction or a stay under § 705 of the APA until Plaintiffs’ claims against the RAD conversion were adjudicated on the merits. See, e.g., *New York v. United States Dep’t of Educ.*, 477 F. Supp. 3d 279, 288, 293-294 (S.D.N.Y. 2020). Plaintiffs’ failure to bring their case at the appropriate time does not give them standing to sue now when the conversion has closed and the Court can no longer redress any alleged injuries they may have.”

## **FACTUAL ALLEGATIONS**

The factual allegations in the First Amended Complaint are quite lengthy and cannot be repeated in this brief in full. We will highlight mold, lead, and heating issues, but the failure to perform, all documented, is far greater.

NYCHA was created in 1935 with the mission of providing decent, affordable housing for low- and moderate-income New York residents. Today, more than 400,000 New Yorkers reside in one of the 326 NYCHA housing developments in New York (the “NYCHA Developments”).<sup>1</sup> Although the NYCHA Developments were built as models of affordable public housing, NYCHA has failed in its responsibilities to its Residents (including Plaintiffs and members of Plaintiffs’ class) and allowed the NYCHA Developments to fall into disrepair, rendering such housing unsanitary, dangerous, and often uninhabitable. This is true of the buildings Plaintiffs live in.

In failing to fulfill its mission to its Residents, including Plaintiffs and members of Plaintiffs’ class, NYCHA flagrantly violated numerous contractual, statutory, and common law obligations that it owes to those Residents, and subjected those Residents to deplorable living conditions. *See*, generally, the Court’s opinion in *United States v. NYCHA*, 347 F.Supp.3d 182 (S.D.N.Y. 2018).

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<sup>1</sup> N.Y.C. Hous. Auth., About NYCHA, NYC.GOV, <https://www1.nyc.gov/site/nycha/about/about-nycha.page> (last visited April 2, 2021).

NYCHA was obligated to its tenants, under a Consent Decree with HUD entered into in 2018, in *United States v. NYCHA* (A179-231), to pursue a series of repairs and reforms to procedural scheduling and reporting of those repairs. That Consent Decree, though in effect, has not been approved by the Court in *United States v. NYC Housing Authority*, 18 Civ. 5213 (S.D.N.Y. Pauley, J); see *United States v. NYC Housing Authority*, supra, and has barely been complied with, whether it be at Harlem River Houses or elsewhere.

**I. For Years NYCHA Has Breached, and Continues to Breach, Its Obligation to Provide Decent, Safe, and Sanitary Housing to Its Residents.**

NYCHA houses over 400,000 New Yorkers. Approximately 27 percent of Residents are children, nearly 20 percent are age 62 or older and more than 37,000 are both over 62 and live alone. Nonetheless, NYCHA has consistently failed in its obligations to provide adequate housing to its Residents, including the young and elderly. For example, New York State investigators sent to inspect a sample of 225 public housing apartments in March 2018 found that 212, more than 80 percent, had “at least one severe condition” that “could pose a health hazard” to those living there.<sup>2</sup> In October 2019, the Regional Planning Association—an independent non-profit group focused on improving living conditions in the New York metropolitan

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<sup>2</sup> Yoav Gonen, *Beleaguered NYCHA Chair Shola Olatoye is Resigning*, N.Y. POST (Apr. 9, 2018), <https://nypost.com/2018/04/09/nycha-chief-shola-olatoye-is-resigning>.

area—issued a report warning that NYCHA’s “public housing has reached an unprecedented state of crisis” and was “nearly uninhabitable.”<sup>3</sup>

In 2018, HUD brought the action discussed above against NYCHA (the “DOJ Action”), asserting that “NYCHA[] violates basic health and safety regulations of [HUD],” which “require NYCHA to ... provide residents decent, safe, and sanitary housing” and “repeatedly made false statements to HUD and the public regarding these issues and has deceived HUD inspectors.”<sup>4</sup> At a news conference announcing the DOJ Action, United States Attorney Geoffrey Berman stated that NYCHA’s “problems exist ... because NYCHA was a dysfunctional operation and is fundamentally flawed and engaged in a culture of false statements and concealment.”<sup>5</sup>

On June 11, 2018, to resolve extensive and well-documented claims against it in the DOJ Action, NYCHA entered into a consent decree (the “Consent Decree”), (A179-231), in which it admitted its responsibility for unsafe conditions in the NYCHA Developments and to making false statements about them to federal inspectors and the public. Among other things, NYCHA conceded, in part:

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<sup>3</sup> Reg’l Plan Ass’n, *NYCHA’s Crisis: A Matter for All New Yorkers* (Dec. 2018), available at [http://library.rpa.org/pdf/RPA-NYCHAs\\_Crisis\\_2018\\_12\\_18\\_.pdf](http://library.rpa.org/pdf/RPA-NYCHAs_Crisis_2018_12_18_.pdf).

<sup>4</sup> Compl., *United States v. N.Y.C. Hous. Auth.*, No. 18-cv-05213-WHP (S.D.N.Y. June 11, 2018), ECF No. 1, ¶ 1.

<sup>5</sup> Spectrum News NY1, *NYCHA Settlement Will Cost City \$2B, Appoint a Federal Monitor*, NY1 NEWS (June 11, 2018), <https://www.ny1.com/nyc/all-boroughs/news/2018/06/11/city-reaches-deal-on-nycha-settlement-terms>.

- “At least once a year, beginning no later than 2010 and extending through 2016, NYCHA’s certifications to HUD contained untrue representations that NYCHA ‘will comply with’ HUD’s federal lead paint safety regulations.”
- “At least once a year, beginning no later than 2010 and extending through 2016, NYCHA’s certifications to HUD contained untrue representations that NYCHA was ‘in compliance with all applicable Federal statutory and regulatory requirements.’”
- “Since at least 2010, NYCHA has not performed most of the biennial lead paint risk assessment reevaluations required by regulation for developments containing lead paint. In a 2011 email, a NYCHA director advised a NYCHA executive that NYCHA was not conducting required risk assessment reevaluations.”
- “Between 2011 and present, NYCHA residents have made many thousands of complaints about mold growth every year.”
- “In many cases, NYCHA staff verified that the mold growth covered 10 or more square feet. In nearly 300 cases between 2014 and 2016, the verified mold growth covered more than 100 square feet.”
- “Currently, after NYCHA has removed mold from apartments, the mold returns at least 30% of the time.”
- “In 2016 alone, NYCHA experienced an average of more than 13 outages per elevator. The majority of NYCHA elevator buildings had at least one period with no functioning elevator service in 2016.”

Significantly, at a September 2018 hearing in the DOJ Action seeking approval for the Consent Decree, at which dozens of Residents testified about their NYCHA living conditions, Judge William H. Pauley agreed with the DOJ,

describing NYCHA's failure to provide adequate housing as "absolutely stunning."<sup>6</sup> The DOJ Action ultimately led to the appointment of a Federal Monitor (the "Federal Monitor"), who similarly noted that "NYCHA routinely failed to comply with lead-based paint safety regulations and failed to provide decent, safe, and sanitary housing with respect to the provision of heat, hot water, and elevators, and the control and treatment of mold and pests." The Federal Monitor further explained that problems with "lead paint, mold, heat/hot water, elevators, pests, and waste management share common causes that must be addressed for any individual solution to be effective. NYCHA's housing stock is aging, and years of neglect have taken a toll."<sup>7</sup>

None of NYCHA's numerous breaches of its obligations was a secret. As the Federal Monitor noted, "New York City and national news media have made numerous reports over many years about the plight NYCHA residents faced with these deficient conditions."<sup>8</sup> For example, in July 2018, the *New York Times* reported that "[p]ublic housing in New York City has become synonymous with the dilapidated living conditions many of its more than 400,000 residents have endured

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<sup>6</sup> Sarina Trangle, NYCHA Residents Detail Horrid Living Conditions *Before Federal Judge* (Sept. 26, 2018), AM N.Y. (Sept. 26, 2018), <https://www.amny.com/news/nycha-court-hearing-1-21262062>.

<sup>7</sup> *Id.* at 23-24.

<sup>8</sup> Monitor's First Report (A232-498) at 23.

in recent years.”<sup>9</sup> Similarly, in December 2019, the *New York Post* reported that tenants in two cases filed against NYCHA in Brooklyn Housing Court claimed “the New York City Housing Authority is miserably failing to provide legally required safe and decent housing” and quoted one resident who stated, “We are living as if it’s a third world country.”<sup>10</sup> That same month, New York City Public Advocate Jumaane Williams named NYCHA as the City’s worst landlord for the second year in a row. He explained that NYCHA Developments have “bad [housing code] violations. They’re things that you can’t live there and be a human being.”<sup>11</sup>

While the Federal Monitor is charged with remedying the deplorable conditions in NYCHA Developments, the Director of Columbia Law School’s Health Justice Advocacy Clinic has described the appointment of that Monitor as “the equivalent of nailing a 2-by-4 to a collapsing building.” She further explained that “[t]he conditions of public housing in New York City are deplorable,” and

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<sup>9</sup> Luis Ferre Sandurni, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html>.

<sup>10</sup> Jacob Henry & Rich Calder, *Tenants at Two Dilapidated NYCHA Complexes Sue Over Living Conditions*, N.Y. POST (Dec. 13, 2019), <https://nypost.com/2019/12/13/tenants-at-two-dilapidated-nycha-complexes-sue-over-living-conditions>.

<sup>11</sup> *Public Advocate Releases List of New York City’s Worst Landlords*, NY1 NEWS (Dec. 16, 2019), <https://www.ny1.com/nyc/all-boroughs/news/2019/12/16/public-advocate-releases-list-of-new-york-city-s-worst-landlords>.

NYCHA is “[b]eset by lead-paint hazards, mold, heating failures, and chronic mismanagement” that pose “a danger to [NYCHA’s] 400,000 residents.”<sup>12</sup>

Although in the Consent Decree NYCHA promised to remedy its breaches, NYCHA has not done that. Harmful conditions continue to plague the NYCHA Developments, including Harlem River Houses. Recurring mold growth (which was supposed to be addressed in a separate Consent Decree in *Baez v. NYC Housing Authority*, 13 Civ. 8916 (WHP)) continues to infect thousands of apartments because of leaks and poor ventilation, a particular health risk for Residents with asthma. Pest infestations, including rats, inside and on surrounding grounds, remain common, fostered by NYCHA’s failure to fix leaks, and provide basic sanitation. Elevators frequently fail to work, stranding elderly and disabled tenants. Incredibly, lead paint safety rules are still violated in the majority of NYCHA Developments. Water and sewage leaks are common and peeling paint frequently goes unaddressed. NYCHA’s own maintenance procedures often are not followed. Many categories of repairs that should be quickly addressed instead take weeks or, more often, months. Garbage compactors and boilers which should have been retired 10-20 years ago frequently break down, and take months to repair, depriving residents of heat, hot water, and

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<sup>12</sup> Emily A. Benfer, *New York’s Public Housing System is the Size of a City. It’s Failing Children.*, WASH. POST (Feb. 11, 2019), [https://www.washingtonpost.com/opinions/new-yorks-public-housing-system-is-the-size-of-a-city-its-failing-children/2019/02/11/458f63c2-2bb7-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/opinions/new-yorks-public-housing-system-is-the-size-of-a-city-its-failing-children/2019/02/11/458f63c2-2bb7-11e9-984d-9b8fba003e81_story.html).

garbage disposal. In recent years, the New York City Department of Investigation (“DOI”) has also found that NYCHA fails to properly conduct key safety checks of items like smoke and carbon monoxide detectors in its apartments, and the New York City Comptroller has found that the majority of NYCHA’s playgrounds have “substandard and visibly hazardous conditions.”

NYCHA’s breaches of its obligations have led Residents to resort to unsafe self- help by, among other things, scraping large mold patches from their bathroom ceilings and using potentially dangerous pesticides. They also are forced to utilize dirty, unlit, hazardous stairwells when the elevators do not work.

