At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Cortland County Courthouse, in the City of Cortland, New York, on the 24th day of March, 2023.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TOMPKINS

PEOPLE OF THE STATE OF NEW YORK
by **LETITIA JAMES**, Attorney General
of the State of New York,

Petitioner,

against

COMMONS WEST, LLC, COLLEGETOWN PLAZA, LLC, CITYVIEW, LLC, COLLEGETOWN CENTER, LLC, COLLEGETOWN COURT, LLC, FANE ENTERPRISES, INC. and **JASON H. FANE** individually and d/b/a **ITHACA RENTING COMPANY,** and as the sole member of **COMMONS WEST, LLC, COLLEGETOWN PLAZA, LLC, CITYVIEW, LLC, COLLEGETOWN CENTER, LLC** and **COLLEGETOWN COURT, LLC,** and as president, director and shareholder of **FANE ENTERPRISES, INC.**,

Respondents.

DECISION, ORDER, AND JUDGMENT

Index No. EF2022-0558
RJI No. 2022-0481-M

APPEARANCES:

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MARK G. MASLER, J.S.C.

The Human Rights Law (Executive Law article 15) was amended in April 2019 to make it an unlawful discriminatory practice to refuse to rent or lease housing accommodations to any person, or group of persons, based on their "lawful source of income" (Executive Law § 296 [5] [a] [1] [the source of income antidiscrimination statute]). As defined in the Human Rights Law, "lawful source of income" specifically includes "any form of federal, state, or local public assistance or housing assistance including . . . section 8 vouchers . . . whether or not such income or credit is paid or attributed directly to a landlord" (Executive Law § 292 [36]). Pursuant to section 8 of the United States Housing Act of 1937, the federal government operates the Housing Choice Voucher Program that provides housing assistance to eligible low-income families by giving subsidies to landlords who rent apartments to them (*see* 42 USC § 1437f).

Respondents own and operate numerous residential rental properties in the City of Ithaca, but do not participate in Section 8.[1] Petitioner commenced this proceeding pursuant to Executive Law § 63 (12), asserting that respondents' refusal to participate in Section 8 constitutes impermissible source of income discrimination in violation of the Human Rights Law, and seeking (1) a permanent injunction enjoining respondents from refusing to rent or lease apartments to recipients of Section 8 housing assistance; (2) restitution for consumers injured by respondents' conduct; and (3) the imposition of penalties and costs (*see* Executive Law §§ 63, 297 [4] [c] [vi]; CPLR 8303 [a] [6]). Respondents move to dismiss the petition pursuant to

[1] Jason Fane admitted that he owns and operates rental properties in his individual capacity, that he is the sole member of each of the limited liability company respondents, a director and shareholder of the corporate respondent, and that he is involved in the management and business of each respondent which is a business entity (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 1, verified petition, ¶¶ 4, 11; NYSCEF Doc No. 51, verified answer, ¶¶ 4, 11).

CPLR 3211 or, alternatively, for an order granting discovery pursuant to CPLR 408 and converting this proceeding to an action pursuant to CPLR 103.

Respondents first contend that the source of income antidiscrimination statute is unconstitutional because it compels landlords to participate in Section 8 – which is a voluntary program under federal law – thereby impermissibly requiring landlords to waive their rights under the Fourth Amendment of the US Constitution.[2] A landlord cannot accept a Section 8 housing voucher as payment for rent without agreeing to participate in Section 8 by entering into a Housing Assistance Payment (HAP) contract with a Public Housing Agency (PHA) (*see Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 761 [2007], *cert denied* 552 US 1141 [2008]; *see also* NY St Cts Elec Filing [NYSCEF] Doc No. 32, Lyman aff, exhibit D, HAP contract). The HAP contract must be in the form required by the Department of Housing and Urban Development (*see* 24 CFR § 982.451 [a] [1]). The HAP contract requires a participating landlord to consent to inspection of "the contract unit and premises *at such times as the PHA determines necessary*," and to provide the PHA, the Department of Housing and Urban Development, and the Comptroller General of the United States "*full and free access* to the contract unit and the premises, and to all accounts and other records of the owner that are relevant to the HAP contract," which includes access to "any computers, equipment or facilities containing such records" (HAP contract, Part B §§ 3 [e], 11 [emphasis added]; *see* 24 CFR § 982.405). The "premises" are "[t]he building or complex in which the contract unit is located,

