IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE INCLUSIVE COMMUNITIES PROJECT, INC.,

Plaintiff,

3:07-CV-945-L

v.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION

Notwithstanding plaintiff's efforts to make the U.S. Department of Housing and Urban Development ("HUD")'s role in setting Section 8 payment levels in the Dallas area appear unreasonable, this Court lacks subject matter jurisdiction over plaintiff's claims against HUD because plaintiff has failed to satisfy the case or controversy requirement of Article III of the U.S. Constitution, and because no waiver of sovereign immunity encompasses its claims.

First, plaintiff lacks standing because it cannot obtain an injunction to preserve the *status quo*, it improperly seeks to redress a generalized grievance, and it cannot establish a likelihood that the relief it requests will redress its injuries.

Second, the APA bars suit because this Court has no standards by which it could judge the reasonableness of HUD's interpretation of the U.S. Housing Act, because plaintiff could bring suit against the Dallas area housing authorities over their rent setting role in the Dallas area, and because the Fair Housing Act provides no discrete mandate for HUD to follow in carrying out its role in the Section 8 program.

ARGUMENT

I. PLAINTIFF CANNOT ENJOIN THE STATUS QUO, IMPROPERLY SEEKS REDRESS FOR GENERALIZED GRIEVANCES, AND IMPROPERLY ASSERTS SPECULATIVE CLAIMS

A. Plaintiff Cannot Obtain Injunctive Relief to Preserve the Status Quo

In an effort to avoid improperly requesting an injunction to prevent past actions, *City of Los*

Angeles v. Lyons, 461 U.S. 95, 102 (1983); *James v. City of Dallas,* 254 F.3d 551, 563 (5th Cir. 2001), plaintiff now claims that its seeking of an injunction requiring HUD to use the fiftieth percentile rents "merely keeps the *status quo*." Pl. Op. at 21 n.9. Nevertheless, absent moving for a preliminary injunction and making all required showings for such a "extraordinary and drastic remedy," *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), plaintiff cannot obtain an injunction to maintain the *status quo*. *Accord Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, as HUD demonstrated in its opening brief, nowhere in plaintiff's Complaint has it alleged that HUD is likely to set future Dallas Area FMR based on anything other than the fiftieth percentile rent. *See* Compl. *passim*. Accordingly, plaintiff cannot invoke this Court's remedial powers to enjoin HUD's past or present actions. *Accord Lyons*, 461 U.S. at 102; *James*, 254 F.3d at 563. *See also Univ of Tex.*, 451 U.S. at 395.

B. Plaintiff's Request for an Injunction Eliminating Racial Disparities In Rental Markets Is Nothing More Than a Generalized Grievance

Plaintiff lacks standing to request an injunction "eliminating the disparities between the number and percent of dwelling units made available in predominantly White rental housing markets and the number and percent of . . . units made available in predominantly minority rental housing markets" Compl. ¶ 39D, not because it has failed to allege *injuries* that might otherwise be sufficient to maintain an action alleging violations of the Fair Housing Act, *see Havens Realty Corp v. Coleman*, 455 U.S. 363 (1979), but because its requested *relief* cannot be construed as anything other than an improper "sweeping request to generally eradicate the effects of discrimination." *James*, 254 F.3d at 568. As demonstrated in our opening brief, *James* expressly rejected plaintiffs' request that HUD be ordered "to remedy 'the loss of housing units caused by the HUD funded housing code enforcement and housing code enforcement related demolitions of repairable family units as well as the resulting blight,'" *id.,* because that was "'a generalized grievance shared in substantially equal measure by all or most citizens,'" and, as such, "cannot provide standing to request injunctive relief." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). *James* controls resolution of this case. Whether plaintiff, as a fair housing organization can meet the injury-in-fact requirements set out in *Havens* and similar cases is beside the point–defendant does not challenge plaintiff's alleged injuries at this time. The *Havens* fair

housing plaintiff sought to enjoin a building owner's discriminatory steering practices, and had standing to do so. *Havens*, 455 U.S. at 369. By contrast, plaintiff's request here to eliminate racial disparities in housing opportunities is nothing more than a request to *redress* generalized grievance shared in substantially equal measure by all or most citizens, and is insufficient to confer standing.