NYCHA’s failures have been documented by the Monitor appointed pursuant to the *U.S. v. NYCHA* Consent Decree, in each of his eight reports since July 22, 2019. His most recent reports, demonstrating ongoing mold problems, lead paint violations, falling ceilings, unattended trash, and a lack of heat, are set forth at A794 – 844)

Specific failures by NYCHA to provide its Residents with decent, safe, and sanitary housing include the following, which are discussed in far greater length in the First Amended Complaint.

**A. NYCHA Has Failed to Repair and Maintain Plumbing Systems and to Adequately Remediate Mold and Mildew.**

The Federal Monitor’s First Report, dated July 22, 2019 (the “Monitor’s First Report”), (A232-498), noted that residents of the NYCHA Developments made

“numerous complaints” about emergency requests for repairs, including “serious water leak[s],” that were “unaddressed for weeks or, in some cases, not at all.”<sup>13</sup>

Inevitably, the unaddressed leaks and resulting moisture cause mold. A survey conducted by the Red Hook Initiative in 2016 found that 94 percent of nearly 300 Residents surveyed currently had or previously had leaks and/or mold in their apartments. Nearly 40 percent of Residents who reported mold to NYCHA did not receive any response, and less than 16 percent of Residents who did receive a response described the outcome of that response as positive.<sup>14</sup> In 2014, in the context of a class action lawsuit (*Baez*) brought to address these problems, NYCHA entered into a Court approved, and therefore enforceable Consent Agreement on behalf of all NYCHA tenants, to address the mold problem. Seven years later little or no action has been taken.

The Monitor’s First Report—as well as the Federal Monitor’s Second Report dated, November 1, 2019 (A499-634)—verifies that these leak and mold problems continued through 2019. For the period from November 2018 through January 2019, 3,293 “7-day” mold work orders (reflecting major mold occurrences) were created and only 1,805 were closed. Of those closed, nearly one-third (31%) were not closed

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<sup>13</sup> Monitor’s First Report (A232-498) at 78.

<sup>14</sup> Red Hook Initiative, *The Impact of Mold on Red Hook NYCHA Tenants* 13, 17 (2016), available at [http://rhicenter.org/wp-content/uploads/2016/10/ImpactofMold\\_RHI\\_-FINALREPORT\\_10.27.16.pdf](http://rhicenter.org/wp-content/uploads/2016/10/ImpactofMold_RHI_-FINALREPORT_10.27.16.pdf).

within seven days. During the same period, 3,960 “15-day” mold work orders (reflecting more minor mold occurrences) were created and only 1,006 were closed. Of those closed, one-third (33%) were not closed within 15 days.<sup>15</sup>

The Monitor’s Second Report (A499-634) also found that from May 1 to July 31, 2019, 10 percent of “7-day” mold work orders were not completed within seven days, and 43 percent of “15-day” mold work orders were not completed within 15 days.<sup>16</sup> The Monitor’s Second Report also states that “[t]hrough leadership at NYCHA has, for years, known of the scope of the mold problem, ... [t]housands of NYCHA residents have long suffered and continue to suffer from the effects of mold and the lack of urgent, rigorous action by NYCHA,” and concludes that “NYCHA is currently not using its best efforts and technically is in violation of the Revised Consent Decree in *Baez [v. N.Y.C. Hous. Auth.]*, an action filed in 2013] and thus the HUD Agreement as it pertains to mold.”<sup>17</sup>

The Federal Monitor’s third report, dated February 4, 2020 (the “Monitor’s Third Report”) (A635-743) found that “NYCHA has a long way to go to effectively remediate mold in apartments and common areas” and that “the fundamental

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<sup>15</sup> Monitor’s First Report (A232-498) at 44.

<sup>16</sup> Bart M. Schwartz, Monitor’s Second Quarterly Report 33-34 (November 1, 2019) (“Monitor’s Second Report”), *available at* <https://nychamonitor.com/wp-content/uploads/2019/11/NYCHA-Monitor-Second-Quarterly-Report-11.1.19-FINAL.pdf>. (A499-634))

<sup>17</sup> *Id.* at 34, 36.

question of how NYCHA will apply adequate resources and methods to comply with the [HUD Settlement] Agreement and the *Baez* Consent Decree remains unanswered.”<sup>18</sup>

The Federal Monitor’s fourth report, dated May 18, 2020 (the “Monitor’s Fourth Report”) (A744-751), similarly found that “NYCHA continues to have serious problems with mold” and that that “for the quarter ending January 31, 2020, only 34% of ‘15-day’ mold work orders were completed within 15 days.” The Federal Monitor also warned that NYCHA’s “battle against mold” would likely “become[] complicated by the impact of the COVID crisis.”<sup>19</sup>

In his letter submitted in lieu of a Fifth Quarterly Report (the “Monitor’s Fifth Report Letter”) (Ex. I), the Federal Monitor confirmed that the NYCHA’s problems with mold worsened during the COVID-19 pandemic. During the period from March 23 through June, nearly half (45.5%) of “7-day” mold work orders were not completed within 7 days, and more than eight in ten (81.8%) “15-day” mold work orders were not completed within 15 days.<sup>20</sup>

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<sup>18</sup> Bart M. Schwartz, Monitor’s Third Quarterly Report 5, 39 (Feb. 4, 2020) (A635-743) (“Monitor’s Third Report”), *also available at* <https://nychamonitor.com/wp-content/uploads/2020/02/NYCHA-Monitor-Third-Quarterly-Report-2.4.20.pdf>.

<sup>19</sup> Bart M. Schwartz, Monitor’s Fourth Quarterly Report 36, 38 (May 18, 2020) (“Monitor’s Fourth Report”), *also available at* <https://nychamonitor.com/wp-content/uploads/2020/05/NYCHA-Monitor-Fourth-Quarterly-Report-5.18.20.pdf>.

<sup>20</sup> Letter from Bart M. Schwartz 5 (Aug. 13, 2020) (“Monitor’s Fifth Report Letter”)(A744-751), *also available at* <https://nychamonitor.com/wp-content/uploads/2020/08/8.13.20-Fifth-Quarterly-Report-Letter- Final.pdf>.

The presence of mold in the NYCHA Developments is also in violation of the HUD Housing Standards, which provide that “dwelling units and common areas must have proper ventilation and be free of mold.” 24 C.F.R. § 5.703(f). The NYC Housing Code similarly provides that NYCHA, as the owner of the NYCHA Developments, “shall take reasonable measures to keep the premises free from ... indoor allergen hazards and from any condition conducive to indoor allergen hazards, and shall take reasonable measures to prevent the reasonably foreseeable occurrence of such conditions and shall take reasonable measures to expeditiously remediate such conditions and any underlying defect[.]” N.Y.C. Admin. Code § 27-2017.1.

If and when NYCHA finally does attempt to repair leaks and remediate mold in the NYCHA Developments, the efforts are often inadequate. The Monitor’s First Report found that from November 2018 through January 2019, mold reoccurred in nearly half (47%) of reported cases for which mold work orders had been closed.<sup>21</sup>

The recurrences of leaks and mold are due, in large part, to the fact that NYCHA’s repairs do not address the underlying problems, such as poorly maintained and inadequate water pipes. As the Monitor’s First Report explains, cutting and replacing sections of piping often simply moves the points at which

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<sup>21</sup> Monitor’s First Report at 44.

water pressure builds and causes a leak farther down the pipe.<sup>22</sup> Problems with leaks and mold are also caused by the poor condition of roofs in the NYCHA Developments, including those in the Red Hook Developments in Brooklyn, which were severely damaged by Hurricane Sandy in 2012.<sup>23</sup> In 2017, NYCHA began the first phase of a post-Sandy reconstruction project planned to involve the installation of new roofs on all 28 buildings in the Red Hook Developments. However, many of the roofs have not been replaced, and the projected completion date for the first phase of the project has already been pushed back from 2021 to 2022.<sup>24</sup> In a July 2019 inspection of 35 roofs repaired by NYCHA, the New York City Comptroller found that more than half (54%) of the repairs had moderate or significant deficiencies that left the roofs “susceptible to water penetration and an accumulation of moisture under the roof line—an ideal condition for mold to grow.”<sup>25</sup>

The leaks, mold and other problems caused by the inadequate plumbing systems in the NYCHA Developments pose a significant risk to the Plaintiffs, and Plaintiffs’ class’s health and safety. When mold grows in a home, it can release

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<sup>22</sup> *Id.* at 45.

<sup>23</sup> See Sophie Kasakove & Tracie Williams, *Is New York City’s Public Housing Ready for the Next Storm?*, THE NATION (Jan. 29, 2019), <https://www.thenation.com/article/new-york-climate-change-public-housing> (“Next Storm Article”).

<sup>24</sup> *Id.*

<sup>25</sup> Marjorie Landa, City of N.Y. Office of the Comptroller, Audit Report on the New York City Housing Authority’s Preventative Maintenance and Repairs on Roofs Under Warranty (July 29, 2019), available at <https://comptroller.nyc.gov/wp-content/uploads/documents/SE18-059A.pdf>.

toxins and allergens linked to significant respiratory problems, including asthma attacks. Asthma is also a significant public health problem for adults in the NYCHA Developments. According to data from the New York City Department of Health (“NYC DOH”), between 2012 and 2014 the rate of asthma hospitalizations for NYCHA tenants aged 20 and above was four times higher than for the rest of New York City. Further, crumbling walls, caved-in ceilings and flooded floors from persistent leaks are certainly not within anyone’s definition of “decent” housing as NYCHA is obligated to provide.

Leaks and mold problems continue to pose health and safety risks on a similar level as when the Consent Decree was entered into. For example, in the Eighth Quarterly Report, (A806-825), the Monitor reported: “The investigation revealed that superficial mold repairs had been made in some units throughout 2020 as the property was being prepared for the conversion, and in many cases, mold was literally being covered up with drywall. In one egregious case, visible signs of mold were evident on recently-installed sheetrock on a bathroom ceiling. Upon removing the sheetrock, it was revealed that the ceiling rafters were contaminated with severe mold growth, indicating that the mold problem had existed for some time and clearly had not been addressed before the new sheetrock was installed.” We recently examined a work order for a development in the South Bronx that listed the root cause for the mold as “resident cause,” without the required further explanation for

the basis for this assessment. A review of relevant photos of the ceiling, however, shows that the leak clearly comes from above. Additionally, there is a hole in the wall behind the toilet. Three child work orders were created for painting and mold cleaning, yet no work orders were opened to investigate the leak of the hole in the wall. In the Ninth Monitor's Report (A826-844), he stated: "In another recent example, the Monitor team found that a superintendent in a Manhattan development appeared to be entering false moisture readings into the mold inspection work order. The matter was referred to NYCHA's Compliance Department. When Compliance interviewed the superintendent, he admitted that they were intentionally not taking proper moisture readings so they could reduce the number of positive findings to lessen their work loads."

**B. NYCHA Has Failed to Inspect for and Remediate Lead-Based Paint.**

Lead-based paint has long been a significant hazard for Residents in many NYCHA Developments, and yet in 2012, NYCHA breached its significant obligations regarding lead paint by *halting its annual inspections for lead*.<sup>26</sup> A September 2019 report of an investigation conducted by the New York City Comptroller states that between January 1, 2013 and October 10, 2018, 572 NYCHA

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<sup>26</sup> Mark G. Peters, Comm'r of N.Y.C. Dep't of Investigation, Investigation into False Certification of NYCHA Lead Paint Inspections 3 (Nov. 2017) ("DOI Lead Paint Report"), available at [https://www1.nyc.gov/assets/doi/press-releases/2017/nov/27NYCHALeadPaint11-14-2017\\_UL.pdf](https://www1.nyc.gov/assets/doi/press-releases/2017/nov/27NYCHALeadPaint11-14-2017_UL.pdf).

buildings were not inspected by NYCHA.<sup>27</sup> Those inspections continue to be sporadic.

Further, for years, NYCHA not only failed to complete the required lead inspections in the NYCHA Developments, but also knowingly and falsely certified to HUD and the public that it was compliant with federal, state, and local laws and performing lead paint inspections on NYCHA residences on an annual basis

Ultimately, the NYC Department of Investigations conducted an in-depth investigation of NYCHA's practices related to lead paint exposure. On November 14, 2017, it published the resulting report, which made NYCHA's failure to keep its residents safe from lead poisoning public knowledge.<sup>28</sup> As noted above, in the June 2018 Consent Decree (A- ), NYCHA admitted that “[s]ince at least 2010, NYCHA has not performed most of the biennial lead paint risk assessment reevaluations required by regulation for developments containing lead paint.”

