No. _____

In The
Supreme Court of the United States

ANTHONY G. PETRELLO,

Petitioner,

v.

MATTHEW W. PRUCKA; SHERYL S. PRUCKA; RAHUL NATH; USHA NATH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair Housing Amendments Act ("FHAA") authorizes courts to award reasonable attorneys' fees to "prevailing parties." Under principles long established and recently reaffirmed by this Court, fees may not be awarded to a prevailing defendant except where the plaintiff's action was frivolous, unreasonable, or without foundation. In this case, a jury deadlocked four to four without reaching a verdict, and the District Court denied the defendants' motions for judgment as a matter of law. Nevertheless, a new judge was assigned to the case and, without conducting a hearing, granted judgment as a matter of law to the defendants, and awarded $900,000 in attorneys' fees to them as prevailing parties.

1. Can defendants be awarded attorneys' fees in a civil rights case based on a subjective, hindsight approach that cites no standards, instead of the objective standard followed by the majority of circuits, under which the denial of a motion for judgment as a matter of law strongly indicates the plaintiff's case is not frivolous, groundless, or without foundation?

2. Because there is direct evidence of discrimination under the FHAA, does the Court of Appeals' opinion conflict with this Court's precedent in adopting a test that has only been applied in cases involving purely circumstantial evidence of discrimination?

LIST OF PARTIES

The parties below are fully listed in the caption.

RULE 29.6 STATEMENT

The petitioner is an individual. Therefore, petitioner has no parent company, and no publicly held companies hold any stock of the petitioner.

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The January 27, 2011 memorandum decision of the District Court is not officially reported, but it is unofficially reported at 2011 WL 30544 and is set out at App. 8. The District Court's order awarding attorneys' fees, which is not officially reported, is unofficially reported at 2011 WL 1157282, set out at App. 23.

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals on August 2, 2012. The decision of the Court of Appeals denying rehearing en banc was entered on September 7, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 804 of the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3604, provides in pertinent part:

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

. . .

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

. . .

(3) For purposes of this subsection, discrimination includes –

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises. . . .

Section 813 of the FHAA, 42 U.S.C. § 3613, provides in pertinent part:

(c) Relief which may be granted. –

. . .

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

STATEMENT OF THE CASE

A. Basis for federal jurisdiction in court of first instance.

The District Court's jurisdiction was based on the United States Fair Housing Amendments Act ("FHAA"). 42 U.S.C. § 3613(a)(1)(A). This case arises out of discrimination, on the basis of handicap or disability, in connection with the sale of housing, which is unlawful under the FHAA. 42 U.S.C. § 3604(f).

B. Statutory background.

In 1988, the FHAA was enacted as "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. at 18 (1988). All forms of handicap discrimination in connection with the sale or rental of a dwelling are unlawful under the FHAA. *See* 42 U.S.C. § 3604(f)(3). The FHAA grants to disabled individuals the protections of the original Fair Housing Act, the Civil Rights Act of 1968, which was passed to "replace ghettos with truly integrated

and balanced living patterns." 114 CONG. REC. 3422 (1968).

The FHAA grants district courts with broad remedial powers to promote the integration of residential neighborhoods and the mainstreaming of disabled adults and children. These powers include the authority to award attorneys' fees and costs to the "prevailing party." 42 U.S.C. § 3613(c)(2); *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 601 (2001). Under the FHAA, suits by "private attorneys general" are critical to successful enforcement of the law because federal enforcement resources are limited. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (discussing the original Fair Housing Act as enacted in 1968).

In *Fox v. Vice*, this Court articulated and clarified the principles governing fee awards under 42 U.S.C. § 1988 and similar civil rights statutes, including the FHAA. *Fox v. Vice*, 131 S. Ct. 2205 (2011). A plaintiff who succeeds in remedying a civil rights violation – a "private attorney general" – vindicates a policy that Congress considered of the highest priority. Ordinarily, a successful plaintiff in a civil rights case should recover an attorney's fee from the defendant, whose misconduct created the need for legal action. *Id*. at 2213. Fee shifting in such a case reimburses a plaintiff for the cost of vindicating civil rights.

Under the civil rights laws, a prevailing defendant may also recover litigation expenses, but under a different standard reflecting the "quite different

equitable considerations" at stake. *Id*. (citing *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 419 (1978). In enacting § 1988, Congress sought to protect defendants from burdensome litigation having no legal or factual basis. *Id.* Accordingly, the civil rights laws authorize a district court to award attorneys' fees to a defendant only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id*. (citations omitted).

The *Fox* decision reaffirmed that these governing principles function only when district courts follow the rules and courts of appeals apply meaningful review:

> But the trial court must apply the correct standard, and the appeals court must make sure that has occurred. That means the trial court must determine whether the fees requested would not have occurred but for the frivolous claim. And the appeals court must determine whether the trial court asked and answered that question, rather than some other. A trial court has wide discretion when, but only when, it calls the game by the right rules.

Id. at 2216-17 (citations omitted).

C. Background.

In granting injunctive relief to the petitioner, the original trial judge noted the merit of his claims for housing discrimination:

> I can understand somebody having a concern about, you know, what's going to be done with my beautiful old house that I've done all this wonderful work to and restored and all that sort of thing. But given the fact that these people lived next door to each other for six years and the Pruckas were pretty seriously knowledgeable as to the child's problems and they want to buy this house for their kid who – cerebral palsy is a burden enough without other inducements, I've got to tell you candid, there are aspects of this case that do not pass the smell test.

Record ("R.") 928.

The Court of Appeals called this a "most unusual case," App. 2, but in its first phase there was nothing unconventional about the dispute. Discovery was completed in a civil fashion, no dispositive motions were filed by either side, and neither side filed a motion for sanctions. Over the course of two years, two different district judges presided over the case without a suggestion that the Petrellos' claims were frivolous, groundless, or without foundation. As shown below, this housing discrimination case took an unusual turn only after its trial, when a third judge was assigned to the case and, without conducting a single hearing, dismissed the Petrellos' claims and assessed

what appears to be the largest reported amount of defense fees ever awarded against an individual plaintiff in civil rights litigation.

1. The jury heard direct evidence of discrimination based on Carena Petrello's disabilities.

At the three-day trial of this case, the jury heard testimony that Carena Petrello, the young daughter of Anthony and Cynthia Petrello, was born 16 weeks prematurely, the cusp of viability, on December 2, 1997. Near her first birthday, she was diagnosed with periventricular leukomalacia ("PVL"), which led to cerebral palsy. As a result of her profound disabilities, she cannot attend to her daily needs and will require 24-hour care every day of her life. First Supplemental Record ("1SR") 1922-23, 1931.

The Petrello family lives in a large home in the Shadyside subdivision in Houston, and they hope to buy or build a smaller home in Shadyside where Carena will be able to reside as she grows older. 1SR 1931-32, 1938. In October 2007, their next-door neighbors, respondents Matthew and Sheryl Prucka, placed their home on the market. 1SR 1951-54. The Pruckas encouraged the Petrellos to bid on the house and, to give the Petrellos an advantage in bidding, made arrangements that a sale to the Petrellos would not be subject to the commissions the Naths would otherwise owe their real estate broker. 1SR 1959.

The Petrellos offered $8.2 million for the Prucka home, an offer that "busted through the list price," as Mr. Prucka admits. 1SR 2328. But the Pruckas rejected the Petrellos' offer and accepted a less valuable one from respondents Rahul and Usha Nath. Mr. Prucka admits that the Nath offer was $190,982.50 less than the Petrello offer. 1SR 1897, 1970-71, 2204, 2392, 2679.

The Pruckas admit that they accepted a less valuable offer for reasons that were directly related to Carena's mental and physical disabilities. At trial, Mr. Prucka testified:

> Q. And the reason you didn't prefer the Petrellos is that they were going – as you've told us, they were going to modify the home by making it handicapped-accessible and you preferred to sell to someone who wouldn't. True?
>
> A. True.
>
> Q. . . . .
>
> Whether Carena lived in that house from day one or down the road as she reached adulthood or after her parents were dead and gone – my question is this: You preferred to . . . sell to the Naths because they were going to live there as a family as opposed to Carena and her therapists, whether she lived there or not. True?
>
> A. Yes.

SR 2234-35. These admissions were direct evidence that proved a prima facie case of handicap discrimination.

2. It is undisputed that the Petrellos are "qualified purchasers."

The undisputed trial testimony established the Petrellos' qualifications for purchasing the Pruckas' house. At trial, Mr. Prucka admitted that the Petrello offer had "busted through the list price," 1SR 2117, that Mr. Petrello's offer was reduced to writing, 1SR 2110-11, and that the Petrello offer was $190,000 higher than the Nath offer, 1SR 2096. The Pruckas and Naths reached a written agreement to unwind their sale if Mr. Petrello prevailed in this litigation. 1SR 329. None of this testimony was disputed by any other witness.