C. Plaintiff's Proposed Remedies Are Not Likely to Redress Its Alleged Injuries

Plaintiff's failure to demonstrate that it is "'likely, as opposed to merely speculative,'" *James,* 254 F.3d at 564 (*quoting Lujan*, 504 U.S. at 561), that a judgment invalidating HUD's FY 2006 and FY 2007 Dallas FMRs, or requiring HUD to create and use new and varying FMRs within the Dallas area, would redress its injuries, *see* Compl. ¶ 39 Prayer for Relief, is fatal to its entire case.

First, plaintiff's request that this Court "order[] HUD to implement the FY 2005 Dallas area Section 8 program rent levels for the non-Black and non-poverty concentrated areas in Collin, Dallas, and Denton counties," Compl. ¶ 39A, will not redress plaintiff's alleged injuries simply because HUD's FMR for the Dallas area for fiscal year 2008, now in effect, is $871, Decl. of Kurt G. Usowski in Supp. of Def. Mot. to Dismiss ("Usowski Decl.") ¶ 21, and is higher than the FY 2005 FMR of $868, *id.*, that plaintiff has requested. Compl. ¶ 39A.[1] Because plaintiff cannot demonstrate that it "would directly benefit from the equitable relief sought," *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997), it lacks standing. *Accord Steel Co.*, 523 U.S. at 107.

Second, regardless of whether plaintiff can trace its injuries to HUD's actions, as it has

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[1] Plaintiff's assertions in its opposition brief, Pl. Op. at 5, that FY 2008 FMRs for three- and four-bedroom units are lower than FY 2003 FMR for three-bedroom units or FY 2004 FMR for four-bedrooms does not solve its standing problem. First, the complaint requests that the Court implement ***FY 2005*** FMRs in certain non-minority areas, not FY 2003 or FY 2004 FMRs. Compl. ¶ 39A. Second, the complaint makes no allegations that any of its clients rent, or seek to rent, three- or-four bedroom units, *see id. passim*, and thus fails to plead a particularized injury about three- or four-bedroom rents. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998). Third, plaintiff's attempt to raise this issue for the first time in its opposition brief in an attempt to create standing is too late to do so now. "It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1107 (7th Cir. 1984) (improper for "district court to have relied on the plaintiffs' briefs to embellish the conclusory allegations of the complaint.").

By contrast, to the extent that plaintiff suggests defendant's declaration is improper or that plaintiff should be given the benefit of the doubt in a Rule 12(b)(1) motion, Pl. Op. at 4-5, it is mistaken. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) (defendant may challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as affidavits, are considered. Moreover, plaintiff bears the burden of proof that jurisdiction does in fact exist.).

unsuccessfully attempted to do, Pl. Op. at 24, plaintiff has failed to establish that, were this Court to order HUD to establish separate FMR Areas for predominately White areas of the Dallas Metropolitan Division, Compl. ¶ 39B-D, it is likely that its clients would be able to obtain housing in those areas. In focusing on traceability, plaintiff ignores its burden to establish that it is likely that the relief it seeks will redress its injuries. Accordingly, plaintiff's reliance on a declaration of its Mobility Assistance Director does nothing to alleviate its reliance on impermissible speculation about what landlords in predominantly White areas might do if HUD set higher FMRs. *Cf. Allen v. Wright*, 468 U.S. 737, 751, 758 (1984) (overly speculative as to whether requiring the IRS to enforce its rules which prohibited tax breaks to racially discriminatory *private* schools, would prevent segregated schools, because withdrawal of tax breaks would not necessarily convince these private schools to change policies, or convince parents to transfer their children to nonsegregated schools); *Simon*, 426 U.S. 26, 43-44 (1976) (overly speculative to conclude that suspending tax benefits to *private* hospitals would force those hospitals to take on more indigent patients).[2]

