Att. Fee ____ Date ?

(U.L.V. Carter ?)

Memo ____ : "First thoughts" or Petitioner's Brief ____

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Barbara/Eric: some first thoughts on petitioners' brief. Is it true that there are no Title VIII "substantially related" cases? It would be nice to smash them with a citation or two. On the assumption that they are correct, though, I offer the following. We should probably address this point even if there are cases, because there probably aren't a lot.

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Petitioners base their motion for certification on an erroneous understanding of the nature of the fee claim at issue in this case. There is no need for this Court to review the decision of the Appellate Division because that court's decision is correct.

Respondents and the Appellate Division proceeded with very simple and well-established reasoning: under both Title VIII and §1983, fees are recoverable if plaintiff prevails in a non-fee claim that is "substantially related" to the fee claim, even if the fee claim was not ruled on by the court. Respondents are entitled now to show the requisite relationship (the exact nature of which will be discussed below) and if they do so, the fee claim is valid.

Petitioners seek to set this simple and obvious reasoning awry by creating a specious, mechanical distinction between Title VIII claims and §1983 claims, limiting recovery for "substantially related" non-fee claims to §1983 alone. Apart from noting that

there are no cases explicitly applying the "substantially related" test to a Title VIII non-fee claim, petitioners suggest absolutely no reason why Congress might have intended such a distinction. Indeed, the legislative history that petitioner cites suggests the contrary. In enacting §1988, Congress sought to create a uniform system of recovery that would not depend on the fortuity of whether, e.g., a §1982 property rights claim were brought instead of a Title VIII claim. PB at 10, footnote 6. Petitioner suggests no reason why "substantially related" non-fee claims should be recoverable under §1988 but not under §3612(c) if the object is a uniform system for protecting federal civil rights; obviously, exactly the opposite conclusion is the correct one.

Nor is it surprising that understanding of the legal relationship between fee and non-fee claims has been developed largely through §1983/§1988 cases, rather than through Title VIII. Section 1983 is much broader than Title VIII, it generates many more cases, and §1988 is actually more generous to fee applicants than is §3612(c), since it does not limit fee recovery to instances where the applicant is unable to bear its own expenses. Thus, a well-pleaded claim of discrimination regarding property will normally

include a §1982 count as well as a Title VIII count, in order to avoid having a susequent dispute about plaintiff's financial means. In any event, it is perfectly appropriate for Respondents, and the Appellate Division, to look to §1983 cases for guidance, and there is no need for this Court to fix what ain't broke.

Moreover, the "substantially related" test is less often relevant in Title VIII litigation, because the history of fair housing litigation has been one almost exlcusively of direct reliance on the federal law in federal courts. It takes a relatively unique state court setting, such as that afforded by the Mount Laurel litigation in New Jersey, to set up the possibility of both raising and resolving the fair housing issues under a "substantially related" non-fee theory. This Court will undoubtedly note that other states have not been swift to follow Mount Laurel II, see Suffolk Housing Services v. Town of Brookhaven. That the present fee application is therefore somewhat out of the ordinary in its specific factual setting makes it no less legally correct, as the Appellate Division understood.