The Monitor's Second Report (A499-634) notes that XRF (X-Ray) testing is “significantly behind NYCHA's publicized schedule for completion (by the end of 2020)” and that the Federal Monitor “continue[s] to believe that inadequate

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<sup>27</sup> N.Y.C. Comptroller, N.Y.C. Comptroller Scott Stringer's Investigation into Child Lead Exposure 24 (Sept. 2019), *available at* <https://comptroller.nyc.gov/wp-content/uploads/documents/Lead-Investigation.pdf> (“Comptroller's Lead Report”).

<sup>28</sup> N.Y.C. Dep't of Investigation, DOI Investigation Reveals NYCHA Failed to Conduct Mandatory Lead Paint Safety Inspections for Four Years (Nov. 14, 2017), *available at* [https://www1.nyc.gov/assets/doi/press-releases/2017/nov/27NYCHALeadPaint11-14-2017\\_UL.pdf](https://www1.nyc.gov/assets/doi/press-releases/2017/nov/27NYCHALeadPaint11-14-2017_UL.pdf).

resources are being applied to XRF testing and that NYCHA must use better methods to identify locations where children under six reside or regularly visit.”<sup>29</sup>

In addition to requiring public housing agencies to test for lead, federal regulations also require housing agencies to follow work practices set forth in the Renovation, Repair, and Painting Rule (“RRP Rule”) to reduce the risk of lead exposure during renovation work. *See* 40 C.F.R. § 745.85. And yet, the Monitor’s First Report (Ex. E) found that “adherence to the [RRP] [R]ule has not been uniform, nor has it been strictly enforced or supervised by NYCHA,” that “the norm was that some violation of the [RRP] Rule would occur in all jobs,” and that “NYCHA lacks a comprehensive policy to address the many issues surrounding lead-based paint.”<sup>30</sup>

Further, the Monitor’s Second Report found that NYCHA was still “not in compliance with lead-based paint regulations and many required lead safe work practices,” and that “broad IT improvements must be made by NYCHA to bolster necessary record keeping for work that must comply with lead-based paint regulations.”<sup>31</sup>

In a July 31, 2019 report to the Federal Monitor submitted in connection with its certification to HUD, NYCHA acknowledged that its practices have “not resulted

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<sup>29</sup> Monitor’s Second Report (A\_\_\_) at 24, 25 n.3.

<sup>30</sup> Monitor’s First Report (A\_\_\_) at 33.

<sup>31</sup> *Id.*; Monitor’s Second Report (A\_\_\_) at 4.

in timely clearance examinations,” and that “many sites have not received any clearance examination as required.” ...In September 2019, NYCHA was only able to document timely collection of dust wipe samples approximately 71% of the time.<sup>32</sup>

In the Monitor’s Third Report (A635-743), the Federal Monitor noted that only about 20% of apartments that NYCHA identified that needed to be tested for lead-based paint had been tested, and 55% of the apartments tested were positive. The Federal Monitor also found that, as of February 20, 2020, NYCHA was “unable to ensure that next-day clearance is obtained (or even that wipes are taken within 48 hours), and no protection or temporary housing is given to residents before clearance is obtained.”<sup>33</sup>

The Monitor’s Fifth Report Letter (A769-781) found that NYCHA has “accrued a significant backlog of lead paint corrective work in apartments which must be addressed” and “NYCHA continues to face a great challenge in the timely and successful performance of dust wipes necessary to clear apartments for safe occupancy after lead paint work is completed.”<sup>34</sup>

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<sup>32</sup> *Id.* at 2.

<sup>33</sup> Monitor’s Third Report at 29-30.

<sup>34</sup> Monitor’s Fifth Report Letter at 5.

The Federal Monitor also noted that “[a]lthough no key HUD Agreement deadlines relating to lead came due in the past quarter, future deadlines are at great risk of noncompliance.”<sup>35</sup>

On October 22, 2020, the Federal Monitor released a statement revealing that there was a “significantly larger number of apartments where children under six reside who might be exposed to lead risks” than previously believed. ... Approximately 6,000 apartments have been added to the count available two years ago, which was around 3,000 based on an annual certification process.”<sup>36</sup>

NYCHA’s failure to comply with state and federal regulations regarding lead-based paint continues to pose a significant risk to the Plaintiffs and Plaintiff’s class’s health and safety. *See* Monitor’s Ninth Report, (A826-844): “NYCHA has identified 4,523 apartments with positive components in buildings with local and/or federal exemptions from lead-based paint requirements.... Compliance has identified that, for over 94% of work orders potentially subject to RRP requirements, NYCHA renovators are indicating on the work order that they are not performing work that requires RRP protocols.”

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<sup>35</sup> *Id.*

<sup>36</sup> Press Release, NYCHA’s Efforts to Locate Child Under Six in Apartments That May Contain Lead Paint (Oct. 22, 2020), *available at* <https://nychamonitor.com/nychas-efforts-to-locate-children-under-six-in-apartments-that-may-contain-lead-paint>.

- C. NYCHA Has Failed to Repair and Maintain Working Drainage and Sewage Systems.**

(See A 47-48)
- D. NYCHA Has Failed to Repair and Maintain Electrical Systems.**

(See A 48-50)
- E. NYCHA Has Failed to Repair and Maintain Operative, Safe and Clean Elevator Systems.**

(See A 50-54)
- F. NYCHA Has Failed to Maintain Safe and Secure Premises.**

(See A 54-57)
- G. NYCHA Has Failed to Repair and Maintain Smoke and Carbon Monoxide Detectors.**

(See A 57-58)
- H. NYCHA Has Failed to Remediate Problems with Pests.**

(See A 58-60)
- I. NYCHA's Has Failed to Provide Adequate Waste Receptacles and Clean Common Areas.**

(See A 60-64)
- J. NYCHA Has Failed to Provide Gas.**

(See A64-65)
- K. NYCHA's Has Failed to Make Necessary Repairs At All or Within a Reasonable Period of Time.**

(See A 65-67)

As discussed in detail above, NYCHA routinely fails to respond to the Plaintiffs and other Residents' requests for necessary repairs and does not make repairs within a reasonable time. NYCHA also fails to offer the Plaintiffs or other Residents any alternative accommodations or allow their rents to abate during the period in which repairs were not made. NYCHA's website (A752-755) indicates that from September 2018 to August 2021, the number of days required to make repairs in the NYCHA Developments has **more than quadrupled**—from 62 days to 283 days—and is well above NYCHA's target of 15 days.<sup>37</sup>

The data on NYCHA's website also indicates that the number of open work orders in the NYCHA Developments has **increased by 100 percent**—from 223,610 in September 2018 to 548,120 in August 2021. In every month from September 2018 through August 2021, the number of work orders opened in the NYCHA.

Moreover, it is likely that the publicly available data on NYCHA's website understates the scope of unresolved problems in NYCHA Developments. The Monitor's First Report "found that NYCHA's data is often incomplete, imprecise, and/or inaccessible, creating an inaccurate perception of NYCHA's performance" and that "often there is little, if any, correlation between closing work orders and completing the repair of a problem."

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<sup>37</sup> NYCHA Metrics, N.Y.C. HOUS. AUTH., [https://eapps.nycha.info/NychaMetrics/Charts/PublicHousingChartsTabs/?section=public\\_housing&tab=tab\\_repairs](https://eapps.nycha.info/NychaMetrics/Charts/PublicHousingChartsTabs/?section=public_housing&tab=tab_repairs) (last visited Oct. 7, 2019), and Exhibit M.

The failure to make repairs to the heating systems within NYCHA is one of the most egregious ongoing failures of the Authority. Tenants go length periods of time without heat in the winter and without hot water year round. The Monitor noted this in his 10th Report, (A826-844) at page 2: “As reported below in the heating trend analysis report, there has been a significant increase in the number of heating outages, many of which were building-wide, as compared to the same period last heating season. Prolonged heat outages are unacceptable, particularly given the frigid temperatures we have had since the start of the year. ... We found that NYCHA’s Heating Management Service Department (HMSD) staff often failed to follow their own established procedures to perform proper PM.”

## II. NYCHA PACT/RAD Program

In *Baez v. NYC Housing Authority*, ----F.Supp. 3d----, 2021 WL 1371793 (S.D.N.Y. April 12, 2021), Judge William Pauley described the PACT/RAD program as follows:

### Section 8 vs. Section 9 Housing

The United States Department of Housing and Urban Development (“HUD”) administers two major low-income housing programs that fund NYCHA Section 8 and Section 9. ... The Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, provides Section 9 federal funding for publicly owned and operated housing units... The Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.*, provides Section 8 federal funding in the form of vouchers to low-income families who may subsidize their rent in privately owned and operated housing units...

In 2012, HUD launched the Rental Assistance Demonstration program (“RAD”) funded by Section 8.... Instead of a voucher system for tenants, RAD disburses funding to public housing authorities to enter into long-term leases with private developers.

Under RAD, HUD still subsidizes the tenants’ rent payments and the local housing authority provides a subsidy to the developer. Developers renovate housing authority-owned properties with their own capital, and retain private property management companies to operate the developments...To utilize RAD funds, NYCHA launched the Permanent Affordability Commitment Together (“PACT”) program in May 2015...Under the PACT program, NYCHA continues to own its housing portfolio but leases its buildings to private developers, who in turn renovate them and manage day-to-day operations.

As of February 3, 2021, 9,517 units-approximately 5% of NYCHA’s housing portfolio-have been converted to PACT. ... NYCHA plans to transfer an additional 12,000 units to PACT by the end of 2022...

One key element of the PACT/RAD program appears to be the fact that once the formerly Section 9 NYCHA units become Section 8 units owned by the RAD transferee, it opens the door to various funding streams from the Federal Government, most especially funding under the Low Income Housing Tax Credit Program (“LIHTCP”). According to HUD the LIHTC program is the most important resource for creating affordable housing in the United States today. Created by the Tax Reform Act of 1986, the LIHTC program gives State and local LIHTC-allocating agencies the equivalent of approximately \$8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction

of rental housing targeted to lower-income households.” <https://www.huduser.gov/portal/datasets/lihtc.html>. The federal government issues tax credits to state and territorial governments. State housing agencies then award the credits to private developers of affordable rental housing projects through a competitive process. Developers generally sell the credits to private investors to obtain funding. Once the housing project is placed in service (essentially, made available to tenants), investors can claim the LIHTC over a 10-year period. The Section 8 owners can also use funds from NYC Housing Development Corporation bonds.

NYCHA has pointed to the PACT/RAD program, up to now, as the only means by which it could raise the capital funds to do the \$40 billion in repairs that it estimates need to be done to make the Section 9 housing livable. Under Section 8 the tenants receive vouchers from the government which they give to the landlord, which gets paid whatever the tenants don’t pay (tenants pay 30% of their income at most). The sums paid to the landlord under Section 8, and various Section 8 programs, and New York State bond programs described above, will exceed what HUD gives to NYCHA per apartment.

### **III. Conversion Under HUD Regulations**

Conversion under RAD, if HUD regulations are followed, may not occur until the Public Housing Authority (“PHA”) (here, NYCHA) has submitted a Plan,

requiring multiple steps, to HUD, and HUD approves the plan. Conversion does not occur until there is a closing held only after the plan is approved by HUD.

Under current HUD Regulations (see H-2019-09 PIH-2019-23(HA), Rental Housing Assistance REV-4—Final Implementation), to be eligible for a RAD conversion a PHA must be “classified as a Standard or High Performer under the Public Housing Assessment System ... If classified as ‘troubled’ ... the PHA may still be eligible if it is making substantial progress under its Recovery Agreement, Action Plan, Corrective Action Plan, or Memorandum of Agreement or proposes a revision to such agreement or plan that incorporates conversion under RAD and that is acceptable to HUD.” HUD must have determined that factors resulting in the PHA’s Troubled status will not affect its capacity to carry out successful conversion.