In this regard, *Burton v. Cent. Interstate Low-Level Radioactive Waste Compact Com'n,* 23 F.3d 208 (8th Cir. 1994), exposes plaintiff's failure in establish a likelihood of favorable redress. As defendant explained in its opening brief, the *Burton* court acknowledged that plaintiffs, might be able to establish the traceability prong of standing, by showing that "LES [a third party] *increased* electricity rates in response to the [defendant's] taxes on LLRW [another third party]." *Id.* at 209-10. Nevertheless, the court held that establishing traceability was *still* insufficient because, as is the case here, it required the court to "take it on faith that LES, which is not a party to this action, would adjust its rates if the district court enjoined the [defendant's] taxes on LLRW." *Id.* at 210. Thus, in *Burton*, as here, it was "merely speculative" whether a favorable decision would affect plaintiffs. *Id.* This Court has already applied the holding of *Burton* before to hold that plaintiffs lacked standing because they could not establish a likelihood of favorable redress, *Haile v. Town of Addison*, 264 F. Supp. 2d

[2] Plaintiff's reliance on *Adarand Constructors, Inc. v. Peňa*, 515 U.S. 200, 211 (1995), and *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997), Pl. Op. At 23-34, is inapposite. *Adarand* did not concern redressability. 515 U.S. at 211. *Bennett* did not concern a *private* party, but two different branches of the federal government, one of which, the Court held, was bound to follow the other. 520 U.S. at 168-69.

464, 467 (N.D. Tex. 2003), and should do so again here. As in *Allen, Simon, Burton* and *Haile*, even if this plaintiff could establish that private owners in predominantly White areas have *reduced* their participation in the Dallas area PHAs' voucher programs because of HUD's use of the Dallas MSA to calculate the FMR, it remains merely speculative whether private owners in such areas would *increase* their participation in the Dallas area PHAs' voucher programs if this Court were to set aside HUD's determination.[3]

II. THIS COURT HAS NO JURISDICTION OVER PLAINTIFF'S CLAIMS BECAUSE THE APA PROVIDES NO WAIVER OF SOVEREIGN IMMUNITY HERE

A. Congress's Use of the Term "Market Area" In the Housing Act Does Not Define That Term Nor Provide This Court With Any Standards To Evaluate Its Meaning

Because the APA precludes judicial review of agency actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), its waiver of sovereign immunity is unavailable to plaintiff.[4] As defendant demonstrated in its opening brief, Congress's use of the term "market area" in the Housing Act provides no "meaningful standards for defining the limits of [agency] discretion," and accordingly, there is no "law to apply" under § 701(a)(2). *See* Def. Mot. to Dismiss at 16-20 (citing *Heckler*, 470 U.S. at 834; *Suntex Dairy v. Block*, 666 F.2d 158, 163-64 (5th Cir. 1982)).

In attempting to inject some standard into the meaning of the term "market area" by which this Court could review the reasonableness of HUD's interpretation, plaintiff offers the plain language of the statute, legislative history, HUD and other government documents, and caselaw. None advances plaintiff's case.

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[3] Defendant notes that nowhere in plaintiff's opposition does it oppose defendant's contention that plaintiff's challenges to HUD's FMR for the Dallas area for both FY 2006 and FY 2007, Compl. ¶¶ 12, 39A, are moot. *See* Pl. Op. *passim*. Accordingly, this Court should treat this part of plaintiff's claim as conceded. Defendant also notes plaintiff makes no mention of the FY 2008 FMR in its complaint, only its opposition. Pl. Op. at 21.

[4] Plaintiff devotes several pages of its opposition to arguing that HUD's determination of the FMR area constitutes "final agency action," Pl. Op. 10-11, and arguing that 5 U.S.C. § 702 waives sovereign immunity in non-APA cases, *id.* at 11-12, even though neither point is at issue in this case. See Compl. *passim*; Def. Mot. *passim*. In this regard, plaintiff's reliance on *Trudeau v. FTC*, 456 F.3d 178, 183-187 (D.C. Cir. 2006), is completely inapposite. *Trudeau* held only that the waiver of sovereign immunity in 5 U.S.C. § 702 extends beyond APA actions and is not confined to a court's power to review final agency actions. *Trudeau* is inapposite here because plaintiff brings its case directly under the APA *and* because it seeks review of HUD's final actions in setting FMRs for the Dallas area.