3. At the close of the evidence, the District Court denied the defendants' motions for judgment as a matter of law.

At the close of the plaintiffs' case, each set of defendants moved for judgment as a matter of law on the FHAA claims. The District Court denied them all. 1SR 3133-34. After a mistrial was ordered, the Pruckas and the Naths filed renewed motions for judgment, which the District Court again denied. These motions did not contain any allegations or evidence that Mr. Petrello's claims were frivolous, groundless, or filed in bad faith.

4. The jury deadlock confirms that the Petrellos' claims were not groundless.

After the close of evidence, the jurors deliberated over the course of two days. On the second day, after they signaled that they were deadlocked, the District Court gave them instructions that negate any argument that the judge who presided over the trial sheltered any doubts about the merits of the plaintiffs' claims, their good faith in bringing them, or Mr. Petrello's credibility:

> This is an important case. The trial has been expensive in time and effort and money to both the Plaintiff and the defense.
>
> . . . .
>
> Those of you who believe that the parties with the burden of proof carried its burden of proof should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that a party has not carried its burden of proof should stop and ask yourselves if the doubt you have is sufficient, given that the other members of the jury do not share your doubt.

SR 3071-72.

Thus, the District Court expressly viewed the Petrellos' evidence as having sufficient weight to support a verdict. Nevertheless, the jurors informed the court they were deadlocked and unable to reach a verdict, and the court ordered a mistrial. The jurors'

final vote was four to four. A new trial was scheduled, but on the eve of the second trial, the presiding judge, the Honorable David Hittner, recused himself *sua sponte*, and the case was reassigned to a new district judge, the Honorable Kenneth Hoyt. 1SR 3942. Soon after, the case took its unusual turn.

5. The new district judge dismissed the Petrellos' claims without conducting a single hearing.

Three weeks after the reassignment, the new trial judge entered what he called an "order *sua sponte*" staying all proceedings, which stated:

> Having summarily reviewed the pleadings on file, the Court questions the basis for its jurisdiction over this removed case. In light of this query, the Court STAYS all proceedings in this case pending further review. Therefore, the parties are instructed to cease further filings in the case until further orders of the Court.

SR 4121. The new trial judge conducted no hearings, heard no testimony, requested no new briefing, and requested no other input from the parties, either before or after entering this order.

Just 52 days later, the new trial judge entered a final judgment against Mr. Petrello. App. 8. This ruling was based on the Texas statute of frauds, an argument the defendants had never made:

> It is undisputed that the Petrellos are members of the protected class protected by the fact that their daughter suffers with a handicap. However, they cannot establish that they were qualified to purchase the Pruckas' house. Traditionally, the requirement of qualification to purchase is addressed to an approved loan or having sufficient legal capacity. Here, however, the Petrellos lacked a qualification that is necessary to the purchase of real estate. There was no written offer to purchase executed by the Petrellos.

App. 15. The District Court's analysis was unprecedented and legally indefensible on its merits.[1] As a matter of basic fairness and process, it was also suspect because the new trial judge had never conducted a hearing or even spoken to the parties, was not

[1] A written offer is not required for the enforcement of the FHAA or similar state laws barring housing discrimination. *HUD v. George*, Fair Hous.-Fair Lending Rptr. P 25010 (HUD ALJ 1991) ("Respondents' interpretation of the Act would permit housing providers to *discriminate* with impunity as long as no offer to sell is made that is so clear and complete that an enforceable contract will be created if the buyer gives his assent"), available online at http://www.hud.gov/offices/oha/oalj/cases/fha/files/HUD%2001-89-0383-1.pdf. *See also Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975) (opinion by Justice Tom Clark, sitting by assignment, holding: "it matters not whether there was a specific contract or not; otherwise the very purpose of the FHAA would be completely frustrated."); *Newbern v. Lake Lorelei Inc.*, 308 F. Supp. 407 (S.D. Ohio 1968); ("To hold that the statute of frauds barred the remedy devised in this case would frustrate the purpose of the act against discrimination."); *State by Balfour v. Bergeron*, 290 Minn. 351, 187 N.W.2d 680 (1971).

present at the trial, and could not have carefully reviewed the existing record before reaching this result. At the time of its reassignment, the case was set for a second jury trial, and there was no sound reason for the District Court's unusual action.

6. Ignoring *Christiansburg* and *Fox v. Vice*, the new trial judge granted $900,000 in defense fees.

After this unexpected ruling, the Pruckas and Naths filed applications for attorneys' fees in the total amount of more than $1.6 million. The Naths requested an award of $1,241,465.34 to two different law firms, 1SR 4337, but did not include copies of any invoices, billing records, or even an estimate of the number of hours these firms had worked. All they offered were two-page affidavits from a member of each firm, stating the total amount sought and conclusory opinions that the fees and expenses sought were reasonable and necessary. 1SR 4377-78, 4380-81.

The Pruckas sought an award of $450,605.15 in attorneys' fees paid to two different law firms, including $314,578.25 incurred by a new law firm the Pruckas engaged on October 5, 2010, seven months after the conclusion of the trial, and just two months before the new trial judge ordered the parties to file no further documents while it undertook its "jurisdictional review." 1SR 4121, 4170.

In a memorandum order based more on conjecture than on reasoned analysis and calculations,

the District Court awarded $452,000 in fees to the Naths, and $508,000 to the Pruckas, App. 33, which appears to be the largest amount ever assessed against an individual plaintiff in civil rights litigation. The District Court ignored the *Christiansburg* decision and its directive that plaintiff's and defense fees are governed by different standards reflecting the "quite different equitable considerations" at stake. 434 U.S. at 419. Inexplicably, it held:

> Awarding an attorney's fees and costs against the plaintiff in an instance where his suit lacks foundation or is otherwise unmeritorious requires the same analysis as in an instance where a plaintiff is the prevailing party.

App. 25. This statement of the governing standard is a remarkably clear violation of this Court's precedent, and its observation that a "trial court has wide discretion when, but only when, it calls the game by the right rules." *Fox v. Vice*, 131 S. Ct. at 2217.

7. The Court of Appeals also ignored *Christiansburg* and *Fox v. Vice*.

In affirming, the Court of Appeals paid no heed to *Fox v. Vice*, which stresses the duty of appeals courts to ensure district courts ask and answer the right question – "whether the fees requested would not have accrued but for the frivolous claim" – before awarding defense fees to defendants in civil rights cases. *Id*. The Court of Appeals' analysis simply ignored this

Court's precedent in affirming the District Court's $900,000 fee award: "Enormous as these sums seem, they are considerably less than Petrello himself or the appellees actually expended. The court did not abuse its discretion in its analysis or calculation of the fees according to governing Fifth Circuit law." App. 6-7. The Court of Appeals could not have read *Fox v. Vice* before it issued this opinion.

The Court of Appeals also affirmed the District Court's take-nothing judgment, without "ruling definitively" on the District Court's application of the Texas statute of frauds. App. 5. Instead, it held that Mr. Petrello's cash offer was "unqualified and dissimilar from the Naths." *Id*. The Court of Appeals, like the District Court, ignored Mr. Prucka's trial testimony, summarized in Mr. Petrello's appellate briefing, which admitted that Mr. Petrello was a qualified purchaser whose offer was financially superior to the Naths.

REASONS FOR GRANTING THE WRIT

There is a conflict among the circuits. When a civil rights case reaches trial, and the district court submits the plaintiff's civil rights claims to the jury, most circuit courts have reversed awards of defense fees on the ground that the claims could not have been frivolous or groundless if they survived a motion for judgment as a matter of law. The Fifth Circuit's decision in the case places it squarely among the minority of circuit courts that have reached the opposite result.

This Court has granted certiorari on this frequently recurring issue without deciding it, because of an intervening settlement. *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237, 242 (6th Cir. 1986), *vacated as moot*, 482 U.S. 901 (1987). In the years since, circuit courts have wrestled with the issue and reached conflicting results. This case presents an apt vehicle for resolving this conflict and adopting a practical rule that will further the goal of the civil rights laws that include "prevailing party" provisions.

I. There is a split among the Circuits that should be resolved by the adoption of a nationwide standard that would prohibit subjective hindsight determinations of frivolousness.

There are many circuit decisions that wrestle with the issue of improper defense fees awarded after a trial for reasons that become clear, after consideration of the practicalities. After a trial, attorneys' fees will have reached a large amount that will motivate the defendants to seek to recapture them. In these cases, fees will spawn "a second major litigation," an effect this Court has recognized and sought to control, by adopting standards to limit this phenomenon. *Fox*, 131 S. Ct. at 2216 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983)).