Under those same regulations, the PHA must perform a detailed physical inspection to determine short-term rehabilitation needs that will be completed as part of the RAD conversion and long-term capital needs. This assessment must be completed no earlier than 180 days after a Financing Plan is submitted to HUD.

Additionally, under PL 112-55 (the Continuing Appropriations Act of 2012), as amended by PL 115-141 (the 2018 Amendments), as well as the aforementioned HUD regulations, the law (and HUD) requires ownership of a “Covered Project” by a public or non-profit entity, unless private ownership is needed to facilitate the use of tax credits AND the PHA preserves an interest in the property.

#### **IV. The Conversion of Harlem River Houses**

##### **A. Harlem River Preservation LLC**

An entity was created in April 2020 to be the RAD/PACT developer, called Harlem River Preservation LLC (“HRP”). HRP is a partnership of at least four corporate entities: (a) C&C Apartment Management, LLC, a private property management company; (b) the Settlement Housing Fund, a non-profit developer/owner created in 1971, which received 90% of its funds from “related organizations”; (c) West Harlem Group Assistance, a small non-profit self-funded by management fees and half-funded by government grants; and (d) L&M Builders, a multi-million dollar General Contractor, which is to be the GC at Harlem River Houses. Tenants were being asked to sign leases not with HRP, but with C&C, the private sector property manager—the only entity in HRP which seems designed to stick around after federal money is used, under Section 8, to perform renovations at Harlem River Houses.

##### **B. The Conversion at Harlem River Houses**

Although HRP was created just for Harlem River Houses conversion, it appears that the long-term RAD/PACT landlord will be C&C. The agreement it has with NYCHA, upon information and belief, leaves little or no genuine interest in Harlem River Houses with NYCHA or HRP; it is simply a conduit of public funds for a C&C project.

Even in the early stages of this process, C&C continued to push Plaintiffs and all other Harlem River Houses NYCHA tenants to sign their leases. They intrusively visited tenants' apartments, insisting that they have a right to enter in order to do a survey so that they could plan repairs, and, in many cases, using those visits as an opportunity to tell tenants that they would face eviction if they don't sign leases with C&C, commencing when conversion occurs "in the Fall [of 2021]." Tenants had multiple notices posted on their apartment doors, were pressured to come to meetings with C&C, and are being told that repair orders they requested of NYCHA had to be refiled with C&C and be reassessed.

### **C. Tenants Raise Questions**

Beginning in June 2021, Plaintiffs, who had formed an organization called The United Front Against Displacement, began writing letters of complaint to HUD about C&C's actions, along with photographs, asking that HUD "approval of the RAD conversion" be withdrawn. (A744-751). C&C was acting already as though they were in charge. On June 22, 2021 Plaintiffs wrote a group letter to HUD complaining about C&C's intimidating tactics. (A769-781)

On August 2, 2021 HUD staffer Tai Merey Alex wrote back (A784-787) stating that NYCHA had only submitted a "preliminary application," and that HUD would conduct a "fact-finding" concerning Plaintiffs' complaints. According to Alex, "Upon conclusion of our fact-finding, we will issue a findings letter that will

include whether we have determined there to be program violations.” She promised “appropriate action” if violations were found.

On September 17, 2021 Counsel for Plaintiffs wrote to Ms. Alex supplying additional documentation in support of Plaintiffs’ complaints, and asking that he be kept up to date. Also, Counsel made a FOIL request for a “copy of NYCHA’s preliminary application regarding Harlem River Houses.” (A786-787)

In October 2021 HRP announced to tenants that it was going to begin repairs on apartments, which in many cases will require tenants to move out, without any assurance about whether they will return to their apartment or about how long they will be forced out of their apartment. And, in announcing these plans, HRP continued to pressure tenants to sign leases with C&C.

On October 21, 2021, Plaintiffs’ counsel made additional complaints, including about what had been announced by HRP in its October meeting, alleging that HRP was not the real entity in control of the RAD conversion at Harlem River Houses, a violation of PL115-141, and that NYCHA, as a Troubled PHA, was ineligible to supervise a RAD conversion. (A789-790) That letter also made an information request under the Freedom of Information Act for the results of HUD’s investigation of the Plaintiffs’ complaints and of counsel’s complaint.

On November 15, 2021 Ms. Alex responded (A792-793), again stating that HUD was undertaking a “fact-finding” regarding the complaints, that the “current

status” of the submitted financial plan was “under review,” and that a proposal to have tenants displaced from their apartments by C&C was under review. With respect to NYCHA’s status as a Troubled Housing Authority and the ineligibility of C&C and Harlem River Preservation to act as an appropriate entity in the RAD conversion process, all Ms. Alex did was refer counsel back to the regulations that he alleged were being violated.

On around February 18, 2022, C&C sent a notice to all tenants at Harlem River Houses, including Plaintiffs, advising them that “effective immediately, we are the new managing agent of Harlem River Houses.” The leases that they demand that everyone sign is with them, not with HRP.

No notice of the RAD conversion approval was given by HUD to the Plaintiffs or other tenants at Harlem River Houses. No Plaintiffs were interviewed by HUD about their complaints, nor were they or their attorney given copies of NYCHA’s applications, financing plans, or the fact-finding results, despite a request.

There is no question that NYCHA intends to continue the PACT/RAD program throughout its system so that it can eschew all responsibility to run the NYCHA developments, and convert the entire NYCHA property into privately owned Section 8 housing. Its ability to supervise what the new RAD owners are and will be doing is questionable, and its track record should create no confidence that it

will act to protect the rights of its former tenants, as is its responsibility to do under RAD.

### **CAUSES OF ACTION STATED IN THE COMPLAINT**

**1. Implementation of RAD in Violation of 42 U.S.C. Section 1437f and PL 112-55 as Amended and H-2019-09 PIH-2019-23(HA), Rental Housing Assistance REV-4 – Final Implementation)**

Plaintiffs-Appellants asserted that under current HUD Regulations (*see* H-2019-09 PIH-2019-23(HA), Rental Housing Assistance REV-4 – Final Implementation), to be eligible for a RAD conversion a PHA must be “classified as a Standard or High Performer under the Public Housing Assessment System ... If classified as ‘troubled’ ... the PHA may still be eligible if it is making substantial progress under its Recovery Agreement...

After having been accused by HUD, in *United States v. NYCHA*, of being a Troubled PHA, and conceding the underlying facts, which were probably criminal in nature, NYCHA has not made substantial progress under the court-unapproved Consent Agreement to be eligible for a RAD conversion. Under those same regulations the PHA must “perform a detailed physical inspection to determine short-term rehabilitation needs that will be completed as part of the RAD conversion and long-term capital needs.” This assessment must be completed “no earlier than 180 days *after* a Financing Plan is submitted to HUD.” At no time within the 180

days after NYCHA submitted its RAD Financing Plan for Harlem River Houses did it do the required assessment.

**2. Implementation of RAD in Violation of 42 U.S.C. Section 1437f and PL 112-55 as Amended**

Under PL 112-55 (the Continuing Appropriations Act of 2012) as amended by PL 115-141 (the 2018 Amendments), as well as the aforementioned HUD regulations, the law (and HUD) requires ownership of a “Covered Project” by a public or non-profit entity, unless private ownership is needed to facilitate the use of tax credits AND the PHA preserves an interest in the property.

Although Harlem River Preservation LLC was created just for Harlem River Houses conversion, it appears that the long-term RAD/PACT landlord will be C&C Apartment Management, LLC, which is not a public or non-profit entity, and the agreement it has with NYCHA, upon information and belief, leaves little or no genuine interest in Harlem River Houses with NYCHA or Harlem River Preservation LLC; HRP is simply a conduit of public funds for a C&C project. C&C itself is not a qualified owner of Harlem River Houses as converted, nor has NYCHA preserved a genuine interest in the property. In fact, NYCHA is incapable of playing a meaningful role in the operation or supervision of Harlem River Houses.

**RELIEF SOUGHT**

Plaintiffs sought the following relief:

- a. Ent[ry] of a Preliminary Injunction and Permanent Injunction reversing approval by HUD of the RAD Conversion of Harlem River Houses;
- b. Ent[ry] of Judgment declaring NYCHA is not eligible to participate in the RAD conversion process, and the Harlem River Preservation is not an eligible owner of a RAD property.

## **ARGUMENT**

### **POINT I**

#### **THE DISTRICT COURT WRONGFULLY ESCHEWED JURISDICTION BOTH OF PLAINTIFF-APPELLANTS’ CLAIM FOR INJUNCTIVE RELIEF AND THEIR REQUEST FOR A DECLARATORY JUDGMENT**

##### **A. The Standards to Apply**

The outlines for standing are basically addressed in a series of Supreme Court decisions.

In *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) the Supreme Court held that “As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf... A federal court’s jurisdiction therefore can be invoked only when the plaintiff himself has suffered ‘some threatened or actual injury resulting from the putatively illegal action...’” The Court continued, “[S]o long as this requirement is satisfied, persons to whom Congress has granted a right of action,

either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim...”*Warth* supra at 500–01.

“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim ... .” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61(1992) And see *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

In reviewing a facial attack to the court’s jurisdiction, the court draws all facts—which are assumed to be true unless contradicted by more specific allegations or documentary evidence—from the complaint and from the exhibits attached thereto. *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). Plaintiffs are entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial ... does not contradict plausible allegations that are themselves sufficient to show standing. *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 57 (2nd Cir. 2016).

**B. Plaintiffs Have Standing to Challenge the RAD Approval**

HUD asserted below that Plaintiffs lacked standing to challenge HUD’s approval of the RAD conversion. It is our assertion that the approval, in and of itself, is an injury. The statutory and regulatory requirements concerning the viability of

the Public Housing Authority, and the not-for-profit nature of the approved RAD lessee have a purpose. The Public Housing Authority maintains both ownership of the properties involved, and a supervisory role in the administration of the program. Consequently, the statute and regulations require that the PHA be a “Standard or High-Performer”?

The notion that beneficiaries have a right to challenge government action which violates regulations addressed to a benefit is not new. See *Peoples v. U.S. Dept. of Agriculture*, 427 F.2d 561, 566 (D.C.Cir. 1970); *Caramico v. Secretary of Dept. of Housing and Urban Development*, 509 F.2d 694 (2d Cir 1974) (eviction from public housing); *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (occupancy in public housing); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974) (occupancy in quasi-public housing); *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973) (same); *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1973) (rent increase in public housing); *Ashton v. Pierce*, 716 F.2d 56, 66, 230 U.S.App.D.C. 252, 262 (DC Cir.1983).

The notion that the tenants are not the intended beneficiaries of the RAD regulations was debunked in *Holbrook v. Pitt*, 643 F.2d 1261, 1271 (7th Cir. 1981). And see *Velez v. Cisneros*, 850 F.Supp. 1257, 1275 (E.D.Pa. 1994) (“Plaintiffs’ APA claims against HUD focus on 42 U.S.C. § 1437p(a) and (b) setting the conditions

under which HUD may approve a PHA's application to demolish a project or a portion of a project. Plaintiffs argue that HUD's "approval" of the alleged de facto demolition was arbitrary and capricious because "HUD had knowledge of the conditions [at NYCHA], took no action to halt the de facto demolition, and endorsed the de facto demolition by continuing to fund CHA at a steady or increasing level during the period of HUD's knowledge of de facto demolition.")

Plaintiffs here are all long-time residents of Harlem River Houses with Section 9 leases. The circumstances of their living will change with a private landlord in place, one, for purposes of this motion, that is a For-Profit Corporation which exists simply to make money out of being a landlord. (This is the only reason that C&C exists). They clearly have standing to challenge, under the APA, the assessment by HUD, a) that NYCHA is a public housing authority eligible to convert its property to Section 8 housing, and b) that Harlem River Preservation, LLC, isn't just a front for C&C to act as a private landlord, and its construction contractor "partners" to make a lot of money doing renovations.