First, plaintiff simply quotes the language of the statute itself, emphasizing that it uses the term "market area." Pl. Op. at 13 (quoting 42 U.S.C. §§ 1437f(o)(1)B) and 1437f(c)(1)). But the issue is not whether "market area" is a term used in the statute. Rather the issue is whether the Housing Act includes any standard by which a court could judge the reasonableness of HUD's interpretation of that term. As demonstrated in our opening brief, Def. Mot. at 18-19, because the Act does not do so, interpretation of that term is committed to agency discretion. *Suntex Dairy*, 666 F.2d at 163-64.[5]

Second, plaintiff offers a quotation from the Senate version of a bill to suggest that a reasonable geographic area for a housing market could not have any significant variance in rent, Pl. Op. at 13-14 (quoting S. Rep. No. 93-693 (*reprinted in* 1974 U.S.C.C.A.N. 4273, 4315)). The problem with plaintiff's argument is that, with respect to this statutory provision, Congress passed the *House* version. H. Conf. Rep. No. 93-1279 ("The *House* amendment requires HUD to establish fair market rental in each housing market area. . . . The conference report contains the *House* provisions.") (*reprinted in* 1974 U.S.C.C.A.N. 4449, 4465 (1974) (emphasis added)). Moreover, the language of the Conference Report, which is what Congress ultimately passed, does not resolve the meaning of "market area." *Id.* (stating only that "the HUD Secretary is expected to take into account factual data, analyses, and recommendations . . . in various *market areas*.") (emphasis added).

In a case such as this, legislative history provides this Court with no guidance, because "[l]ike other extrinsic aids to construction, the use of legislative history is to solve, but not to create, an ambiguity." *H. Wetter Mfg. Co. v. U.S.*, 458 F.2d 1033, 1035 (6th Cir. 1972). *See also Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J. concurring) ("It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind."). Accordingly, in deciding whether HUD's interpretation of the term "market area" is subject to judicial review, this Court should focus on the language of the

[5] Contrary to plaintiff's contention that defendant has conceded that the Dallas FMR Area is not a market area, Pl. Op. at 13, defendant has defined the term "market area" to include the Dallas FMR Area.

statute, for "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" *Cooper Indus., Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168 (2004) (quotation marks and citation omitted).

Moreover, where, as here, "Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). *See also Peyote Way Church of God, Inc., v. Meese*, 698 F. Supp. 1342, 1346 (N.D. Tex. 1986) (same). In this case, since passing the 1974 Amendments to the U.S. Housing Act that created the Section 8 program, Congress has amended 42 U.S.C. § 1437f some 36 times and has twice expressly amended § 1437f(c)(1) to create separate fair market rental areas for Westchester County, New York, Pub. L. 100-242, Title I § 142(c)(1), 101 Stat. 1849 - 1853, 1878, 1890 (Feb. 5, 1988), and Monroe County, Pennsylvania, Pub. L. 102-139, Title II, 105 Stat. 756 (Oct. 28, 1991), but has otherwise left the term "market area," and HUD's interpretation of it, unchanged. Usowski Decl. ¶ 4. Indeed, despite repeated amendments to the Section 8 program generally and the express additions to § 1437f(c)(1) of specific fair market rent areas, Congress's acceptance of HUD's interpretation provides "an unusually strong case of legislative acquiescence in and ratification by implication." *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 599 (1982).

Third, plaintiff points to a HUD report, not on the Section 8 program, but on housing production subsidies in the U.S. Department of Agriculture's Rural Housing Service Section 515 program, Pl. Op. at 15 (citing Targeting Housing Production Subsidies (2003)). The report states that "there is no single national rental housing market," and that large metropolitan areas "do not constitute single housing markets." Targeting Production Subsidies, at 7. Whatever the value of these statements about a program operated by a different Department, the fact that HUD not only sets FMRs in about 2,500 market areas, Usowski Decl. ¶ 3, but has also divided the Dallas-Ft. Worth-Arlington Metropolitan area into different FMR areas in administering the housing choice voucher program, *id.* ¶¶ 11, 14-17, demonstrates that HUD's actions are not inconsistent with the report's statements. More

to the point, the report does nothing to provide this Court with the standards necessary to determine whether HUD's interpretation of the term "market area" is reasonable.