A. The majority view is based on objective factors.

The *Christiansburg* case was a simpler case decided in a simpler time: a Title VII lawsuit decided by a single motion for summary judgment, granted about three months after the filing of the complaint. *Equal Employment Opportunity Comm'n v. Christiansburg Garment Co., Inc.*, 376 F. Supp. 1067, 1069 (W.D. Va. 1974). In the 34 years since, lower courts have applied the *Christiansburg* standard to cases with procedural complexities similar to this one, in which the District Court awarded defense fees even though the plaintiff's claims survived one or more rounds of dispositive motions. At the circuit level, these cases have produced a mix of results and inconsistent standards of review – or as in this case, appellate review that appears to be unguided by any meaningful standard.

The majority of circuit decisions to consider this issue have followed the *Christiansburg* principles. One of the earliest decisions in this line was the Sixth Circuit's opinion in *Haynie v. Ross Gear Div. of TRW, Inc.*, 799 F.2d 237 (6th Cir. 1986), *vacated as moot*, 482 U.S. 901 (1987). Setting aside an award of defense fees awarded after the district court had denied a motion for judgment at the close of the plaintiff's case, the Sixth Circuit explained: "We are at a loss to understand how a case that is strong enough to withstand a motion for judgment at the conclusion of the plaintiff's proofs can be considered 'frivolous, unreasonable, or without foundation.'" 799 F.2d at 242. The Sixth Circuit, however, affirmed an award of

defense fees to a second defendant whose motion for judgment had been granted. This Court granted certiorari, but the parties settled before the case could be argued.

The Second, Third, Fourth, Eighth, and Eleventh circuits have followed the Sixth Circuit's model:

- *Am. Fed'n of State, County & Mun. Employees, AFL-CIO (AFSCME) v. County of Nassau*, 96 F.3d 644 (2d Cir. 1996) (rejecting the district court's assessment that the prima facie case was "meaningless," and holding that a prima facie showing ought to always negate a finding of frivolousness unless a witness intentionally misleads).
- *Equal Employment Opportunity Comm'n v. L.B. Foster Co.*, 123 F.3d 746, 752-53 (3d Cir. 1997) (district court's finding of a prima facie case required court of appeals to vacate defense fee award).
- *Equal Employment Opportunity Comm'n v. Great Steaks, Inc.*, 667 F.3d 510, 518 (4th Cir. 2012) (vacating post-trial award of defense fees where motion for judgment as a matter of law was denied).
- *Marquart v. Lodge 837, Intern. Ass'n of Machinists & Aerospace Workers*, 26 F.3d 842 (8th Cir. 1994) (reversing a defense fee award when plaintiff alleged a prima facie case).

- *Sullivan v. Sch. Bd. of Pinellas County*, 773 F.2d 1182, 1189-90 (11th Cir. 1985) (vacating fee award because district court had denied a motion for involuntary dismissal based on its finding that the plaintiff had established a prima facie case of unemployment discrimination).

These decisions, recognizing the dangers of hindsight thinking, have held that a prima facie showing, evidenced by favorable rulings on dispositive motions, will defeat a finding of frivolousness in all but the most unusual cases involving perjury, intentional misconduct, or subjective bad faith.

The First Circuit has explicitly rejected arguments for a bright-line rule. *Foster v. Mydas Associates, Inc.*, 943 F.2d 139, 144 (1st Cir. 1991). More recently, however, the First Circuit vacated an award of defense fees granted after trial, and relied on the "natural inference that denial of summary judgment was based on a determination of the adequacy of support for plaintiffs' claims at the time of the summary judgment ruling." *Lamboy-Ortiz v. Ortiz-Vélez*, 630 F.3d 228, 242-43 (1st Cir. 2010). In this most recent decision, the First Circuit conducted a thorough and nuanced analysis, which would have benefited from the guidance that petitioner requests from this Court in this case.

B. The minority view allows district courts to make overly subjective determinations.

Nevertheless, in the absence of guidance from this Court, the majority view has long evolved in fits and starts, resulting in a split in circuit decisions. *See Brooks v. Center Park Assocs.*, 33 F.3d 585, 588 (6th Cir. 1994) (Martin, J., concurring) (identifying circuit split as it existed in 1994). The Ninth and Tenth Circuits have taken a different path from the majority view, in which district courts are allowed to award defense fees even after the plaintiff proves a prima facie case at trial, based on subjective factors. For example, the Tenth Circuit has held that the plaintiffs' lack of credibility would be sufficient to support defense fees, even after the denial of defendants' motion to dismiss and a trial. *Taylor v. Coors Biotech Products Co.*, 951 F.2d 1260 (10th Cir. 1991). In considering this Court's precedent against such "hindsight" review, the Tenth Circuit held that "this admonition is merely cautionary. . . ." *Id*. at *2.

More recently, in *Raad v. Fairbanks N. Star Borough*, 201 Fed. Appx. 396 (9th Cir. 2006), the Ninth Circuit affirmed an award of $150,000 granted after the plaintiff lost her Title VII claims at trial. Judge Berzon dissented because the Ninth Circuit had previously reversed a summary judgment against plaintiff and found that she had made a prima facie case of discrimination. As the dissent recognized, "substantial case law" suggests a fee award for defendants is improper in such a case.

C. The lack of an objective standard led to the improper award in this case.

The lack of guidance from this Court was a significant factor in the record award of defense fees in this case. Here, Mr. Petrello argued in the District Court that he had established a prima facie case of housing discrimination through direct evidence and testimony, as repeatedly confirmed by pretrial and trial rulings. In the Court of Appeals, he extensively briefed the evidence and legal arguments to establish that his claims were not frivolous, groundless, or without foundation.

The Fifth Circuit, however, held that the District Court did not abuse its discretion "according to governing Fifth Circuit law." App. 7. Even if this holding were correct – which Mr. Petrello respectfully submits it cannot be – it exposes an unfortunate analytical gap in the Fifth Circuit's standards governing defense fees in civil rights cases. The lack of any governing standard allowed both lower courts to rely on subjective factors and biases in granting and upholding an immense award of fees even though the merits of the plaintiffs' claims had already been definitively decided.

In *Christiansburg*, this Court identified the problem of hindsight logic, a recurring analytical defect that also led to the improper award in this case:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that,

> because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most air-tight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-22.

Hindsight creates clarity even though the reality of litigation is more ambiguous, as the *Fox* decision recognized:

> These standards would be easy to apply if life were like the movies, but that is usually not the case. In Hollywood, litigation most often concludes with a dramatic verdict that leaves one party fully triumphant and the other utterly prostrate. The court in such a case would know exactly how to award fees (even if that anti-climactic scene is generally left on the cutting-room floor). But in the real world, litigation is more complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits.

> Some claims succeed; others fail. Some charges are frivolous; others (even if not ultimately successful) have a reasonable basis. In short, litigation is messy, and courts must deal with this untidiness in awarding fees.

Fox, 131 S. Ct. at 2213. This observation is directly relevant to the present case, where the trial did not end in a dramatic verdict, but with a deadlocked jury. The ambiguity of the resulting mistrial facilitated a wildly arbitrary outcome, after the case was re-assigned to a new judge who did not preside over the trial or even one hearing.

Here, the lack of a governing standard based on objective factors allowed the Court of Appeals to affirm a very large award based on subjective hostility to Mr. Petrello's claims. This undue hostility was evidenced at the oral argument in this appeal, at which the panel's description of Mr. Petrello as a "gazillionaire" reflected its unwarranted skepticism regarding the merits of his claims, which was not shared by the judges who actually conducted hearings in the case. This hostility is also evidenced in the dismissive rhetoric of its opinion. This skepticism, however, is not supported by the record, as summarized above. Because the Court of Appeals' opinion ignores significant facts, like Prucka's testimonial admissions, and legal authorities prominently cited in Mr. Petrellos' briefs, it is inconceivable that the Fifth Circuit panel or its staff ever reviewed the underlying record or the appellate briefing. This mode of review is inappropriate under the *Fox* decision, which

stressed the duty of appeals courts to ensure that district courts correctly apply the governing legal principles.

There has long been a need for a nationwide standard, similar to that adopted by the majority of the circuit courts of appeals, that it is improper to award defense fees in a civil rights case where the plaintiff's claims have been tested by a dispositive motion, such as a motion for judgment as a matter of law at the close of the plaintiff's case. The standard followed by the majority of circuit courts is a just and practical one that would provide clear guidance to all district courts.