## **POINT II**

### **THIS IS NOT A CASE WHERE RELIEF IS IMPOSSIBLE**

Without any such assertion by an expert of an affiant HUD's counsel has asserted that "relief is impossible." But there is no showing that relief is impossible, or that the "eggs have become so scrambled" so that no repair is possible. In this

case, the key parties are all before the Court, and all of the matter undertaken (mortgages and repairs) involve money. If HUD is right here, then an APA case could never be brought concerning a RAD conversion approval. HUD announced its approval on February 17, 2022, and on February 17, 2022 a closing took place and a mortgage and various assignments of rents occurred. If HUD is right here, its actions under the PACT/RAD program, which do not include any minimum waiting time between approval and closing, could never be challenged. No agency action of this scope should ever be above the law, no matter how complex.

“[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.” *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir.1986). The Second Circuit has adopted the *Garcia* approach in *Savoie v. Merchants Bank*, 84 F.3d 52, 58–59 (C.A.2 1996), and in *Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 509–10 (2nd Cir 2005).

The *Savoie* decision, which the District Court focused on, is most relevant, not because the facts are the same, but because the Court approved steps to undo a completed transaction. Plaintiffs complained about approving NYCHA as a PHA, and about HRP being a genuine non-profit back in August and September 2021. They filed suit (*Walsh v. Russ*) seeking injunctive relief against NYCHA, not HUD. As was proper, Plaintiffs complained to HUD, and HUD promised to meet with Plaintiffs and to keep them apprised of what was happening; it did neither. HUD did not supply Plaintiffs with copies of NYCHA’s application and the associated documents, despite a request. HUD, NYCHA and C&C

moved forward, nevertheless. Especially with the lack of factual analysis, based on proof, from HUD about why undoing the RAD approval was not possible, the “impossibility” argument is essentially equitable, rather than jurisdictional. Here is what the Second Circuit said in *Savoie*:

For either of two reasons, the District Court’s order was appropriate, notwithstanding the Bank’s prior distribution of the \$9 million. First, it is settled that “where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*.” *Porter v. Lee*, 328 U.S. 246, 251, 66 S.Ct. 1096, 1099, 90 L.Ed. 1199 (1946); *see* \*59 *Symington Wayne Corp. v. Dresser Industries, Inc.*, 383 F.2d 840, 842 (2d Cir.1967). Here, the Bank not only had notice that the set-aside was requested, but the Magistrate Judge had recommended issuance of the preliminary injunction compelling such a set-aside. In these circumstances the District Court had power to restore the status quo ante ... *Cf. Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir.1986) (stating that, in context of issuing injunction to restore status quo, courts have broad discretion in shaping equitable remedies and that “the question is not whether the precise relief sought at the time the application for an injunction was filed is still available,” but rather “whether there can be any effective relief”).

*Savoie v. Merchants Bank*, 84 F.3d 52, 58–59 (2nd Cir.1996). The emphasis was that cited by this Court when it favorably mentioned *Garcia*, i.e., “whether there can be any effective relief.”

HUD cannot argue on the record it created before the District Court, that no remedy is possible here, or that the evidence they submitted permitted such a conclusion as a matter of law.

HUD attached affidavits to its motion describing what happened on the day of approval and closing. It is not clear how these are intended to affect standing:

a. Beverly Rudman submitted an affidavit (A848-975) about the closing at Harlem River Houses. And attached all of the documents which were signed and recorded. These include a loan between the Federal Home Loan Mortgage Corp and the NYC Housing Development Corporation (Para 8(g)), the assignments of leases and rents for 40 different buildings, and one overall assignment of rents to the NYC Housing Development Corp in the amount of \$93, 000,000 (which is the sum of the 40 earlier assignments) (see Para 8(vv)).

b. Brodie Hefner submitted an affidavit (A976-1126) describing the Section 8 subsidy program now in place at Harlem River Houses. The purpose of the affidavit is to show how under Section 8, Harlem River Preservation was now getting \$6 million a year more in Federal subsidies that NYCHA got from the Federal Government under Section 9.

c. Thomas R. Davis submitted an affidavit (A1127-1147) which attaches a series of reports, one (the Sources and Uses Report) prepared by NYCHA, which details the “uses of funds to facilitate the RAD transaction and physically rehabilitate the property.”

None of these affidavits or the other three which were submitted (A1148-1510) discussed the “impossibility” of rolling back the RAD program, or the

inability of NYCHA to assume responsibility for the obligations which Harlem River Preservation entered into, the actual expenditures of the borrowed money, the ability of Harlem River Preservation to return money it did not spend, the income received by Harlem River Preservation since February 17, 2022, how much of the loan was repaid, and how much of that income became profit for C&C or the construction contractor which is “part” of Harlem River Preservation.

And, equally as important, was Plaintiffs-Appellants’ request for declaratory relief, plus the impact that injunctive relief would have in the future. In *Garcia*, which this Court cited with approval, an injunction was issued addressed to a discharge, in part, where there were questions about whether the employee had a right to reinstatement, The 9th Cir. held: “This case, however, involves more than a claim of harm to the plaintiff and his family as the result of the termination. The claimed violation of the law in this case is retaliatory action for the exercise of Title VII rights, action which, if plaintiff is correct, will have a deleterious effect on the exercise of these rights by others.”

A judgement here for Plaintiffs-Appellants could not only have addressed some of what was going to unfold after the rushed closing (assuming that the affidavits submitted established as a matter of law that the financial transactions were irreversible), it also would have forestalled efforts by NYCHA and HUD to

secure approval of later RAD proposals, since only between 5 and 10% of NYCHA housing has been converted.

### **POINT III**

#### **PLAINTIFFS COULD NOT HAVE INITIATED AN APA CASE PRIOR TO THE FINAL ANNOUNCEMENT BY HUD, WHICH CAME AFTER THE CLOSING**

HUD argued below that this entire case failed because “At no point did plaintiffs seek to enjoin the conversion of Harlem River Houses. Now, following the completion of numerous intricate and complex corporate, financial, and real estate transactions necessary to finance the rehabilitation work already underway, plaintiffs seek to have the Court rescind those transactions ...” In light of their failure to seek relief prior to the conversion, Plaintiffs’ assertion that no party could ever challenge a RAD conversion is incorrect. It is undisputed that plaintiffs never sought to enjoin the conversion of Harlem River Houses prior to or upon HUD’s approval, despite being on notice of the pending conversion. Plaintiffs’ attempt to analogize the circumstances here to those in *Savoie v. Merchants Bank* is misguided. That plaintiffs complained to HUD about the conversion, purportedly received assurances from HUD that they would be kept apprised of developments and filed a lawsuit against NYHCA—to which HUD was not a party—is a far cry from the circumstances in *Savoie*. See *id.* In *Savoie*, the defendant bank had notice of preliminary injunction proceedings, after which a magistrate judge issued a report

and recommendation ordering the bank to set aside \$500,000 of a \$9M distribution pending a determination of whether attorney's fees should be awarded, the bank ignored the magistrate judge's report, and distributed the \$9M in full before the district court could rule on the report. 84 F.3d 52, 54 (2d Cir. 1996). In contrast, plaintiffs filed suit after the RAD conversion was complete, but maintain that the Court can return Harlem River Houses to the status quo. ...Plaintiffs do not attempt to explain how or on what basis the Court would have the authority to unwind or rescind the complex and numerous corporate, financial, and real estate transactions that were completed as part of the RAD conversion."

The District Court adopted this argument verbatim. But this argument bore no relationship to the law or the facts. This is an APA action for injunctive relief addressed to the final approval by HUD of the conversion of Harlem River Houses from a PHA development funded by Section 9 , to a privately owned and managed development corporation functioning under Section 8. But here Plaintiffs made the complaints they make here to HUD many months before the approval, and had sued NYCHA to block the project. HUD told Plaintiffs that their complaint would be addressed, and that they were kept apprised of developments about what HUD described as a "preliminary application." Without further notice, or any meeting with Plaintiffs, HUD granted a Final Approval to the project, and on the February 10, 2022 (A\_\_\_), eight days before Plaintiffs received any notice, HUD, NYCHA and

Harlem Preservation closed on the project, and on February 17, 2022, one day before Plaintiffs received notice, a large mortgage agreement was entered into by Harlem River Preservation. No APA lawsuit was possible “prior” to all of this occurring.

The APA provides judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. “A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). “There are two requirements: (A) ‘the action must mark the consummation of the agency’s decision making process—it must not be of a merely tentative or interlocutory nature.’ *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016). And (B) the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. *Ibid.*” *Data Marketing Partnership, LP v. United States Department of Labor*, 2022 WL 3440652, at \*3 (5th Cir. August 17, 2022).

This Circuit has made this clear:

“We are governed by the finality requirement of Section 10(c) of the APA, 5 U.S.C. § 704, which is to be interpreted in “a pragmatic way,” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), with an eye toward protecting agencies from the disruption of piecemeal appeals and toward insuring that judicial review involves concrete disputes over meaningful interests, rather than abstract disputes over hypothetical governmental actions. *Id.* at 148-49.”

*National Wildlife Federation v. Goldschmidt*, 677 F.2d 259, 263 (2nd Cir. 1982).  
And see *Housing Study Group v. Kemp*, 736 F.Supp. 321, 331–32 (D.D.C.,1990)  
 (“when a party challenges action by an agency, that action must be sufficiently final to be felt in an immediate, direct and concrete way to a complaining party. ... The concept of ripeness is imposed to assure that the issues are fit for judicial resolution, i.e., the questions are essentially legal rather than factual in nature, and the challenged agency action is *sufficiently final* to assure that a real controversy exists.”).

The District Court only cited one case for the proposition that a preliminary injunction could be sought before an agency makes a final ruling. But that decision, a District Court ruling in *State of New York v. United States Department of Education*, 477 F.Supp.3d 279 (S.D.N.Y. 2020), bears no relationship to the facts here. In *State of New York* the Education Department issued a “Final Rule” in the Federal Register, addressed to sexual harassment complaints, subject to public notice and comment. The plaintiffs alleged that the proposed Rule was issued in excess of the Department’s authority, The Rule had an effective date of August 14, 2020, but was published on May 19, 2020. The PI application was made on June 4. *Id* at 291-293. The District Court allowed the Plaintiffs to litigate the Rule as a final rule, which the District Court could do under *Abbot Labs v. Gardner*, 387 U.S. 136 at 151-152. The situation bears no relationship to the issue here.

More applicable is another case involving rulemaking, *Occidental Chem. Corp v. FERC*, 869 F.2d 127 (2d Cir 1989). There Occidental sought judicial review before the agency made its final decision in order to “end uncertainty in the industry.” *Id.* at 129. This Court found that the agency action wasn’t ripe even though that position was not taken by the government. And see *Charter Federal Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 209 (4th Cir. 1992) (“Although we realize that “final agency action” in this context does not mean that all administrative procedures must have been satisfied, see *Frozen Food Express v. United States*, 351 U.S. 40, 44–45 (1956), it does mean that a definitive decision or ruling must have been made with regard to petitioner.”) And see *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“An injury must be “concrete and particularized” and “actual or imminent,” not “conjectural or hypothetical.”) Had Plaintiffs-Appellants sued HUD before February 2022, the government would have argued that it hadn’t made a final decision.”

Here, Plaintiffs raised the issues they raised in the lawsuit in administrative complaints, had gotten to promised final ruling on their complaints, and had the approval sprung on them eight days after the closing. HUD has not submitted its administrative record to show how and when it reached its conclusion, including its conclusion that NYCHA was not a “failing PHA.”

Once HUD approved the RAD turnover, it is clear that there was an expedited closing, an expedited series of loan agreements, and an expedited agreement to turn over the right to Housing Assistance Payments, all done before a clearly interested group of tenants, who had a “concrete interest” in the outcome, were even given notice.

To declare now that relief had progressed too far for the Court to act, is a way of laying out a plan by which all government agencies can avoid APA review: act secretly, renege on promises to talk to objectors, fail to keep objecting parties informed, and then make huge financial transactions before making the government action known. There is no prior APA case that allows this.

### **CONCLUSION**

For the above-stated reasons, the Court’s decision below should be reversed.