Lastly, plaintiff cites two district court cases that merely mention, but do not define, the term "market area" and have nothing whatsoever to do with the U.S. Housing Act. Pl. Op. at 15 (citing *CCA Assocs. v. U.S.*, 75 Fed. Cl. 170, 202-03 (2007); *DKE Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 113-14 (N.D.N.Y. 2007)). Neither case provides this Court with any standards by which to review HUD's actions. In *CCA Assocs.*, the court addressed expert testimony concerning "fair market value," not market areas, in a case that concerned takings, not the housing choice voucher program. 75 Fed. Cl. at 20-3. *DKE Alumni Corp.* was an antitrust case, and, in fact, expressly rejected the plaintiff's efforts to define the relevant housing market as contiguous with the borders of a town, finding a much larger area, perhaps even a national one, was appropriate for that analysis. 492 F. Supp. 2d at 115-18. The fact that plaintiff is forced to rely on these cases demonstrates the complete dearth of any judicial standards by which this Court could judge the reasonableness of HUD's actions.[6]

B. Because Suit Against Dallas Area Public Housing Authorities Provides Plaintiff With Another Adequate Remedy in a Court, the APA Does Not Waive Immunity

Because plaintiff's ability to bring suit against Dallas area PHAs for unreasonably refusing to vary rents above HUD's published FMR for the Dallas area provides it with "an adequate remedy in a court," 5 U.S.C. § 704, the APA's waiver of sovereign immunity does not apply to any of plaintiff's

[6] In an effort to focus the Court's attention of the reasonableness of HUD's interpretation, rather than whether any such interpretation is even reviewable, plaintiff claims that OMB has issued a "strong warning" against use of its metropolitan area definitions in non-statistical programs, Pl. Op. at 6 (citing Pl. App. at 13). However, unless and until this Court resolves defendant's motion to dismiss, the reasonableness of HUD's interpretation is not properly before this Court. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). In any event, plaintiff fails to mention that OMB expressly states that the use of its metropolitan area definition may or may not be suitable for use in program funding formulas," and that OMB acknowledges that each agency has discretion to determine if such use is appropriate. *See* Pl. App. at 13. In fact, HUD economists and demographers were not only involved in drafting the new OMB definitions, but also determined that they "better reflect how local housing markets should be evaluated" because they "placed increased weight on commuting patterns." 70 Fed. Reg. 32401, 32403 (June 2, 2005). Plaintiff's insinuation also ignores the fact that, where appropriate, HUD modified these definitions, as it did in the Dallas-Ft. Worth-Arlington Metro Area, if, for example, "2000 Census Base Rents differed by more than [five] percent from the new OMB area 2000 Census Base Rent." *Id.*

claims against HUD.[7] Notwithstanding plaintiff's mischaracterization of HUD's exception payment standards, Pl. Op. at 19, each Dallas area PHA retains the authority not only to vary rents between 90 and 120 percent of HUD's published FMR (with HUD approval above 110 percent), *see* 24 C.F.R. §§ 982.503(b)-(c), but also, with HUD approval,[8] to vary them in "an exception area" ***above*** 120 percent of HUD's published FMR to help families find housing outside areas of high poverty. *Id.* § 982.503(c)(3)-(4)(i)(A). Thus, if, as plaintiff asserts, Pl. Op. at 19, the median rent in Coppell, TX is 27 percent higher than HUD's published FMR for the Dallas area, any Dallas area PHA could, with HUD approval, vary the rent in Coppell above 120 percent. 24 C.F.R. § 982.503(c)(3)-(4)(i)(A). Thus, suit against the Dallas area PHAs to compel them to follow through on their initial attempts to vary rents could provide plaintiff with the remedy it seeks – "provid[ing] black DHA housing voucher participants "equal access" to "White rental housing markets," Compl. ¶ 39C, D, and "eliminating the disparities between the number and percent of dwelling units made available in predominantly White rental markets and the number and percent of . . . units made available in predominantly minority rental . . . markets." *Id.* ¶ 39D. Because this remedy is available to plaintiff, the APA provides no waiver of sovereign immunity here. *Turner v. Sec'y of HUD*, 449 F.3d 536, 540 (3d Cir. 2006).