Recently, the Fourth Circuit concisely summarized this standard, which should apply to all district courts in each circuit:

> [T]he denial of a motion for judgment as a matter of law made at the close of all evidence is a particularly strong indicator that the plaintiff's case is not frivolous, unreasonable, or groundless. At that point, all of the evidence has been introduced as to both the claims and the defenses, and the district court must determine whether a legally sufficient evidentiary basis exists that would allow a reasonable jury to find for the plaintiff. If the district court denies the motion, it signals that a jury could reasonably find for the plaintiff. Although we do not preclude their existence, we are hard-pressed to imagine circumstances where the district court

> could make this determination and nevertheless deem the plaintiff 's case frivolous, unreasonable, or groundless. Generally, therefore, the denial of a motion for judgment as a matter of law made at the close of all evidence strongly indicates that the plaintiff's case was not frivolous, unreasonable, or groundless.

Equal Employment Opportunity Comm'n v. Great Steaks, Inc., 667 F.3d at 518 (citations omitted).

The precedent in the Fifth, Ninth, and Tenth Circuits, which currently allows district courts to revisit the issue of frivolousness very late in the case, creates a risk of extremely large fee awards that are improper because they are often based on a subjective, hindsight determination of frivolousness. The better rule is that frivolousness should be determined early in the case, before fees become so great that they foster an additional round of major litigation. District courts and litigants should be encouraged to determine whether a claim is frivolous early in the case, to save judicial resources and to prevent disfavored windfalls to defendants. *See Fox v. Vice*, 131 S. Ct. at 2216. It would also serve the justice system's interest in protecting civil rights plaintiffs from the chilling effect that an award of defense fees would cause if allowed in cases that are not frivolous.

II. For similar reasons, the Court of Appeals judgment on the merits was improper.

The Court of Appeals' opinion holds that a plaintiff "*must* prove that he is a member of a protected

class; he applied for and was 'qualified to purchase' the housing; he was rejected; and the housing remained available to other similarly situated purchasers thereafter." App. 4. (Emphasis added). This is the wrong test for a case, like this one, in which the plaintiff offers *direct* evidence of housing discrimination. The test cited by the Fifth Circuit is borrowed from a Ninth Circuit case involving only *circumstantial* evidence of discrimination under California's Fair Employment and Housing Act. *McDonald v. Coldwell Banker*, 543 F.3d 498, 503 (9th Cir. 2008). This case, however, turns on *direct* evidence of discrimination in the form of Matt Prucka's testimony, detailed above.

The test does not apply when there is *direct* evidence of discrimination. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10th Cir. 1995); *Cmty. House, Inc. v. City of Boise, Idaho*, 468 F.3d 1118, 1123 (9th Cir. 2006), *opinion amended and superseded on denial of reh'g sub nom. Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir. 2007).

In its unexplained departure from this precedent, the Court of Appeals' holding conflicts with decisions of this Court and other circuit courts of appeal on the showing required to make a prima facie case of discrimination under the Fair Housing Act and similar laws. *E.g.*, *Trans World Airlines v. Thurston*, 469 U.S. 111, 121-22 (1985) (when there is direct evidence of discrimination, the *McDonnell Douglas* "burden shifting" test for circumstantial evidence is irrelevant).

The variation of the *McDonnell Douglas* test cited by the opinion has long been followed in Title VIII cases involving *circumstantial* evidence. *See*, *e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 635 F.2d 1032, 1038 (2d Cir. 1979) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). But this test is never proper in a case involving *direct* evidence, as this Court has carefully and thoughtfully explained in its earlier decisions.

Here, Prucka testified that he and his wife made their decision to sell to the Naths because of Carena's disabilities. 1SR 2103-04. Without explanation, the Court of Appeals' opinion ignores Prucka's testimony of his facially discriminatory motives and applies a test for circumstantial evidence that is irrelevant to this case. This error creates a conflict with precedent from this Court and the circuit courts of appeals.

The Court of Appeals' opinion wrongly holds that the variation of the *McDonnell Douglas* test used in FHAA cases is the *only* way in which Petrello could make a prima facie case. Indeed, "there is no strict formula." *Trans World Airlines v. Thurston*, 469 U.S. at 121-22. The prima facie case requires only that Petrello show that the Pruckas' decision was made "under circumstances which give rise to an inference of unlawful discrimination." *Id*. The Court should grant certiorari to correct the conflict created by the panel's mistaken adoption of a new test that has no place in the enforcement of the FHAA.

Furthermore, the Court of Appeals' opinion commits error of exceptional importance that warrants review, because it narrowly construes a statute that was enacted to remedy housing discrimination against the handicapped – and undermines its enforcement. Housing discrimination against the disabled was outlawed in 1988 as "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. at 18 (1988).

The Court of Appeals' opinion fails to cite or otherwise acknowledge the text of the FHAA, which specifically defines discrimination on the basis of handicap to include:

> a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises. . . .

42 U.S.C. § 3604(f)(3)(A). Under this text, Mr. Prucka's testimony is plain and direct evidence of unlawful discrimination. 1SR 2103-04. The Pruckas' refusal to permit *any* modifications, let alone *reasonable* modifications, is direct evidence of their violation of the text of the FHAA. *See Laflamme v. New Horizons, Inc*., 605 F. Supp. 2d 378, 390 (D. Conn. 2009) (granting partial summary judgment on liability based on plaintiff's direct evidence of handicap discrimination).

The gaps in the opinion's analysis of the record and the governing law led the Court of Appeals to the conclusion that Petrello is not entitled to equitable relief. Such a decision should be based on an accurate account of the facts and on the actual text of the FHAA, which permits equitable relief or any other order that is necessary to remedy discrimination. 42 U.S.C. § 3613(c)(1); *see Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (rescinding a home sale because of racial discrimination). The Fifth Circuit's narrow and erroneous interpretation undermines the FHAA and represents a radical deviation from its language and purpose. This is error of exceptional importance, which should be remedied by granting certiorari.

CONCLUSION

For all of the reasons discussed above, Petitioner requests that this Honorable Court grant its Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

2012 WL 3139561

United States Court of Appeals,
Fifth Circuit.

Anthony G. PETRELLO, Plaintiff-Appellant
v.
Matthew W. PRUCKA; Sheryl S. Prucka;
Rahul Nath; Usha Nath, Defendants-Appellees.

Nos. 11-20139, 11-20273. | Aug. 2, 2012.

David H. Berg, Christopher Lee Gadoury, Berg & Androphy, George R. Gibson, Nathan Sommers Jacobs, Lynne Liberato, Haynes & Boone, L.L.P., Jeffery T. Nobles, Houston, TX, for Plaintiff-Appellant.

Thomas Martin Fulkerson, Esq., Wesley G. Lotz, Esq., Fulkerson Lotz, L.L.P., Murray Jules Fogler, Esq., Beck, Redden & Secrest, L.L.P., John Wesley Raley, III, Esq., Raley & Bowick, L.L.P., Guy Edward Matthews, Matthews, Lawson & Bowick, P.L.L.C., Houston, TX, for Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas, USDC No. 4:08-CV-1933.

Before JONES, Chief Judge, and OWEN and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM:*

In this most unusual case, Appellant, a resident of one of the toniest streets in Houston, Texas, has been suing his former and current next-door neighbors for five years in state and federal court because appellant's oral offer to buy the neighbors' house was rejected. He claimed breach of contract in state court – and lost. In federal court, he pursued claims under and related to the Fair Housing Act, 42 U.S.C. § 3604(f)(1) – and lost. Appellees received a favorable judgment as a matter of law and their attorneys' fees. On appeal, Petrello raises numerous issues challenging every major and minor point in the district court's decision, but the case boils down to three easily resolved questions:

1. Was Petrello "qualified to purchase" the Pruckas' house at 8 Remington Lane?
2. Is there any basis to support a conspiracy between the sellers (Pruckas) and buyers (Naths) to violate the Fair Housing Act?
3. Are the appellees' attorneys' fee awards sustainable?

For the following reasons, we **AFFIRM.**

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

When Anthony Petrello learned that the multi-million-dollar mansion next door to his own was about to go on the market in 2007, he telephoned Matt Prucka and offered to purchase it for $6.5 million. Petrello claims he wanted to buy the house and configure it for his severely disabled daughter, then not yet a teenager, to inhabit when she grew up. Prucka declined the offer, placed the house on the market for about $8.3 million, and in a short time, secured from the Naths a written offer for the full list price without contingencies. Petrello, having been informed of this, was only willing to offer $8.2 million – orally. When Prucka and the Naths signed a sale contract and the Naths paid $75,000 earnest money, the Naths did not know Petrello and had no knowledge of his motives nor specific knowledge about his competing offer. Two days later, however, Petrello encountered Rahul Nath during a walk-through of the house, explained his intentions for his daughter and asked Nath to step aside. Nath refused.