[2] The Fourth Amendment recognizes the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (US Constitution, Fourth Amendment). It was made applicable to the states by incorporation in the Due Process Clause of the Fourteenth Amendment (*see Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 528 [1967]). The New York Constitution also recognizes this right (NY Const, art I, § 12). For the sake of simplicity, reference will be made only to the Fourth Amendment of the US Constitution.

including common areas and grounds" (HAP contract, Part C, § 17). Respondents contend, therefore, that the source of income antidiscrimination statute violates a property owner's Fourth Amendment rights by giving the owner no choice but to consent to these inspections by entering into a HAP contract.

Petitioner agrees that Section 8 is a voluntary program, but contends that the Human Rights Law does not mandate participation in Section 8 because the law "merely prohibits [respondents] from denying an applicant for an apartment based on their source of income, which includes Section 8 vouchers" (NYSCEF Doc No. 57, reply memorandum of law at 4). Petitioner's argument is fundamentally flawed for the simple reason that, as set forth above, a landlord cannot accept a Section 8 housing voucher as payment for rent without agreeing to participate in Section 8, which, in turn, requires that the landlord authorize warrantless searches of the rental property and the landlord's records. Indeed, the Appellate Division has expressly held that similar source of income antidiscrimination statutes adopted by municipalities prior to the April 2019 amendment of the Human Rights Law *required* a landlord to accept Section 8 vouchers, effectively compelling the landlord's participation in the otherwise voluntary program (*see Matter of People v Ivybrooke Equity Enters., LLC*, 175 AD3d 1000, 1003 [2019]; *Kosoglyadov v 3130 Brighton Seventh, LLC*, 54 AD3d 822, 824 [2008]). Thus, although Section 8 is a voluntary program at the federal level, the source of income protections provided by the Human Rights Law would necessarily compel a landlord to participate in Section 8 to obtain reasonable rent for an apartment rented or leased to a person who is eligible to receive Section 8 assistance.

Although it has been determined that Section 8 does not preempt state laws which provide tenants with additional protections (*see Rosario v Diagonal Realty, LLC*, 8 NY3d at 762-

764; *Matter of People v Ivybrooke Equity Enters., LLC*, 175 AD3d at 1002), respondents' argument that the source of income antidiscrimination statute is unconstitutional because it compels landlords to waive their Fourth Amendment rights presents an issue of first impression. In 1967, the United States Supreme Court established the principle that administrative searches of buildings to ensure compliance with a municipal housing code are significant intrusions upon the interests protected by the Fourth Amendment (*see Camara v Municipal Court of City and County of San Francisco*, 387 US 523, 540 [1967] ["except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant"]).[3] The New York Court of Appeals, relying largely on *Camara*, specifically held that laws which authorize inspections of residential rental properties without either the consent of the owner or a valid search warrant violate the Fourth Amendment, and specifically noted that a property owner cannot be indirectly compelled to consent to a search (*see Sokolov v Village of Freeport*, 52 NY2d at 345-347).[4] Stated another way, *Sokolov* stands for the proposition that a law may not coerce property owners into consenting to warrantless inspections in derogation of their constitutional rights by conditioning their ability to rent real property on providing such consent, which is precisely the effect of the source of

[3] *Camara* was argued and decided concurrently with *See v Seattle* (387 US 541 [1967]), which held that the protection against unreasonable searches extends to administrative inspections of private commercial enterprises.