Dated: New York, New York  
July 18, 2023

ADVOCATES FOR JUSTICE  
*Attorneys for Appellant*

By:           /s/ Arthur Z. Schwartz            
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**CERTIFICATE OF COMPLIANCE**

1. I certify that this document complies with Fed. R. App. P. Rule 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,740 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using the Microsoft Word Office 365 word processing program in 14-point Times New Roman type.

Dated: New York, New York  
July 18, 2023

*/s/ Arthur Z. Schwartz*  
\_\_\_\_\_  
Arthur Z. Schwartz  
*Attorney for Appellant*

# **SPECIAL APPENDIX**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

LYDIA GONZALEZ DIAZ, et al.,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF  
HOUSING AND URBAN DEVELOPMENT,  
et al.,

Defendants.

No. 22-CV-2051 (LAP)

OPINION & ORDER

LORETTA A. PRESKA, Senior United States District Judge:

Before the Court are Defendants New York City Housing Authority ("NYCHA"),<sup>1</sup> United States Department of Housing and Urban Development ("HUD"),<sup>2</sup> C+C Apartment Management L.L.C. ("C+C") and Harlem River Preservation L.L.C.'s ("HRP")<sup>3</sup> motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1)

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<sup>1</sup> (See Notice of Defendant NYCHA's Motion to Dismiss the Amended Verified Class Action Complaint ("NYCHA MTD"), dated May 27, 2022 [dkt. no. 27]; Memorandum of Law in Support of Defendant NYCHA's Motion to Dismiss the Amended Verified Class Action Complaint ("NYCHA Br."), dated May 27, 2022 [dkt. no. 28]; Joinder to the Reply Memorandum in Further Support of HUD's Motion to Dismiss the Amended Verified Class Action Complaint ("NYCHA Joinder"), dated August 22, 2022 [dkt. no. 48].)

<sup>2</sup> (See HUD's Notice of Motion ("HUD MTD"), dated May 27, 2022 [dkt. no. 29]; Defendant HUD's Memorandum of Law in Support of its Motion to Dismiss the Amended Verified Class Action Complaint ("HUD Br."), dated May 27, 2022 [dkt. no. 30]; Defendant HUD's Reply Memorandum of Law in Further Support of its Motion to Dismiss the Amended Verified Class Action Complaint ("HUD Reply"), dated August 18, 2022 [dkt. no. 46].)

<sup>3</sup> (See C+C's Notice of Motion ("C+C MTD"), dated May 31, 2022 [dkt. no. 38].)

and 12(b)(6). Plaintiffs oppose the motions.<sup>4</sup> For the reasons below, the motions to dismiss are GRANTED.

**I. Background**

This action concerns the Harlem River Houses, a public housing authority ("PHA") development funded under Section 9 of the Housing Act of 1937 originally owned and managed by NYCHA. (Dkt. no. 4 at ¶ 1.)<sup>5</sup> Plaintiffs seek injunctive relief, challenging HUD's approval of NYCHA's plan to convert Harlem River Houses into a privately owned and managed development corporation funded under Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 et seq. (Id.)

HRP was created in April 2020 to be the RAD/PACT developer for the Harlem River Houses conversion. (AC at ¶ 152.)

HRP is a partnership of at least four corporate entities: (a) C+C Apartment Management, LLC, a private property management company which manages thousands of residential units, most of which are funded under the LIHTC; (b) the Settlement Housing Fund, a non-profit developer/owner created in 1971, which has a bevy of high-paid executives and which received 90% of its funds from "related organizations"; (c) West Harlem Group Assistance, a small non-profit which is half-funded by management fees and half-funded by government grants; and (d) L&M Builders, a multi-million dollar General Contractor, which is to be the General Contractor at

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<sup>4</sup> (See Plaintiffs' Memorandum of Law in Opposition to the Motions to Dismiss ("Pl. Opp."), dated July 22, 2022 [dkt. no. 44]; Plaintiffs' Sur-Reply Memorandum of Law in Opposition to the Motions to Dismiss ("Pl. Sur-Reply"), dated August 27, 2022 [dkt. no. 50].)

<sup>5</sup> (Amended Verified Class Action Complaint ("AC"), dated March 11, 2022.)

Harlem River Houses. Tenants are not being asked to sign leases with HRP, they are being asked to sign leases with C+C, the private sector property manager, the only entity in HRP which seems designed to stick around after federal money is used, under Section 8, to perform renovations at Harlem River Houses.

(Id.)

**A. Plaintiffs' Communications with HUD and Issues with HRP**

In 2021, Plaintiffs organized as United Front Against Displacement and lodged "a series of complaints<sup>6</sup> with HUD about what C+C Apartment Management, LLC and NYCHA were doing at Harlem River Houses." (AC at ¶ 165.) The two emails attached as exhibits to the AC complained of "intimidation" and "harassment" by C+C trying to pressure Plaintiffs into signing the new private leases. (Dkt. nos. 4-12 and 4-14.) The AC alleges that the C+C lease "does not contain all of the protections of the NYCHA lease (Exhibit A) and the tenants have none of the statutory protections set forth in Section 9 of the Housing

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<sup>6</sup> (The AC cites to Exhibit L, which contains three documents. First, a June 22, 2021 email from "nogonyc@riseup.net" addressed to the "HUD Special Projects Center" that allegedly attached a letter from Harlem River Houses tenants "requesting that HUD withdraw approval of RAD conversion" due to inadequate tenant engagement and reports that C+C had the second highest eviction rate in New York City. [Dkt. no. 4-12.] Second, an article in the American Prospect titled "Public Housing Is Going Private- and Residents are Fighting Back" that discusses the RAD program and the tenant organizing around the Harlem River Houses conversion. [Dkt. no. 4-13.] Third, a June 30, 2021 email from the same "nogonyc" email address addressed to the HUD Special Projects Center allegedly attaching several letters from Harlem River Houses residents requesting that HUD withdraw approval of the RAD conversion. [Dkt. no. 4-14.]

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Act[] of 1937.” (AC at ¶ 157.) The AC alleges that

representatives of HRP and C+C:

continued to push Plaintiffs and all other Harlem River Houses NYCHA tenants to sign their leases. They intrusively visited tenants’ apartments, insisting that they have a right to enter in order to do a survey so that they could plan repairs, and, in many cases, using those visits as an opportunity to tell tenants that they would face eviction of [sic.] they don’t sign leases with C+C, which they say will come into effect when conversion occurs ‘in the Fall [of 2021].’ Tenants have multiple notices posted on their apartment doors, are pressured to come to meetings with C+C, and are being told that repair orders they requested of NYCHA will have to be refiled with C+C and be reassessed.

(AC at ¶ 168.)

On August 2, 2021, Tai Meroy Alex of the HUD Office of Recapitalization responded to Plaintiffs’ June 22, 2021 email.

(Dkt. no. 4-15.) Alex informed Plaintiffs that HUD would investigate the claims set out in Plaintiffs’ email and attached letter and, at the conclusion of the investigation, HUD would issue a findings letter that would include whether HUD determined there to be program violations. (Id.) Alex further assured Plaintiffs that if HUD found non-compliance with RAD program requirements or HUD regulations, HUD would “take appropriate actions” in response. (Id.) Alex noted that while NYCHA had submitted the “preliminary application,” NYCHA had not then submitted the full project proposal, and as a result, HUD had not yet done “a detailed review of the project proposal documents.” (Id.) Finally, Alex instructed Plaintiffs to send

any future correspondence about RAD to Alex's email address and requested contact information for Plaintiffs' primary contact so that HUD could "communicate with [Plaintiffs] effectively during [HUD's] fact-finding." (Id.) On September 17, 2021, Plaintiffs' Counsel responded to Alex's August 2, 2021 email, asking that he be kept up to date on HUD's investigation. (Dkt. no. 4-16.)

In October 2021, HRP announced that it would begin repairs on apartments, that in "many cases" the repairs would require tenants to move out, and HRP did not provide any assurances about whether tenants would return to their apartments or how long tenants would be "forced out" of their apartments. (AC at ¶ 172.) Plaintiffs' counsel then emailed Alex complaining of the relocations, alleging that C+C was the real entity in control of the RAD conversion and asserting that NYCHA was ineligible to supervise a RAD conversion due to its status as a troubled PHA. (Dkt. no. 4-18.)<sup>7</sup> Alex responded on November 15, 2021. Alex informed Plaintiffs' counsel that HUD was conducting a fact-finding to investigate specific items raised to HUD by residents, that the submitted financial plan was under review, and that C+C's proposed relocation was under review. (Dkt. no.

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<sup>7</sup> (The AC cites to Exhibit O. However, the document in question appears to be Exhibit P, a letter from Arthur Schwartz emailed to Alex on October 21, 2021.)

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4-17.)<sup>8</sup> Regarding Plaintiffs' counsel's statements on NYCHA's status as a troubled PHA, Alex referred Plaintiffs' counsel to the RAD Notice. (Id.)

Around February 18, 2022, C+C sent notice to all Harlem River Houses tenants that it was the new managing agent of Harlem River Houses. (AC at ¶ 175.) Plaintiffs allege that HUD did not give them any notice of the RAD conversion approval, that Plaintiffs were not interviewed by HUD regarding their complaints, and that neither they nor Plaintiffs' counsel were given copies of NYCHA's applications, financing plans, or the fact-finding results. (Id. at ¶ 176.)

Plaintiffs allege that:

[T]heir rights as Section 9 tenants will be severely compromised by the RAD conversion and their change to being Section 8 tenants. NYCHA tenants will begin to have different obligations and be governed by a different set of regulations as Section 8 tenants. NYCHA tenants will continue to have certain reporting obligations to NYCHA, which administers the Section 8 program, and other obligations to their new landlords. They will pay their rent to the new landlord, and will have to contact the new landlord about any repair issues. In fact, all existing work orders, i.e., repairs which tenants have requested to make their apartments habitable, will be erased, and new requests will have to be made to the new landlord. The landlord-tenant relationship will be shifted to NYC Housing Court instead of to administrative proceedings before NYCHA staff with expertise.

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<sup>8</sup> (The AC cites to Exhibit P. However, the document in question appears to be Exhibit O, a letter from Alex emailed to Schwartz on November 15, 2021.)

(AC at ¶ 158.)

Further, Plaintiffs take issue with a process called “rightsizing,” which Plaintiffs allege C+C will undertake after it begins managing the Harlem River Houses. (AC at ¶ 159.) Rightsizing involved reassessing tenants to “determine whether they are living in an apartment which is the right size for their household composition.” (Id.) Plaintiffs allege that “[t]enants whose apartments are selected for repair and renovation have a right to return to the same property but not necessarily the same unit. Rightsizing is likely to result in evictions of people who according to NYCHA’s records, are not in the household composition.” (Id.)

**B. Legal Authority for the Conversion**

NYCHA’s conversion plan is authorized under the federal Rental Assistance Demonstration (“RAD”) program, implemented by NYCHA under the moniker Permanent Affordability Commitment Together (“PACT”). (AC at ¶ 2.) Under RAD, HUD subsidizes tenants’ rent payments and NYCHA provides a subsidy to the private developer. The developer then renovates the housing with its own capital and retains private property management companies to operate the development. (Id. at ¶ 149.) Under PACT, NYCHA owns the housing and leases it to the private developers. (Id.)

Before a PHA can convert a development under RAD, the PHA must submit a plan to HUD, HUD must approve the plan, and the conversion must close. (Id. at ¶ 160.) HUD regulations limit RAD eligibility to PHAs that are:

classified as a Standard or High Performer under the Public Housing Assessment System (PHAS). If classified as "troubled" (Troubled) the PHA may still be eligible if the PHA is making substantial progress under its Recovery Agreement, Action Plan, Corrective Action Plan (CAP) or Memorandum of Agreement (MOA) or proposes a revision to such agreement or plan that incorporates conversion under RAD and that is acceptable to HUD. HUD must have determined that the factors resulting in the PHA's Troubled status will not affect its capacity to carry out a successful conversion under this Demonstration.<sup>9</sup>

HUD regulations further require each project selected for a RAD award to perform a "detailed physical inspection" that "must have been completed no earlier than 180 days prior to submission of the Financing Plan, except with HUD approval." (RAD Notice at 23.) Finally, HUD regulations require that:

[e]xcept where permitted to facilitate the use of tax credits, during both the initial term and all renewal terms of the HAP Contract, HUD will require ownership or control of the Covered Project by a public or non-profit entity. HUD may also allow ownership of the project to be transferred to a tax credit entity controlled by a for-profit entity to facilitate the use of tax credits for the Covered Project, but only if HUD determines that the PHA or a non-profit entity preserves an interest in the property.