C. The Court Should Dismiss Plaintiff's Section 3608(e)(5) Claims Because HUD Has Neither Failed to Act Nor Wrongfully Withheld Action

Because plaintiff does not, and could not, identify a circumscribed, discrete agency action that 42 U.S.C. § 3608(e)(5) requires HUD to take, *Norton v. So. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55 (2004), requires dismissal of plaintiff's § 3608(e)(5) claims. *SUWA* held that "pervasive

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[7] Because the Tucker Act does not create a substantive right enforceable against the United States for monetary damages, *e.g., Mients v. U.S.*, 50 Fed. Cl. 665, 671 (2001), and because plaintiff's complaint has not alleged a right to monetary damages under a statute or regulation, *Compl. passim*, defendant withdraws its argument that APA § 704 bars jurisdiction over plaintiff's claims because it could have pursued an action in the Court of Claims for monetary damages.

[8] Plaintiff's assertion, Pl. Op. at 19, that HUD has not approved DHA's exception payment request is disingenuous. Although the Dallas Housing Authority submitted an initial request, Pl. App. at 31-33, HUD's explained that DHA need to provide additional information. *Id.* at 34. Although DHA provided some additional information, *id.* at 35, it was unable to provide HUD with specific apartments or census tracts where rents were too high. *Id.* Thus, it was DHA, and not HUD, that failed to follow through in seeking exception payments in 2002, but again, in 2006. *See* Decl. of Donald L. Darling [submitted herewith].

oversight by federal courts over the manner and pace of agency compliance with [broad] congressional directives is not contemplated by the APA." *Id.* at 66-67.

Contrary to plaintiff's assertions, Pl. Op. at 17, the only case plaintiff cites which does not either pre-date *SUWA* or ignore it,[9] *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Hous. Auth.*, 417 F.3d 898 (8th Cir. 2005), affirmed the *dismissal* of an action alleging violations of § 3608(e)(5). 417 F.3d at 909. It did not, as plaintiff suggests, reject application of *SUWA* to § 3608 claims. *See generally id.* Of course, to the extent *Darst-Webbe* is in any way inconsistent with *SUWA*, this Court should simply disregard the decision. In any event, the *Darst-Webbe* panel merely addressed its earlier order (which pre-dated *SUWA*) that the district court, on remand, determine whether HUD had assessed "those aspects of its proposed course of action that would further limit the supply of genuinely open housing" and assessed "those aspects of the proposed course of action that would increase that supply." *Id.* at 907. In so doing, the court found that its standard of review was merely "to assess whether HUD exercised its broad authority in a manner that demonstrates consideration of, and an effort to achieve, fair housing opportunities." *Id.* However, because the court's holding addressed an order that pre-dated *SUWA*, its finding is *sui generis*, and has no precedential value.[10]

Accordingly, because *SUWA*, and not *Darst-Webbe*, controls resolution of plaintiff's § 3608(e)(5) claims, the APA precludes review of these claims.

CONCLUSION

This Court should grant defendant's motion to dismiss for lack of subject matter jurisdiction.

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[9] *Anderson v. Jackson*, 2007 WL 458232 (E.D. La. Feb. 6, 2007), did not even acknowledge *SUWA*.

[10] Even if *Darst-Webbe* had any persuasive authority after *SUWA*, which it does not, HUD's efforts to increase fair housing opportunities in the administration of its housing choice voucher program would easily satisfy the *Darst-Webbe* standard. First, as noted in HUD's opening brief, in order to increase the ability of voucher tenants to access all parts of large metropolitan housing markets, especially in markets where affordable housing was concentrated in high poverty areas, HUD has issued an interim rule establishing criteria for setting the FMR at the fiftieth percentile rent (instead of the fortieth percentile) in large metropolitan FMR areas that meet specific criteria for size, concentration of housing renting at or below the fiftieth percentile FMR, and concentration of voucher tenants in particular neighborhoods. Usowski Decl. ¶ 9; 24 C.F.R. § 888.113(c). Second, as set out above and in HUD's opening brief, HUD's regulations implementing the voucher program provide PHAs with options to increase or decrease area rents in order to increase housing opportunities in non-minority areas. Usowski Decl. ¶ 6; 24 C.F.R. §§ 982.503(b)-(c). Both these efforts easily demonstrate HUD's consideration of and efforts to achieve, fair housing opportunities.

Dated: November 13, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2007, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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