Petrello's lawsuits began immediately with a state court petition seeking specific performance of an alleged oral contract and attorneys' fees. By filing a lis pendens, he attempted unsuccessfully to hold up the closing, which occurred in January 2008. After six months of litigation, Petrello first asserted, in a Fourth Amended Petition, that the Pruckas and Naths had conspired and engaged in handicap discrimination against his family in violation of the Fair Housing Act, ("FHA") 42 U.S.C. § 3604(f)(1), forbidding discrimination in the sale or rental of dwellings

by virtue of a purchaser's or planned occupant's handicap, and 42 U.S.C. § 1985(3). This and associated claims were removed to federal court. It is unnecessary to recount the procedural history, which includes voluminous discovery, multiple legal claims, a hung jury, and three federal judges before the dispositive judgment was entered. Because the court entered judgment as a matter of law, this court's standard of review is whether, "after considering the evidence presented and viewing all reasonable inferences in the light most favorable to the nonmovant, the facts and inferences point so strongly in favor of the movant that a rational jury could not arrive at a contrary verdict." FED. R. CIV. P. 50(a)(1); *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 697 (5th Cir. 1997) (internal citation omitted). We address each of the material issues identified above.

1. FHA Claim

To assert a prima facie claim of housing discrimination under this section of the FHA, a plaintiff must prove that he (or a family member) is a member of a protected class; he applied for and was "qualified to purchase" the housing; he was rejected; and the housing remained available to other similarly situated purchasers thereafter. *Lindsay v. Yates*, 498 F.3d 434, 438-39 (6th Cir. 2007); *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). The significant issue here is whether Petrello was a "qualified purchaser." The district court held he was not because his oral offer to purchase did not satisfy the Texas real estate statute

of frauds and was therefore unenforceable. TEX. BUS. & COM. CODE ANN. § 26.01(b)(4) (Vernon 2005). (The Texas Court of Appeals subsequently confirmed the district court's reading of the state law.)

Neither the parties' extensive briefing nor our research has located a case directly on point. Cases from outside this circuit state that to be "qualified," a buyer seeking FHA relief must "meet the terms of the seller," *McDonald v. Coldwell Banker*, 543 F.3d 498, 504 (9th Cir. 2008), and his offer must be "similarly situated" to that of competing purchasers. *Id.* We need not rule definitively on whether the noncompliance of Petrello's offer with the Texas statute of frauds suffices to defeat his prima facie case, however, because taken in conjunction with the undisputed facts that he did not meet the listing terms, offered a lower purchase price than the Pruckas sought and obtained from the Naths, and did not back up his offer with a writing of any kind or earnest money, he was both unqualified and dissimilar from the Naths.

In addition to his failure to set out a prima facie case under the FHA, Petrello's claim fails for lack of a remedy. He disclaims money damages and is thus precluded from seeking punitive damages or attorneys' fees. *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 303 (5th Cir. 2000) (FHA disallows punitive damages in absence of actual damages or constitutional violation); *Farrar v. Hobby*, 506 U.S. 103, 114-16, 113 S. Ct. 566, 574-75 (1992) (no attorneys' fee award without meaningful legal relief). "All"

Petrello seeks is equitable relief, *i.e.*, title to the house. 42 U.S.C. § 3613(c)(1). No court would grant such discretionary, equitable relief on this record. Petrello already owns a sizeable lot adjacent to his mansion, which he purchased prior to offering to buy 8 Remington Lane. The Naths were bona fide purchasers *vis-a-vis* Petrello's FHA claim, as they signed a contract and then closed the sale knowing only that he asserted breach of contract, not housing discrimination, against them. The Naths have now owned and occupied the house for four years. Petrello's initial state law claim to the property has been rejected. The equities strongly disfavor granting Petrello the only relief he deems acceptable.

2. Conspiracy Claim

Because there is no actionable FHA claim against the appellees, Petrello's civil conspiracy claim fails, as the district court held. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994) (conspiracy requires agreement to violate the law).

3. Attorneys' Fee Awards

The district court concluded that the Pruckas were entitled to nearly $450,000 and the Naths about $390,000 in attorneys' fees in the trial court, plus up to $60,000 each for an appeal, because they prevailed over Petrello's groundless claims. 42 U.S.C. § 3613(c)(2); *Myers v. City of Monroe*, 211 F.3d 289, 292-93 (5th Cir. 2000). Enormous as these sums

seem, they are considerably less than Petrello himself or the appellees actually expended. The court did not abuse its discretion in its analysis or calculation of the fees according to governing Fifth Circuit law.

The judgment is **AFFIRMED.**[1]

[1] Other issues raised by Petrello lack merit; we need not reach appellees' cross-points.

APPENDIX B

2011 WL 305444

United States District Court,
S.D. Texas, Houston Division.

Anthony G. PETRELLO, Plaintiff,
v.
Matthew W. PRUCKA, et al, Defendants.

Civil Action No. H-08-1933. | Jan. 27, 2011.

David H. Berg, Berg & Androphy, George R. Gibson, Nathan Sommers Jacobs PC, Lynne Liberato, Haynes Boone, LLP, Houston, TX, for Plaintiff.

Steven J. Edelstein, Williams & Edelstein, P.C., Norcross, GA, Thomas M. Fulkerson, The Law Offices of Tom Fulkerson, Murray J. Fogler, Alex Benjamin Roberts, Beck Redden et al, Emilio Fernando Deayala, Buck Keenan LLP, John Wesley Raley, III, Raley & Bowick, L.L.P., Houston, TX, for Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

KENNETH M. HOYT, District Judge.

I. *INTRODUCTION*

This preferentially set housing discrimination case is before the Court, following a final pretrial conference in advance of a second trial. *See* [Document No. 230]. Earlier a mistrial was declared when the jury failed to reach a verdict. However, on the eve of the trial the presiding judge recused himself,

causing the case to be reassigned to the undersigned. Now having reviewed the Court's orders, pending motions, the record and the opinion of the Fifth Circuit Court of Appeals, the Court is of the opinion that the plaintiffs cannot and have failed to establish a federal claim, as a matter of law. Therefore, this case should [be] remanded to the 55th Judicial District Court of Harris County, Texas.

II. FACTUAL BACKGROUND

In late October 2007, Anthony Petrello learned that his next-door neighbors, Matthew and Sherry Prucka, would be selling their house. He wanted to purchase the Pruckas' house, and engaged Mr. Prucka in discussions about buying it. The parties' dispute a number of facts, but the essential[ ] facts of their discussions are not in dispute. It is undisputed that the parties did not enter into a written agreement and that the Petrellos were intent on being excluded from any listing agreement that the Pruckas might consummate with their own broker. Hence, when Peggy McGee, the Pruckas' broker who was also an employee of Heritage Texas [Properties], L.P., completed a listing agreement with the Pruckas, the Petrellos were specifically excluded as persons of interest. However, the Petrellos made an oral offer of $6.5 million to the Pruckas for the house. The Pruckas promptly rejected the offer, expressing the desire to test the housing market.

The property was listed by the broker for $8,299,500. Shortly thereafter, an offer of $7.6 million was made by Rahul and Usha Nath. The Petrellos were informed that the Pruckas had an offer that was in the range of their asking price. However, they refused to disclose the details of the offer. The Petrellos then made an offer of $8.2 million, net of commission. However, the Pruckas entered into an earnest money contract with the Naths and proceeded to close on the sale of their house to the Naths, which closing occurred on or about January 16, 2008. Earlier, on December 11, 2007, the Petrellos had filed a suit against the Pruckas and a *lis pendens* notice was filed against their house.

III. THE SUIT AND THE PARTIES' ALLEGATIONS

As stated, on December 11, 2007, the Petrellos filed a lawsuit in the 55th Judicial District Court of Harris County against the Pruckas and also filed a notice of *lis pendens* against the house. They allege that the Pruckas breached an oral agreement with them concerning the sale of their house, and sought, by their suit, to unwind the sale to the Naths so that they might purchase the house.

On July 8, 2008, the Petrellos amended their petition to allege that the Pruckas discriminated against them in the sale of their house. They allege that they desired to purchase the Prucka house so their daughter, who is disabled, and her medical

team, would have space for her rehabilitation. They explained to the Pruckas that certain structural modifications would be necessary so that the house would meet their daughter's needs. The Petrellos claim that Mr. Prucka's statement that he preferred to sell the home to someone who would preserve the historical architectural integrity of the house, constituted discrimination against their disabled daughter.

In a volley of allegations and contentions, the Petrellos claim that the Pruckas, Heritage, McGee and the Naths, violated the Federal Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3631, the Texas Fair Housing Act ("TFHA"), TEX. PROP. CODE ANN. §§ 301.001-.171; the Houston Fair Housing Ordinance ("HFHO"), Title 17, 17-1 to 17-80; committed civil conspiracy, 42 U.S.C. §§ 1981-1988; and breach of contract for which they sought equitable relief such as estoppel, constructive trust, tortious interference with existing contracts and with business relations, aiding and abetting, breach of auction and for declaratory relief.