[4] *Sokolov* is a leading case that has been widely followed (*see Paschow v Town of Babylon*, 53 NY2d 687, 688 [1981]; *Wisoff v City of Schenectady*, 116 AD3d 1187, 1188 [2014], *appeal dismissed* 23 NY3d 1012 [2014], *lv denied* 24 NY3d 908 [2014]; *ATM One, LLC v Incorporated Vil. of Hempstead*, 91 AD3d 585, 587 [2012]; *McLean v City of Kingston*, 57 AD3d 1269, 1271-1272 [2008], *lv dismissed* 12 NY3d 848 [2009]; *Stender v City of Albany*, 188 AD2d 986, 987 [1992], *appeal dismissed* 81 NY2d 1006 [1993]; *Town of Brookhaven v Ronkoma Realty Corp.*, 154 AD2d 665, 666 [1989]; *Mamakos v Town of Huntington*, 715 Fed Appx 77, 79 [2d Cir 2018], *cert denied* —— US ——, 139 S Ct 171 [2018]).

income antidiscrimination statute. Thus, by requiring landlords to accept Section 8 vouchers, the source of income antidiscrimination statute necessarily compels landlords to consent to warrantless searches of their properties, in violation of the Fourth Amendment.

Similarly, the source of income antidiscrimination statute further violates the Fourth Amendment by compelling landlords to consent to warrantless searches of their records. Petitioner's argument that "there is no violation of the Fourth Amendment regarding the inspection of [respondents'] records *when entering into a HAP contract*" is unavailing (NYSCEF Doc No. 57, reply memorandum of law at 20 [emphasis added]). This argument assumes the conclusion – that consent to such searches is given when entering into a HAP contract – and overlooks the determinative factor – that the source of income antidiscrimination statute improperly compels landlords to waive their Fourth Amendment rights by requiring them to accept the HAP contract's terms. Also unavailing is petitioner's argument that landlords have no reasonable expectation to privacy in their business records. There is no reasonable expectation of privacy in records maintained by closely regulated industries, especially records specifically prepared in compliance with regulatory requirements (*see Matter of Glenwood TV v Ratner*, 103 AD2d 322, 328-329 [1984], *affd on opinion below* 65 NY2d 642 [1985], *appeal dismissed* 474 US 916 [1985]). However, this exception to the reasonable expectation of privacy in business records applies only to businesses in industries which "have such a history of government oversight that no reasonable expectation of privacy could exist," such as liquor sales, firearms dealing, mining, or operating an automobile junkyard (*Los Angeles v Patel*, 576 US 409, 424 [2015] [internal quotation marks, ellipsis, and citation omitted]; *see Matter of Glenwood TV v Ratner*, 103 AD2d at 328-329 [listing numerous other examples where there is "little or no" expectation of privacy in records that are required to be maintained by law or

regulation]). Other than Section 8, petitioner has not identified any law or regulation requiring respondents to maintain specific business records, and renting residential apartment units is not a closely regulated industry (*see e.g. Los Angeles v Patel*, 576 US 409 [holding that hotels are not closely regulated industry and that a law requiring hotels to provide guest registry records to police for inspection violated the Fourth Amendment because it did not provide any opportunity for precompliance review]).

Accordingly, Executive Law § 296 (5) (a) (1) is unconstitutional to the extent that it makes it an unlawful discriminatory practice to refuse to rent or lease housing accommodations to any person, or group of persons, because their source of income includes Section 8 vouchers. This determination renders academic the parties' remaining contentions. Based on the foregoing, respondents' motion is granted, and the petition is dismissed, with prejudice.

This decision constitutes the order and judgment of the court. The filing of this decision, order, and judgment, or transmittal of copies hereof, by the court shall not constitute notice of entry (*see* CPLR 5513).

Dated: June 27, 2023
Cortland, New York

ENTER

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Digitally signed by Hon. Mark G. Masler
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Date: 2023.06.27 09:11:29-04'00'

HON. MARK G. MASLER
Supreme Court Justice

The following documents filed with the Clerk of the County of Tompkins via New York State Courts Electronic Filing System were considered in this proceeding (*see* CPLR 2219 [a]):

Document Numbers 1-3; 6-15; 18; 26-49; 51; 56; 61-63.