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Opposition to Defendant's' petition for Certification, or, in the alternative, crosspetition for Certification

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SUPREME COURT OF NEW JERSEY
DOCKET NO.

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	]	
Plaintiffs-Respondents,	]	
vs.	]	
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	]	Sat Below:
Defendants-Petitioners.	]	Hon. James H. Coleman, Jr. Hon. James M. Havey Hon. Edwin H. Stern

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OPPOSITION TO DEFENDANTS' PETITION FOR CERTIFICATION, OR, IN THE ALTERNATIVE, CROSSPETITION FOR CERTIFICATION

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Introduction

This brief is respectfully submitted on behalf of the Civic League plaintiffs in opposition to the petition of the defendant municipalities for certification, or, in the alternative, in support of plaintiffs' cross petition for certification. Plaintiffs oppose certification because there is no "question of general public importance which has not been but should be settled by the Supreme Court" presented here. R. 2:12-4.

The unique facts here preclude a finding of "general" public importance. Moreover, the only legal question raised is a matter of well-established law. The Appellate Division's decision below relied upon and applied the basic principle set forth in numerous federal court decisions and this Court's prior rulings in fee cases, namely that a party prevailing upon a cause of action for which fees are not provided by statute may nevertheless recover fees if certain federally mandated conditions are met. This Court need not take this case merely to confirm that the Appellate Division has correctly read its prior precedents.

Contrary to the petitioners' contention, there is no authority for the proposition that plaintiffs seeking fee awards under 42 U.S.C. §3601 et seq. ("Title VIII") should be held to a different standard from parties seeking fees under the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. §1988 (the "Fees Act"). Indeed, as the United States Supreme Court explained in

Evans v. Jeff D., 106 S. Ct. 1531, 1548 (1986), the Fees Act was intended to "correct 'anomalous gaps' in the availability of attorneys' fees to enforce civil rights laws." Congress' interest in a uniform approach precludes the distinction demanded by defendants.

The only error of the Appellate Division's decision of December 29, 1987 was in determining the burden imposed on plaintiffs on remand. That decision requires plaintiffs to prove a prima facie case of racial discrimination under Title VIII using only a twelve year old trial record, together with facts which the trial court may judicially notice and expert testimony. This is a far more rigorous test than required by the United States Supreme Court in Maher v. Gagne, 448 U.S. 122 (1980) (as well as the plethora of federal and state authorities cited in plaintiffs' brief below) and it is unfair to plaintiffs. Nevertheless, the Civic League plaintiffs believe that they can readily make the required showing and respectfully urge this Court to deny certification, which can only result in further delay and even higher fees.

If certification is nevertheless granted, however, the Civic League respectfully submits that the test formulated by the Appellate Division should be rejected. New Jersey should adopt the test explicitly required by the Maher Court. The proper test presents a simple question of law, well within the scope of this Court on review. First, were plaintiffs' Title VIII claims

"substantial" (Hagans v. Lavine, 415 U.S. 528 (1974)) and, second, did they arise from "a common nucleus of operative facts" (United Mineworkers v. Gibbs, 383 U.S. 715 (1966)), as the state claims upon which they prevailed? Under that test, no court will be required to render a decision on the sensitive constitutional issue presented here, i.e., did the defendant municipalities' zoning ordinances discriminate against minorities? There has been no finding that plaintiffs do not satisfy Hagans/Gibbs. There has merely been a persistent refusal to apply it. As plaintiffs show in their brief below, both prongs are easily satisfied here and plaintiffs are accordingly entitled to attorneys' fees under Title VIII.[1]

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[1] Indeed, in A. Wolf, "Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act," 2 W.N. Eng. L. Rev. 193 (1979) South Burlington County NAACP v. Tp. of Mount Laurel, 67 N.J. 151 (1975) ("Mount Laurel I") is used as an example of a state case in which the Hagans-Gibbs analysis would apply, "if the 1976 Fees Act had been public law at the time [it] was decided." Id. at 203-4. Professor Wolf served as special counsel to the Honorable Robert Drinan when Congressman Drinan was acting as floor manager for the Fees Act. Id. at n.14.

Laurel decisions and the changes in the law which followed them. This case was filed before the Mount Laurel I decision. Mount Laurel rendered a separate Title VIII claim for nonwhite low income persons less likely in this kind of litigation. Moreover, under the state Fair Housing Act, almost all Mount Laurel matters are or will be before the Council on Affordable Housing, which cannot hear or adjudicate Title VIII claims.[2]

In short, plaintiffs and defendants in the case at bar are the only parties likely to be affected by the decision below. Thus, this case does not present an issue of general public importance requiring this Court's intervention and guidance under R. 2:12-4.