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<sup>9</sup> Rental Assistance Demonstration—Final Implementation, Revision 4 (H-2019-09 PHI-2019-23 (HA)) (Sept. 5, 2019) ("RAD Notice"), Section 1.3, at 22, available at [https://www.hud.gov/sites/dfiles/Housing/documents/H-2019-09-PIH-2019-23\\_RAD\\_Notice%20Rev4\\_20190905.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/H-2019-09-PIH-2019-23_RAD_Notice%20Rev4_20190905.pdf).

(Id. at 30.)

**C. Plaintiffs' Causes of Action**

Plaintiffs assert that they "have a right to be tenants in a converted development run by a qualified non-profit, supervised by a public housing agency which has the ability and desire to supervise the new RAD landlord, approved by HUD in a transparent process." (AC at ¶ 183.) Plaintiffs write that the fact that none of these rights has been met has caused Plaintiffs "irreparable injury." (Id.)

Both of Plaintiffs' causes of action assert that HUD's approval of the Harlem River Houses conversion was "arbitrary, capricious and in violation of applicable law." (Id. at ¶¶ 189 and 192.) Plaintiffs base their first cause of action on what they assert is NYCHA's status as a Troubled PHA, NYCHA's failure to make substantial progress under a Consent Agreement (id. at ¶ 186), and NYCHA's failure to do a required "detailed physical inspection" (id. at ¶¶ 187-188). Plaintiffs based their second cause of action on their assertion that C+C, a private, for-profit entity, will be the "long-term RAD/PACT landlord" and that the Harlem River Houses conversion will leave "little or no genuine interest in Harlem River Houses with NYCHA or [HRP]." (Id. at ¶ 191.)

Seeking relief, Plaintiffs pray the Court will enter a preliminary and permanent injunction reversing HUD's approval of the RAD conversion of Harlem River Houses, declare NYCHA ineligible to participate in the RAD conversion process, and declare HRP ineligible to own a RAD property. (AC at 69.)

## II. Legal Standard

On May 27, 2022, HUD moved to dismiss the AC,<sup>10</sup> asserting that Plaintiffs lack constitutional standing under Article III to challenge HUD's approval of the RAD Conversion of Harlem River Houses. (HUD Br. at 17.) HUD argues that Plaintiffs failed to establish legally cognizable injury in fact (id. at 18) and that Plaintiffs' allegations regarding HUD's approval of the RAD Conversion are not likely to be redressed by a favorable judicial decision (id. at 22). Because the motion can be resolved on redressability grounds, the Court will not reach the question of whether Plaintiffs have properly alleged an injury in fact.

### A. Motion to Dismiss under FRCP 12(b)(1)

"In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable

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<sup>10</sup> Defendants NYCHA and C+C also each moved separately to dismiss the AC. However, only HUD's papers provide substantive arguments regarding dismissal. Therefore, the Court will reference only HUD's papers.

inferences in favor of the party asserting jurisdiction.” Tandon v. Captain’s Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014) (citing Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir.2011) (per curiam)). “[A] plaintiff asserting standing must ‘allege facts that affirmatively and plausibly suggest that [she] has standing to sue’ and courts ‘need not credit a complaint’s conclusory statements without reference to its factual context.’” Soule by Stanescu v. Connecticut Association of Schools, Inc., 57 F.4th 43, 50 (2d Cir. 2022) (quoting Conn. Parents Union v. Russell-Tucker, 8 F.4th 167, 172 (2d Cir. 2021)).

**B. Constitutional Standing Under Art. III**

“[T]he ‘irreducible constitutional minimum’ of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016) (citation omitted). “The party invoking federal jurisdiction bears the burden of establishing these elements.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to

support the claim.’” Id. “The elements are conjunctive, so that a failure of any of the three elements deprives a plaintiff of standing to maintain an action in federal court.” Dickerson v. Feldman, 426 F. Supp. 2d 130, 134 (S.D.N.Y. 2006).

i. Redressability

“To determine whether an injury is redressable, a court will consider the relationship between ‘the judicial relief requested’ and the ‘injury’ suffered.” California v. Texas, 141 S. Ct. 2104, 2115 (2021) (quoting Allen v. Wright, 468 U.S. 737, 753 n.19 (1984)).

The ‘fairly traceable’ and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement.’ To the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested.

Allen, 468 U.S. at 753 n.19. “Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 107 (1998). However, plaintiffs need not show that a favorable decision would relieve their every injury (see Larson v. Valente, 456 U.S. 228, 243 n.15 (1982)) or that judicial relief would entirely remedy an injury (Massachusetts v. E.P.A., 549 U.S. 497, 526 (2007)).

### **III. Discussion**

HUD argues that, assuming Plaintiffs were able to establish a cognizable legal injury from the RAD conversion, Plaintiffs' requested relief would not be redressed by a favorable decision from this Court. HUD writes that even if the Court were to reverse or set aside HUD's approval of the Harlem River Houses RAD conversion, "Harlem River Houses cannot be returned to Section 9, and the Court lacks the equitable powers to rescind the complex corporate and financial transactions that have already been effectuated," and "any attempt to do so would exacerbate the harm to residents of the Harlem River Houses." (HUD Br. at 22.)

In supporting its argument regarding the limits of the Court's equitable powers, HUD cites a list of cases establishing that courts "lack the power, once a bell has been rung, to unring it." (Id. at 23 (citing Presidential Gardens Assocs. v. United States, 175 F.3d 132, 143 (2d Cir. 1999).) HUD further specifies that federal courts have routinely rejected requests to rescind complex corporate, financial, and real estate transactions once they have closed. (Id. at 23-24.) In Bank of N.Y. Co. v. Ne. Bancorp, Inc., Bank of New York Co. ("BNY") sought to enjoin the merger of Northeast and First Fidelity Bancorporation. 9 F.3d 1065, 1066 (2d Cir. 1993). Judge Covello of the District of Connecticut denied BNY's motion for a

preliminary injunction and the merger was completed. Id. BNY then appealed Judge Covello's denial of the motion for preliminary injunction and, because the merger had already been completed, sought to transform the motion into an application for rescission. Id. at 1066-67. The Court of Appeals held that "where a merger had been consummated, restoration of the status quo may be impossible" due to the "commingling of assets and other substantial changes in the structures of the enterprise involved." Id. at 1067 (citing FTC v. Exxon Corp., 636 F.2d 1336, 1342-43 (D.C. Cir. 1980)). Similarly, in Presidential Gardens, the Court of Appeals held that the district court "lacked jurisdiction to issue an injunction to hold trust funds when the trust corpus no longer existed, and could not issue an injunction to enjoin an auction that had already taken place. Therefore, the claims for injunctive relief were properly dismissed." 175 F.3d at 144.

In this case, HUD asserts that the structure and transactions necessary for Harlem River Houses' RAD conversion "have already been effected and are too integrated and too far advanced to be unwound." (HUD Br. at 24.) Among the relevant transactions are: 1) a ground lease between NYCHA, HRP, and Harlem River Housing Development Fund Company, Inc.; 2) HRP's corporate structure, which allocated investment, risk, and control of the project among NYCHA, several non-profit entities,

and for-profit investors, and included a master-tenant relationship that facilitated a nearly \$63 million investment by Chase Community Investments, LLC; 3) several mortgages, loans, and other forms of debt in excess of \$209 million to fund acquisition and rehabilitation of the project; and 4) a management contract with C+C that replaces NYCHA's now-disbanded workforce for the property. (Id. at 24-25.) HUD also argues that Harlem River Houses "cannot simply be restored to the Section 9 public housing program." (Id. at 26.) If NYCHA were to try to return Harlem River Houses to Section 9, HUD regulations would require NYCHA to complete a detailed development plan that allowed HUD

to determine the project would be financially sustainable, provide safe and sanitary housing, and meet a multitude of other requirements, including accessibility, environmental suitability, compliance with the Fair Housing Act—requirements that are very much in doubt given the anticipated physical and financial state of the property if the conversion were rescinded.

(Id. at 26-27, (citing 24 C.F.R. §§ 905.600, 905.602, 905.606, 905.610).) HUD notes that Section 9 projects are required to record a declaration of trust in first position, which would be impossible in this case because "[t]he original declarations of trust were released concurrent with the closing for the RAD conversion and any new declarations of trust would be subordinate to dozens of encumbrances recorded in the interim,

including over 40 mortgages, use agreements, regulatory agreements, memorandums of lease, and subordination agreements.” (Id. at 27) HUD also writes that HUD must approve NYCHA’s mortgage payments based on HUD’s determination that NYCHA has the ability to make the payments and HUD could not grant approval for Harlem River houses, which would be “unable to service its debt without the increased subsidies flowing from the RAD conversion.” (Id.)

Finally, HUD asserts if this Court were retroactively to enjoin the transactions and order Harlem River House’s return to HUD’s Section 9 program, it would only exacerbate the harm to the project and its residents. (HUD Br. at 25.) HUD writes that such a return would result in a nearly \$6 million reduction in annual subsidies that would “render the project insolvent and its operations unsustainable,” leaving the project vulnerable to foreclosure by the lenders if it failed to meet its debt service obligations. (Id. at 25-26.)

Plaintiffs respond that “[i]f HUD is right here, then an APA case could never be brought concerning a RAD conversion approval” because there was no waiting period between when HUD announced its approval of the RAD conversion and when the conversion closed. (Pl. Opp. at 35.) Plaintiffs further argue that HUD has not made any showing that relief is impossible because “the key parties are all before the Court, and all of

the matter [sic.] undertaken (mortgages and repairs) involve money.” (Id.) Plaintiffs write that “the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief.” (Id. (citing Savoie v. Merchants Bank, 84 F.3d 52, 58-59 (C.A.2 1996), and in Moore v. Consolidated Edison Co. of New York, Inc., 409 F.3d 506, 509-10 (C.A.2 (N.Y.) 2005).) In particular, Plaintiffs rely on Savoie, which held that where the defendant Bank had notice that a \$500,000 set-aside was requested and the magistrate judge had recommended the issuance of a preliminary injunction compelling such a set-aside, “the District Court had power to restore the status quo ante by entering a preliminary injunction ordering the Bank to escrow \$500,000.” Savoie, 84 F.3d at 58-59.

HUD replies that Plaintiffs never sought to enjoin the conversion of Harlem River Houses. (HUD Reply at 12.) HUD writes that “Plaintiffs seek to ‘revers[e]’ HUD’s approval of the conversion of Harlem River Houses, and presumably have the Court restore the Harlem River Houses to the Section 9 program. Nowhere in plaintiffs’ opposition brief do they explain how this would be accomplished.” (HUD Reply at 12-13.) HUD rejects Plaintiffs’ analogy to Savoie, arguing that Plaintiffs’ complaints to HUD about the conversion, HUD’s assurances to Plaintiffs that they would be kept apprised of developments, and

Plaintiffs' lawsuit against NYCHA does not equate to the circumstances in Savoie, where the defendant bank had notice of the preliminary injunction proceedings and the magistrate judge's report and recommendation. (HUD Br. at 14.)

The Court agrees with HUD's analysis. Plaintiffs bear the burden of establishing the elements of constitutional standing, Lujan, 504 U.S. at 561, and the Court "need not credit a complaint's conclusory statements without reference to its factual context," Conn. Parents Union, 8 F.4th at 172. Here, Plaintiffs did not meet their burden because they failed to establish that the injuries they alleged were likely to be redressed by a favorable decision from this Court.