On January 24, 2008, the Naths intervened in the case asserting separately, against the Petrellos, claims of tortious interference with the Prucka/Nath contract, violations of the TFHA and intentional infliction of emotional distress. Five months into the suit, and after an amended pleading a Notice of Removal was filed by both the Petrellos and the defendants.

IV. LEGAL STANDARD – JUDGMENT AS A MATTER OF LAW

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, judgment as a matter of law is warranted when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). Hence, "[a] motion for judgment as a matter of law is appropriate if, after considering the evidence presented and viewing all reasonable inferences in the light most favorable to the nonmovant, the facts and inferences point so strongly in favor of the movant that a rational jury could not arrive at a contrary verdict." *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 697 (5th Cir. 1997) (citing *London v. MAC Corp. of Am.*, 44 F.3d 316, 318 (5th Cir.), *cert. denied*, 516 U.S. 829, 116 S. Ct. 99, 133 L.Ed.2d 53 (1995)). However, "if reasonable persons could differ in their interpretations of the evidence, then the motion should be denied." *Bryant v. Compass Group USA Inc.*, 413 F.3d 471, 475 (5th Cir. 2005) *Thomas v. Tex. Dep't of Criminal Justice*, 220 F.3d 389, 392 (5th Cir. 2000) (citing *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998)). While examining the record as a whole, "the Court 'should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *U.S. Commodity Futures Trading*

Com'n v. Dizona, 594 F.3d 408, 413-14 (5th Cir. 2010) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000)).

V. ANALYSIS AND DISCUSSION

The Petrellos contend that the defendants engaged in a conspiracy to violate the rights of their mentally and physically disabled daughter in violation of the FHA, 42 U.S.C. § 3601 *et. seq.*, and 42 U.S.C. § 1985(3). At this stage of the proceedings, the sole basis for federal question jurisdiction rests on whether the Petrellos can establish a viable claim of housing discrimination against the Pruckas, McGee and/or the Naths.[1] The Court is of the opinion that the Petrellos' conspiracy claim under section 1985(3) is maintainable only if there exists a sustainable federal cause of action based in a federal statute or the federal Constitution.

Here, the basis for the Petrellos' conspiracy claim rests on allegations of a violation of the FHA, specifically § 3604(f)(1). Section 3604(f)(1) provides, in relevant part:

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[1] On April 5, 2010, the Petrellos and Heritage entered into a joint motion to dismiss their respective claims against each other with prejudice. [Document No. 199]. The effect of a "with prejudice" dismissal is that it adjudicates the merits of the Petrellos' claim against Heritage.

> . . . it shall be unlawful to discriminate in the sale . . . or to otherwise make unavailable or deny, a dwelling to any buyer . . . because of a handicap . . .
>
> (A) [of] that buyer . . . ;
>
> (B) a person . . . intending to reside in that dwelling after it is sold, . . . ; or
>
> (c) any person associated with that buyer . . .

The FHA prohibits property owners from refusing to sell a house to a person because of that person's disability in specific circumstances. *See* § 3604(f)(1)(A-C). Any such claim of discrimination or disparate treatment may be brought by a person [on] behalf of a disabled person who intends to live in the house. *Id.* Where, as here, the Petrellos' suit is brought pursuant to 42 U.S.C. § 1981, the necessary proof and analysis required follows the *McDonnell Douglas* test. *See Mitchell v. Century 21 Rustic Realty*, 233 F. Supp. 2d 418, 432 (E.D.N.Y. 2002).

Under the *McDonnell Douglas* test, to establish a *prima facie* case, a plaintiff must establish that he is a member of a protected class, he sought to purchase and [was] qualified to purchase the dwelling at issue, he was denied the right to purchase the dwelling, and the dwelling, remained available after he was denied the opportunity. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973); *see also Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1229 (5th Cir. 1996), *cert. denied*, 520 U.S.

1229, 117 S. Ct. 1821, 137 L.Ed.2d 1029 (1997). The Court will address these elements of proof in turn in light of the trial evidence and the briefs on file.

The Petrellos cannot establish a *prima facie* case against the Pruckas, McGee or the Naths. It is undisputed that the Petrellos are members of the protected class protected by the fact that their daughter suffers with a handicap. However, they cannot establish that they were qualified to purchase the Pruckas' house. Traditionally, the requirement of qualification to purchase is addressed to an approved loan or having sufficient legal capacity. Here, however, the Petrellos lacked a qualification that is necessary to the purchase of real estate. There was no written offer to purchase executed by the Petrellos. *See Ward v. Ladner*, 322 S.W.3d 692, 700 (Tex. App. – Tyler 2010, pet. denied). Hence, they lacked the legal capacity to invoke the FHA, the TFHA or the HFHO.

Under state law, the statute of frauds is an affirmative defense requiring that specified classes of contracts be in writing to be enforceable. A contract for the sale of real estate falls within the class of contracts that must be in writing to be enforceable. *Id.* (citing *Gerstacker v. Blum Consulting Engr's, Inc.*, 884 S.W.2d 845, 850 (Tex. App. – Dallas 1994, writ denied); *see also* TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(4) (Vernon 2009). It is undisputed that the Petrellos and the Pruckas did not enter into a written agreement.

The Petrellos' claim, however, that an oral contract exists between the Pruckas and themselves giving them a "last look" opportunity. Assuming, that allegation to be true, it is nevertheless, an unenforceable contract against the property. While the agreement might give rise to a suit for breach of promise, it does not give rise to specific performance such as where a valid earnest money contract is in place. The Petrellos admit that no written contract for the purchase of the Pruckas' house exists. Hence, in order to enforce a sale, an exception to the statute of frauds must be established.

An exception to the statue of frauds bar does, in fact, exist. The Court recognizes that an equitable exception to the statute of frauds may be asserted by a party in certain circumstances. To qualify for the exception, a plaintiff is required to show that consideration for the promise(s) passed between the seller and the purchaser, the purchaser is in possession of the house and the purchaser has performed substantial and valuable improvements to the house. *See Hooks v. Bridgewater*, 111 Tex. 122, 129, 229 S.W. 1114 (Tex. 1921). The Petrellos do not argue, nor do they suggest, that an equitable exception to the statute of frauds exists in their behalf.

The evidence also fails to establish that Heritage, McGee or the Naths were involved in any discussions with the Petrellos concerning the house. When the Pruckas and McGee were consummating a broker agreement, the Pruckas informed McGee that the Petrellos desired to be excluded from consideration

under the agreement. This is as the Petrellos would have it. The evidence, therefore, establishes that the Petrellos never sought to purchase the Pruckas' house through Heritage and McGee. Likewise, it was after the Naths entered into a contract with the Pruckas that they learned of the Petrellos interest in the house. Therefore, the evidence fails to establish that Heritage, McGee or the Naths engaged in any conduct that prevented the Petrellos and the Pruckas' from consummating a contract for the purchase of the house.

Hence, the Court holds that the Petrellos, even after a trial, have failed to establish a *prima facie* case of a violation of the FHA, the TFHA or the HFHO. Equally, the trial evidence is undisputed that the Petrellos excluded themselves from the necessary legal process to make a claim for unlawful discrimination. Mr. Prucka's personal bias, assuming it constitutes unlawful discrimination on his part, as opposed to his wife, does not give rise to a suit for unlawful discrimination because the Petrellos had excluded themselves from the usual and necessary commercial process, that arguabl[y], gives rise to such a discrimination claim. *See* 42 U.S.C. § 3603(1)(A-C). The Pruckas' house was not part of any federal loan mortgage. And, because the Petrellos excluded themselves from the traditional real estate sale process, the sale that they now seek to enforce

was arguably exempt from the FHA. *See* 42 U.S.C. § 3603(b)(1).[2]

Equally critical in this analysis of the plaintiffs' suit is the fact that the Petrellos' federal conspiracy claim rests on their ability to establish a FHA claim. As well, the nature of the evidence, as it relates to the Petrellos' TFHA and HFHO, claims is the same. In all instances, the Court finds that their conspiracy claim fails. In order to establish a conspiracy, the Petrellos must establish that two or more of the defendants agreed to deprive them of the benefits of the law, under the FHA, the TFHA and the HFHO because of their daughter's handicap, that one of the defendants committed an act in furtherance of the object of the conspiracy, and the Petrellos suffered injury as a result. *See United States v. Richards*, 204 F.3d 177, 205 (5th Cir. 2000).