B. There is No Unsettled Question of Public Importance Because the Principle Adopted Below Was Correct Under Well-Established Law

In Singer v. State, 95 N.J. 487 (1984) this Court recognized that plaintiffs prevailing on a nonfee state claim could be entitled to attorneys fees under the Fees Act if the state and federal claims were based upon related legal theories. Id. at 496. The instant case is analagous to Singer in that plaintiffs here, like the Singer plaintiffs, prevailed on a

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2 Nor, of course, may the Council hear the instant fee application. Notwithstanding defendants' arguments, the Council is not a court and does not have jurisdiction over such matters. See N.J.S.A. 52:27D 305 et seq.

nonfee claim. In Singer, unlike here, plaintiffs' federal fee claim was rejected by the lower court. The Singer plaintiffs were nevertheless awarded fees, the Court noting that "[e]ven without succeeding on their §1983 claim, plaintiffs obtained substantially all of the relief they sought." Id. at 496. The reasoning of the Court is equally applicable here.

Plaintiffs submit that the legal theories of their state and federal claims were related within the meaning of Singer. Their Title VIII claim alleged discrimination against lower income minorities. Their state claim alleged discrimination against all lower income persons. The federal discrimination claim was not only related to, but subsumed under the state claim. As the Appellate Division noted: "Indeed, the significance of race was a concern to the Court in Mount Laurel II. It referred to suburban exclusion as one of the principal causes making America 'two societies, one black, one white -- separate and unequal.'" (Citation omitted; slip op. at 26).

Even if plaintiffs' state and federal claims were not "legally related," however, plaintiffs would be entitled to fees under a Maher analysis. Congress implicitly recognized that the state and federal claims need not be parallel. As the Maher Court observed:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees

> may be awarded meets the 'substantiality' test, attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' (Citations omitted). Id. at 132, n.15.

Congress never contemplated that the state and federal claims would necessarily be "legally related," nor has such a requirement been imposed by the United States Supreme Court. The Appellate Division correctly refused to impose such a test here.

1. The only flaw in the decision below was in the burden imposed on plaintiffs

The only real flaw in the decision below is the test imposed on the Civic League plaintiffs. The Appellate Division held that:

> Because the fee claim has not been adjudicated, plaintiffs may be regarded as "prevailing parties" within the meaning of Sec. 3612(c) if the record developed in 1976 established a prima facie violation of Sec. 3604(a) which was not rebutted. (Emphasis added; slip op. at 16.)

This test, which is without legal precedent, requires that the federal and state claims be based on the same facts, rather than the "common nucleus" mandated by the United States Supreme Court. This test is prejudicial to the Civic League, not defendant municipalities. If plaintiffs are nonetheless willing to proceed under that test, they should be permitted to do so.

In Mount Laurel I, published shortly after the commencement

of the instant lawsuit, this Court made it perfectly clear that relief under the state Constitution extended to all low and moderate income persons, regardless of race. This Court also unambiguously expressed its preference for deciding these issues on state constitutional grounds.

The reasoning of the Appellate Division would have required plaintiffs to proceed nonetheless to litigate their Title VIII claims. Under this test, every prudent plaintiff would be required to redundantly litigate every statutory fee claim, even where, as here, the court clearly indicated at an early stage of the litigation that it would take a different judicial route to the desired remedy. It is inconceivable that the development of such a record would have been permitted in this case. (Indeed, as noted by defendant Piscataway at page 7 of its trial brief, the trial court refused to consider evidence regarding race on remand.)

Thus, the record to which plaintiffs are restricted is likely to be barren of direct evidence of a prima facie case of a Title VIII violation. This assumes, moreover, that these records are available or can be reconstructed, twelve years and at least as many lawyers after the trial. The Appellate Division, furthermore, has held that plaintiffs may only supplement or clarify that threadbare record with "facts which it may judicially notice," and experts' reports interpreting these facts. Slip op. at 30. Under the Appellate Division test, in

short, plaintiffs will not be awarded attorney fees unless they can establish a prima facie Title VIII using facts which "cannot reasonably be the subject of dispute." Evid. R. 9(1).

The prima facie test effectively gives defendants another opportunity to avoid their obligations. Yet the defendant municipalities seek certification, and plaintiffs oppose it, because all of the parties know that plaintiffs had a prima facie Title VIII case in 1976 and that they can prove it now -- even without the full evidentiary hearing which they should have been granted if they were going to be required to do so. Morales v. Haines, 486 F.2d 880 (1973).