Plaintiffs ask the Court to enjoin the RAD conversion of Harlem River Houses. However, the conversion is already complete and has been effected through multiple transactions that have changed Harlem River Houses' corporate structure, generated debt greater than \$209 million, and released the project's original declarations of trust. There has been a "commingling of assets and other substantial changes in the structures of the enterprise involved." Bank of N.Y. Co., 9 F.3d at 1067. In like circumstances, the Court of Appeals has held that courts "lack the power, once a bell has been rung, to unring it." Presidential Gardens, 175 F.3d at 143. Thus, Plaintiffs' alleged injuries are not likely to be redressed by a favorable judicial

decision, Plaintiffs lack standing to bring their suit, and their Amended Complaint is dismissed for lack of subject matter jurisdiction.

Plaintiffs' reliance on Savoie is misplaced. Savoie involved a motion for a preliminary injunction aimed at restoring the status quo when a bank that was party to the case was aware that an injunction had been sought and nevertheless took action that the injunction would have precluded. Savoie, 84 F.3d at 54. Further, the relief requested in Savoie was only that the bank escrow \$500,000 to facilitate an award of attorney's fees that might have been subsequently made, id., and it appeared that none of the parties believed it was out of the bank's power to escrow that amount of money. Here, Plaintiffs never moved for a preliminary injunction before the RAD conversion closed. HUD's approval of the conversion was not precluded by a pending application for a preliminary injunction. Plaintiffs' requested relief would have the Court order the rescission of the many financial and property transactions that make up the closed RAD conversion, relief that is altogether different from a court's ordering the escrow of otherwise available funds, as the Court of Appeals did in Savoie.

Plaintiffs are incorrect when they argue that a ruling for HUD would mean it is impossible to challenge a RAD conversion that does not include a waiting period between HUD's approval

and the closing of the conversion. (Pl. Sur-Reply at 8-9.) Plaintiffs were aware of NYCHA's prospective application for a RAD conversion as early as June 2021, roughly eight months before the conversion closed on February 17, 2022. (See dkt. no. 4-12.) Even though agency action must be final before it can be challenged under the APA, (Pl. Sur-Reply at 8-9), and HUD's action became final the same day the conversion closed (Pl. Opp. at 35), before HUD approved the conversion, Plaintiffs could have brought suit and moved for a preliminary injunction or a stay under § 705 of the APA until Plaintiffs' claims against the RAD conversion were adjudicated on the merits. See, e.g., New York v. United States Dep't of Educ., 477 F. Supp. 3d 279, 288, 293-294 (S.D.N.Y. 2020). Plaintiffs' failure to bring their case at the appropriate time does not give them standing to sue now when the conversion has closed and the Court can no longer redress any alleged injuries they may have.

#### **IV. Conclusion**

For the reasons above, Defendants' motions to dismiss for lack of subject matter jurisdiction are GRANTED. The Clerk of the Court is ordered to close case number 22-CV-2051 and any open motions.

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SO ORDERED.

Dated: February 21, 2023  
New York, New York



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LORETTA A. PRESKA  
Senior United States District Judge

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
LYDIA GONZALEZ DIAZ, et al.,

Plaintiffs,

-against-

22 CIVIL 2051 (LAP)

**JUDGMENT**

UNITED STATES DEPARTMENT OF  
HOUSING AND URBAN DEVELOPMENT,  
et al.,

Defendants.

-----X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated February 21, 2023, Defendants' motions to dismiss for lack of subject matter jurisdiction are **GRANTED**; accordingly, the case is closed.

**Dated:** New York, New York

February 21, 2023

**RUBY J. KRAJICK**

\_\_\_\_\_  
**Clerk of Court**

**BY:**

*K. mango*

\_\_\_\_\_  
**Deputy Clerk**

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**United States District Court  
Southern District of New York**

Ruby J. Krajick  
Clerk of Court

Dear Litigant:

Enclosed is a copy of the judgment entered in your case. If you disagree with a judgment or final order of the district court, you may appeal to the United States Court of Appeals for the Second Circuit. To start this process, file a "Notice of Appeal" with this Court's Pro Se Intake Unit.

You must file your notice of appeal in this Court within 30 days after the judgment or order that you wish to appeal is entered on the Court's docket, or, if the United States or its officer or agency is a party, within 60 days after entry of the judgment or order. If you are unable to file your notice of appeal within the required time, you may make a motion for extension of time, but you must do so within 60 days from the date of entry of the judgment, or within 90 days if the United States or its officer or agency is a party, and you must show excusable neglect or good cause for your inability to file the notice of appeal by the deadline.

Please note that the notice of appeal is a *one-page* document containing your name, a description of the final order or judgment (or part thereof) being appealed, and the name of the court to which the appeal is taken (the Second Circuit) – *it does not* include your reasons or grounds for the appeal. Once your appeal is processed by the district court, your notice of appeal will be sent to the Court of Appeals and a Court of Appeals docket number will be assigned to your case. At that point, all further questions regarding your appeal must be directed to that court.

The filing fee for a notice of appeal is \$505 payable in cash, by bank check, certified check, or money order, to "Clerk of Court, S.D.N.Y." *No personal checks are accepted.* If you are unable to pay the \$505 filing fee, complete the "Motion to Proceed *in Forma Pauperis* on Appeal" form and submit it with your notice of appeal to the Pro Se Intake Unit. If the district court denies your motion to proceed *in forma pauperis* on appeal, or has certified under 28 U.S.C. § 1915(a)(3) that an appeal would not be taken in good faith, you may file a motion in the Court of Appeals for leave to appeal *in forma pauperis*, but you must do so within 30 days after service of the district court order that stated that you could not proceed *in forma pauperis* on appeal.

For additional issues regarding the time for filing a notice of appeal, see Federal Rule of Appellate Procedure 4(a). There are many other steps to beginning and proceeding with your appeal, but they are governed by the rules of the Second Circuit Court of Appeals and the Federal Rules of Appellate Procedure. For more information, visit the Second Circuit Court of Appeals website at <http://www.ca2.uscourts.gov/>.

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WHITE PLAINS, NY 10601-4150

SPA-24

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_  
\_\_\_\_\_  
(List the full name(s) of the plaintiff(s)/petitioner(s).)

\_\_\_\_ CV \_\_\_\_\_ ( ) ( )

-against-

**NOTICE OF APPEAL**

\_\_\_\_\_  
\_\_\_\_\_  
(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties: \_\_\_\_\_

\_\_\_\_\_  
(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the  judgment  order entered on: \_\_\_\_\_  
(date that judgment or order was entered on docket)

that: \_\_\_\_\_

\_\_\_\_\_  
(If the appeal is from an order, provide a brief description above of the decision in the order.)

\_\_\_\_\_  
Dated

\_\_\_\_\_  
Signature \*

\_\_\_\_\_  
Name (Last, First, MI)

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
E-mail Address (if available)

\* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

SPA-25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_  
\_\_\_\_\_  
(List the full name(s) of the plaintiff(s)/petitioner(s).)

\_\_\_ CV \_\_\_ ( ) ( )

-against-

**MOTION FOR EXTENSION  
OF TIME TO FILE NOTICE  
OF APPEAL**

\_\_\_\_\_  
\_\_\_\_\_  
(List the full name(s) of the defendant(s)/respondent(s).)

I move under Rule 4(a)(5) of the Federal Rules of Appellate Procedure for an extension of time to file a notice of appeal in this action. I would like to appeal the judgment entered in this action on \_\_\_\_\_ but did not file a notice of appeal within the required time period because:

\_\_\_\_\_  
\_\_\_\_\_

(Explain here the excusable neglect or good cause that led to your failure to file a timely notice of appeal.)

\_\_\_\_\_  
Dated: \_\_\_\_\_ Signature \_\_\_\_\_

\_\_\_\_\_  
Name (Last, First, MI)

\_\_\_\_\_  
Address City State Zip Code

\_\_\_\_\_  
Telephone Number E-mail Address (if available)

SPA-26

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

\_\_\_\_\_

\_\_\_\_\_CV\_\_\_\_\_ ( ) ( )

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

**MOTION FOR LEAVE TO  
PROCEED IN FORMA  
PAUPERIS ON APPEAL**

\_\_\_\_\_

(List the full name(s) of the defendant(s)/respondent(s).)

I move under Federal Rule of Appellate Procedure 24(a)(1) for leave to proceed *in forma pauperis* on appeal. This motion is supported by the attached affidavit.

\_\_\_\_\_ Dated

\_\_\_\_\_ Signature

\_\_\_\_\_ Name (Last, First, MI)

\_\_\_\_\_ Address City State Zip Code

\_\_\_\_\_ Telephone Number

\_\_\_\_\_ E-mail Address (if available)

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**Application to Appeal In Forma Pauperis**

\_\_\_\_\_ v. \_\_\_\_\_ Appeal No. \_\_\_\_\_  
 District Court or Agency No. \_\_\_\_\_

<p><b>Affidavit in Support of Motion</b></p> <p>I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)</p> <p>Signed: _____</p>	<p><b>Instructions</b></p> <p>Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.</p> <p>Date: _____</p>
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My issues on appeal are: (required):

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$	\$	\$	\$
Self-employment	\$	\$	\$	\$
Income from real property (such as rental income)	\$	\$	\$	\$

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Interest and dividends	\$	\$	\$	\$
Gifts	\$	\$	\$	\$
Alimony	\$	\$	\$	\$
Child support	\$	\$	\$	\$
Retirement (such as social security, pensions, annuities, insurance)	\$	\$	\$	\$
Disability (such as social security, insurance payments)	\$	\$	\$	\$
Unemployment payments	\$	\$	\$	\$
Public-assistance (such as welfare)	\$	\$	\$	\$
Other (specify):	\$	\$	\$	\$
<b>Total monthly income:</b>	<b>\$ 0</b>	<b>\$ 0</b>	<b>\$ 0</b>	<b>\$ 0</b>

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

<b>Employer</b>	<b>Address</b>	<b>Dates of employment</b>	<b>Gross monthly pay</b>
			\$
			\$
			\$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

<b>Employer</b>	<b>Address</b>	<b>Dates of employment</b>	<b>Gross monthly pay</b>
			\$
			\$
			\$

4. How much cash do you and your spouse have? \$ \_\_\_\_\_

*Below, state any money you or your spouse have in bank accounts or in any other financial institution.*

Financial Institution	Type of Account	Amount you have	Amount your spouse has
		\$	\$
		\$	\$
		\$	\$

*If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.*

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	Other real estate	Motor vehicle #1
(Value) \$	(Value) \$	(Value) \$
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	Other assets	Other assets
(Value) \$	(Value) \$	(Value) \$
Make and year:		
Model:		
Registration #:		

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6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	\$	\$
	\$	\$
	\$	\$
	\$	\$

7. State the persons who rely on you or your spouse for support.

Name [or, if a minor (i.e., underage), initials only]	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	\$	\$
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$	\$
Home maintenance (repairs and upkeep)	\$	\$
Food	\$	\$
Clothing	\$	\$
Laundry and dry-cleaning	\$	\$
Medical and dental expenses	\$	\$

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Transportation (not including motor vehicle payments)	\$	\$
Recreation, entertainment, newspapers, magazines, etc.	\$	\$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	\$	\$
Life:	\$	\$
Health:	\$	\$
Motor vehicle:	\$	\$
Other:	\$	\$
Taxes (not deducted from wages or included in mortgage payments) (specify):	\$	\$
Installment payments		
Motor Vehicle:	\$	\$
Credit card (name):	\$	\$
Department store (name):	\$	\$
Other:	\$	\$
Alimony, maintenance, and support paid to others	\$	\$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$	\$
Other (specify):	\$	\$
<b>Total monthly expenses:</b>	<b>\$ 0</b>	<b>\$ 0</b>

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

Yes       No      If yes, describe on an attached sheet.

10. *Have you spent — or will you be spending — any money for expenses or attorney fees in connection with this lawsuit?*  Yes  No

*If yes, how much?* \$ \_\_\_\_\_

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11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

12. *Identify the city and state of your legal residence.*

City \_\_\_\_\_ State \_\_\_\_\_

Your daytime phone number: \_\_\_\_\_

Your age: \_\_\_\_\_ Your years of schooling: \_\_\_\_\_

Last four digits of your social-security number: \_\_\_\_\_