First, the Petrellos cannot and have not established that the Naths were knowing participants in any alleged conspiracy. They admit, and the evidence establishes, that the Naths did not know that the Petrellos had made an oral offer to the Pruckas at

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[2] The Petrellos standing, to bring a suit under the FHA, TFHA or the HFHO, is absent. Mr. Petrello's trial testimony suggests that his handicapped daughter was not slated to move into the house upon [purchase]. Instead, he described its use as "for her therapy and to play." In other words, she would use the house as she currently uses her playroom. *See* [Trial Transcript pp. 159:21-160:2]. *See also Home Quest Mortg. LLC v. Am. Family Mut. Ins. Co.*, 340 F. Supp. 1177, 1185 (D. Kan. 2004).

any time prior to executing their earnest money contract with the Pruckas. Hence, the Naths cannot be co-conspirators with the Pruckas because a co-conspirator must knowingly engage in illegal conduct. The Petrellos' admission and the absence of other evidence to support such a claim, means that the Petrellos have failed to establish one or more of the necessary elements of their conspiracy claim. Therefore, their conspiracy claim fails as against the Naths.[3]

McGee, the broker, is also accused by the Petrellos of participating in a conspiracy with the Pruckas to thwart the purchase of the Pruckas' house. In her testimony, McGee admitted that the Pruckas expressed a preference not to sell their house to the Petrellos. Their stated reason to her was that they did not want the purchasers to "change the architectural integrity of the home." However, McGee also testified that, while the Pruckas desired no architectural changes in the house, they were "willing to look at any buyer that came along."

The evidence establishes that McGee was aware that the Petrellos were interested in purchasing the Pruckas' house, but desired no formal relationship with her. As a result, there was no duty owed by McGee to the Petrellos outside her general duty under the law, *i.e.*, not to intentionally discriminate

[3] The Naths' FHA claim against the Petrellos fails for the reasons stated in Note 2, infra.

against a handicap purchaser. As a general principle, however, McGee could not conspire against the Petrellos for this very reason – there was no contractual or other relationship between them from which a duty might arise. While her position in the matter ran counter to that of the Petrellos, there was no reason, in law, for her to ignore her contractual obligations to the Naths and the Pruckas.

Moreover, there is no evidence that she engaged in conduct outside her contractual relationship with the Pruckas. In order for McGee to be guilty of engaging in a conspiracy against the Petrellos, the Petrellos must establish that she committed an act prohibited by law. She must intentionally commit some unlawful act that was designed to deprive the Petrellos of their opportunity to "meet or beat" her client's offer. After a full trial, the evidence fails to support such a finding. McGee did no act that furthered the objective(s) of the Pruckas beyond what she contracted to do. Hence, the evidence establishes that McGee's conduct was facially neutral. Establishing that McGee closed the deal between the Pruckas and the Naths is not enough to establish conspiratorious conduct.

As well, the evidence establishes that the Naths, not the Petrellos, were qualified purchasers. There is no evidence that McGee engaged in conduct that was unethical, immoral or illegal designed to defeat the Pruckas' opportunity. And, nothing in the FHA, the TFHA or the HFHO prevented McGee from aiding or assisting the Pruckas in fulfilling their

goal irrespective of the Pruckas' preference so long as her actions remained facially neutral.

Finally, the Petrellos' conspiracy claim against McGee fails because they cannot establish that the FHA the TFHA or the HFHO was violated. *See* [Discussion Infra]. The fact that the Pruckas expressed a preference that may arguably be based in Mr. Pruckas' personal bias does not, *ipso facto*, implicate McGee. It is true that McGee knew of the Pruckas' preference and yet, consummated a contract between the Pruckas' and the Naths. That fact alone is insufficient to establish that she was a co-conspirator. *See United States v. Alzanki*, 54 F.3d 994, 1003 (1st Cir. 1995), *cert. denied*, 516 U.S. 1111, 116 S. Ct. 909, 133 L.Ed.2d 841 (1996). Therefore, the Court holds that the evidence fails to establish even a *prima facie* showing that McGee was a knowing participant in any conspiracy.

VII. CONCLUSION

The Court is of the opinion based on the foregoing discussion that defendants' motions for directed verdict [Document Nos. 165 and 168], renewed motions for judgment [Document No. 194] and, renewed motion for judgment as a matter of law [Document No. 205] are meritorious and should have been granted as to the Petrellos' discrimination and conspiracy claims. Therefore, the Court sets aside its previous adverse rulings on those motions and GRANTS the relief requested. The remaining state law claims and

any counterclaims, including the Naths' claim to clear the title to their house, are remanded to the 55th Judicial District Court of Harris County Texas pursuant to 28 U.S.C. § 1447(c).

It is so Ordered.

APPENDIX C

2011 WL 1157282

United States District Court,
S.D. Texas, Houston Division.

Anthony G. PETRELLO, Plaintiff,
v.
Matthew W. PRUCKA, et al, Defendants.

Civil Action No. H-08-1933. | March 24, 2011.

David H. Berg, Berg & Androphy, George R. Gibson, Nathan Sommers Jacobs PC, Lynne Liberato, Haynes Boone, LLP, Houston, TX, for Plaintiff.

Steven J. Edelstein, Williams & Edelstein, P.C., Norcross, GA, Thomas M. Fulkerson, The Law Offices of Tom Fulkerson, Murray J. Fogler, Alex Benjamin Roberts, Beck Redden et al, Emilio Fernando Deayala, Buck Keenan LLP, John Wesley Raley, III, Raley & Bowick, L.L.P., Houston, TX, for Defendants.

Opinion

MEMORANDUM AND ORDER

KENNETH M. HOYT, District Judge.

I. INTRODUCTION

Before the Court are the motions for attorneys' fees and costs of the defendants, Matthew W. and Sheryl S. Prucka [Dkt. No. 258] and Rahul and Usha Nath [Dkt. No. 259]. Also before the Court is the plaintiff, Anthony G. Petrello's, response [Dkt. No. 264]. The Court has reviewed the motions, the

response and attachments and determines that awards of attorneys' fees are appropriate in this case.

II. RELEVANT PROCEDURAL HISTORY

The plaintiff originally brought this suit as a state common law cause of action to defeat and reverse the real estate transaction between the Pruckas and the Naths where the Naths had purchased the Pruckas' house. Pursuant to that effort, Petrello filed suit in December of 2007 to enjoin or reverse the sale and placed a *lis pendens* lien notice against the property. The Naths were drawn into the suit because the title that the Pruckas gave to the Naths was encumbered by Petrello's suit and the *lis pendens* notice. In June of 2008, after several iterations of his original complaint, Petrello added claims under the Federal Fair Housing Act 42 U.S.C. §§ 3601-31["FHA"], the Texas Fair Housing [Act], TEX. PROP. CODE ANN. §§ 301.001-301.171 ["TFHA"] and the Houston Fair Housing Ordinance, Houston, Tex. Code of Ordinances, Ch. 17, Art. I-VI, §§ 17-1 through 17-80 (2011) ["HFHO"], and a federal conspiracy claim.

A trial on the merits of Petrello's claims resulted in a "hung" jury. Prior to a second trial, however, the Court reviewed and reconsidered the defendants' substantive motions, and determined that the defendants' motions were meritorious and granted them, bringing a conclusion to the plaintiff's claim for federal conspiracy and for violations of the FHA, TFHA and HFHO brought under federal, state and

municipal laws. The Court then remanded to the state court, from which the case had been removed, any remaining unresolved claims that the parties may have between them. The issue now before the Court is whether the defendants should recover attorneys' fees, expenses and costs of court.

III. LEGAL STANDARDS

The defendants seek awards of attorneys' fees, expenses and costs associated with their defense against the plaintiff's conspiracy and housing discrimination claims. Each of the statutes and the ordinance provides for the recovery of a reasonable attorney's fee and costs by the prevailing party within the discretion of the Court. *See* 42 U.S.C. § 3613(c)(2); TEX. PROP. CODE ANN. § 301.156; and Houston City Ordinance Chapter 17, Art. VI, § 17-51(e). Awarding an attorney's fee and costs against the plaintiff in an instance where his suit lacks foundation or is otherwise unmeritorious requires the same analysis as in an instance where a plaintiff is the prevailing party. *See Id.*; *see also NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 239 (5th Cir. 2010). (Internal citation omitted.)

In determining the amount of any award, the Court is guided by the two-step process set out in *Thompson v. Connick*, 553 F.3d 836, 867 (5th Cir. 2008). First, the Court determines the lodestar amount based on a reasonable hourly rate and reasonable hours expended. Next, the Court determines

whether the lodestar should be adjusted. *Id.* The second [step] requires the application of the *Johnson* factors in making any adjustment, whether up or down. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The Johnson factors direct that the Court consider the following in determining lodestar adjustments:

> The time and labor required for the litigation; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson, 488 F.2d at 717-19. In a similar fashion, the Federal Rules of Civil Procedure permit the award of an attorney's fee and costs to a prevailing party. *See* FED. R. CIV. P. 54(d)(2)(A) and (B). In those instances where an award of costs is not prohibited, a court should determine which party is the prevailing party and then allow the costs permitted by statute. *See Fox v. Vice*, 594 F.3d 423, 429 (5th Cir. 2010); *see also* 28 U.S.C. § 1920.

IV. ANALYSIS AND DISCUSSION

A. The Defendants Are Prevailing Parties

In its Memorandum Opinion and Order and Final Judgment, the Court determined that the plaintiff's conspiracy and housing discrimination claims were unmeritorious. The Court determined that the plaintiff could not establish a *prima facie* case because he could not and did not establish that he was "qualified" to purchase the Pruckas' house. The plaintiff's lack was not associated with his financial ability, but the fact that he never entered or attempted to enter into a real estate contract to purchase the house. Moreover, he failed and even refused to do so in accordance with state law, thereby removing himself from the process whereby an enforceable agreement might be consummated and particularly where he might claim that persons other than the Pruckas were at fault. Therefore, the Court held that the plaintiff lacked standing to assert a claim under the FHA, TFHA and the HFHO because he could not show the necessary legal "qualification" to establish standing before the Naths executed an earnest money contract. *See* [Dkt. No. 255]. As a result, the Court is of the opinion and holds that the defendants are the prevailing parties. *See Farrar v. Hobby*, 506 U.S. 103, 11-12 (1992).

The record is clear that neither the facts nor the law supports the plaintiff's claims of conspiracy and housing discrimination. This fact is fully supported in the Court's legal analysis in its Memorandum by the

trial evidence and by the jury's inability to reach a factual finding that would have resulted in a verdict for the plaintiff. Hence, no *prima facie* case was or could be established by the plaintiff. Therefore, the Court determines that the defendants should be awarded attorneys' fees and costs. *Id.*

B. The Naths Claim for Attorneys' Fees and Costs

The Naths seek an attorney's fee and "expenses" in the amount of $1,241,465.34 associated with their defense against the plaintiff's conspiracy and housing discrimination claims. The Naths assert that the fee and expenses claimed are "distinctly traceable and directly related to" their defense of the conspiracy and housing discrimination claims. In this regard, counsel for the Naths assert in their affidavits that they devoted a substantial number of hours to the Naths defense.

The plaintiff argues that his evidence establishes a *prima facie* case of conspiracy and housing discrimination under each of the federal and state statutes and a city ordinance thus, his claims were not filed in bad faith as evidence of merit. He asserts that the parties engaged in settlement negotiations and that his suit survived an "onslaught of dispositive motions." Finally, the plaintiff asserts that the affidavits of the Naths' attorneys are insufficient to justify an award of an attorney's fee and costs.

The plaintiff is correct in some respects, particularly, as it relates to the fact that attorneys for the Naths did not compile and submit billing ledgers or fee invoices. Nor did they provide a ledger of costs associated with their request for expenses. However, the Court is of the opinion that the Naths may recover their costs and legal expenses in state court, to the extent they are recoverable. Therefore, the Court denies, without prejudice, the Naths' motion for the recovery of costs and expenses.

With regard to the Naths' claim for an attorney's fee, the Court is not without supporting evidence. The record shows that the Pruckas' counsel, ranging in numbers from seven to 11 attorneys in two firms, expended over 1,800 hours in trial preparation, trial and post-trial proceedings from January of 2008 through December of 2010. The hours expended from January of 2008 through June 18, 2008, when the plaintiff for the first time added federal claims in his fourth amended petition, total approximately 202.2 hours. Hence, after June 18 the attorneys for the Pruckas expended over 1,600 hours defending Petrello's conspiracy and housing discrimination claims.

Likewise, the record reflects that the plaintiff, himself, expended over $595,185 in legal fees allocated between three separate law firms prosecuting his suit. At a reasonable billing rate of $400 per hour, the attorneys expended in excess of 1,488 hours prosecuting the plaintiff's claims. Therefore, the Court concludes that there is substantial evidence in the record

that indicates and bears on the propriety of the Naths' claim for an attorney's fee.

The Court is of the opinion, based on the affidavits and the totality of the presentations by all parties that the Naths incurred legal fees associated with the plaintiff's housing discrimination claim from on or about July 8, 2008 through December of 2010. This time frame, by and large, parallels that of the Pruckas and the plaintiff's after the housing discrimination and conspiracy claims were added. Hence, the Court is of the opinion that the Naths incurred some 1,400 hours of billable time from July of 2008 through December of 2010. The Court holds that this time expenditure is reasonable in light of the affidavits of the Naths, the invoices of the Pruckas' and the billings of the plaintiff's counsel. Finally, the Court is of the opinion, considering the statute of the attorneys employed, the trial, research and consulting time necessary that a fee rate of $400 per hour is reasonable.

Considering the *Johnson* factors, the Court determines that the experience, reputation and abilities of the plaintiff's attorneys demanded attorneys of equal statute and status as those of the plaintiff. Hence, the skills required to meet the plaintiff's attorneys' litigation efforts were great, the time and attention given precluded other employment; alternatively, the effort required several skilled attorneys sharing the responsibility for the legal services required by the defendants. The Court notes that the fees charged were fixed and billed to the Naths and

the Pruckas on an hourly basis. After the federal claims were added, the plaintiff's case consumed the Naths and the Pruckas. In fact, Mr. Prucka[ ] had been criminally charged by the City of Houston based on the plaintiff's criminal complaint. The implications associated with losing this case, from Mr. Prucka's perspective went far beyond that of the ordinary civil case. At stake was his house, worth $8.2 million, and his liberty and reputation. Therefore, the time expended by the attorneys in providing a defense for the defendants was reasonable and coincides with the time expenditure for cases where the issues are novel or where little or no precedent is recorded.

The Court is also of the opinion that the conspiracy and housing discrimination claims were the "heart and soul" of the plaintiff's suit, representing, in the Court's estimation, 70% of the work effort required and expended to this point in time. Therefore, the Court is of the opinion and holds that the Naths should recover a fee based on 70% of 1,400 hours expended or 980 billable hours.

In light of these factors and the Court's findings of fact, the Court awards an attorney's fee of $392,000 to the Naths. This award is not intended to cover the costs or expenses expended in the state litigation. Nor is it intended to cover the costs associated with any appeal. The Court determines that a reasonable fee for an appeal is $60,000. In the event of an appeal, and the Naths prevail, an appellate fee of $60,000 is awarded.

C. The Pruckas' Claim for Attorneys Fees

The Court relies on its analysis and discussion in the Naths' section of this Memorandum in addressing the Pruckas' claim for an attorney's fee. The Pruckas assert that they, too, are entitled to an attorney's fee and the Court agrees. Attached to their motion are affidavits, the curriculum vitae of several of the attorneys involved, and their detailed billing records relevant to the time periods. As with the Naths, the plaintiff asserts that the Pruckas failed to meet their burden of establishing entitlement to an attorney's fee. He argues, for example, that part of the time that the Pruckas' attorneys expended was used to "learn the facts" and review the transcripts. This fact, even if true, does not cause the Court concern. The Court has reviewed the Pruckas' data and finds it credible, appropriate to the type of case and that the time expended was necessary for a proper defense. After all, the plaintiff expended $595,185.50, at last count, prosecuting his case, and the end has not come to this litigation.

Based on the Court's estimate that 70% of the time expended in the case was expended on the conspiracy and housing discrimination claims, the Court awards an attorney's fee to the Pruckas on 1,120 hours at the rate of $400 per hour or $448,000. In the event of an appeal by the plaintiff, and the Pruckas prevail, an appellate fee of $60,000 is awarded. As with the Naths' claim for costs, the Court is of the opinion that the costs and expenses of this suit should follow the litigation. Therefore, the awards

made here are without prejudice to any awards made in the state court litigation.

It is therefore ORDERED that Rahul and Usha Nath shall recover an attorney's fee against the plaintiff, Anthony G. Petrello in the amount of $392,000. In the event of an appeal, the Naths are awarded an appellate fee of $60,000.

It is further ORDERED that Matthew W. and Sheryl S. Prucka shall recover an attorney's fee against the plaintiff, Anthony G. Petrello in the amount of $448,000. In the event of an appeal, the Pruckas are awarded an appellate fee of $60,000.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-20139
cons/w 11-20273

ANTHONY G. PETRELLO,

Plaintiff-Appellant

v.

MATTHEW W. PRUCKA; SHERYL S. PRUCKA; RAHUL NATH; USHA NATH,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Filed Sep. 7, 2012)

(Opinion 8/2/12, 5 Cir., ___, ___, F.3d ___)

Before JONES, Chief Judge, and OWEN and HIGGINSON Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the

court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX E

42 U.S.C. § 3604

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available

for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

(A) that buyer or renter[;]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of –

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes –

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted[;]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that –

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within

such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means –

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

APPENDIX F

42 U.S.C. § 3613

§ 3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing

practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may –

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary

restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.