Finally, defendants contend that the prima facie test would require review by this Court to settle the standard for Title VIII violations in New Jersey. (Db15) This argument is without merit. The only issue decided by the Appellate Division was the appropriate test to be applied for purposes of a fee application under the very unusual circumstances of this case.

2. The Hagans/Gibbs test is applicable in actions brought under Title VIII

Defendant municipalities contend that the test under which fees are awarded in §1988 cases is not applicable to Title VIII cases. There is neither legal authority nor any logical basis for this proposition. As noted in E. Larson, Developments in the

Law of Attorneys Fees (1986 Supplement):

> Except where express statutory language distinguishes one fee shifting statute from another, the courts have moved toward the adoption of a relatively uniform set of fee principles [citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)]
>
> * * *
>
> The extensive legislative history of the Fees Act is often relied on in determining fee issues under other fee shifting provisions which have similar statutory language. [Citing New York Gaslight Club v. Carey, 447 U.S. 54, 70 n.9 (1980)]

The continuing importance of that legislative history is thus apparent. In the legislative history of the Fees Act, Congress explicitly analogized Title VIII claims to those addressed by §1988:

> Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. §1982, a Reconstruction Act protecting the same rights. U.S. Code Cong. and Adm. News, 5911.

The courts, moreover, have consistently applied standards developed under one of the civil rights statutes to claims arising under another. In Jeanty v. McKey & Poague, 496 F.2d 1119 (7th Cir. 1974), for example, the Seventh Circuit cited Piggie Park in awarding fees under Title VIII:

> The court has the authority under 42 U.S.C. § 3612(c) to award attorney fees when the plaintiff, as here, is financially unable to assume them. The general policy behind the award of attorney fees was set forth by the Supreme Court in Newman v. Piggie Park Enterprises, Inc. Although that case was under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), the language is equally applicable to a Title VIII action ... Id. at 1121. (Emphasis added.)

As this Court noted in Singer, supra at 497, "Title II is essentially analogous to the [Fees Act]".

Defendants suggest no reason why the Hagans/Gibbs test should be applicable under the Fees Act but not under Title VIII. The dearth of Title VIII cases in which Hagans/Gibbs has been applied is not dispositive. It is not surprising that understanding of the legal relationship between fee and non-fee claims has been developed largely through §1983/Fees Act cases, rather than through Title VIII. Section 1983 is much broader than Title VIII and it generates many more cases. The Fees Act, furthermore, is more generous to fee applicants than is Title VIII, since it does not limit fee recovery to instances where the applicant is unable to bear its own expenses.

In view of the additional hurdle presented by the requirements that a Title VIII plaintiff be unable to pay its own fees in order to be awarded fees, prudent post Fee Act Title VIII plaintiffs are likely to append a claim under the Fee Act. (See "Multi-Claim Litigation," supra at 213 (citing Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979)). The case at bar, of course, was filed in 1974, two years before the enactment of the Fee Act.

Moreover, the Hagans/Gibbs test is less often relevant in Title VIII litigation because the history of fair housing litigation has been one almost exclusively of direct reliance on the federal law in federal courts. It takes a 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 nonfee theory. 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.

There is no reason for treating Title VIII claims differently than other civil rights claims. Indeed, its status as one of the earliest civil rights fee shifting statutes clearly shows the particular determination of Congress to prevent discrimination in housing. The case at bar, moreover, fully vindicates Congress' view as to the utility of the "private attorney general" approach in this context. Defendants' arguments are flatly contradicted by the explicit legislative history, the Supreme Court cases and the multitude of upper court decisions. It is respectfully submitted that the decision below comported with the cited authority and it should not be disturbed.

II. IF THIS COURT GRANTS CERTIFICATION, IT SHOULD REJECT THE TEST IMPOSED BY THE APPELLATE DIVISION IN FAVOR OF THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT

If certification is granted it is respectfully submitted that the only issue to be considered by this Court is the test imposed on plaintiffs by the Appellate Division. By requiring plaintiffs to retrospectively prove a prima facie case on a twelve year old record, the decision below contravenes the express intent of the legislature in enacting the fee-shifting civil rights statutes and should be reversed by this Court. The test is especially egregious because plaintiffs are not required to prove any such violation in order to be granted fees under well established law.

The real question is simply whether the Hagans/Gibbs test should be applied where, like here, plaintiffs prevail on a state claim arising from a "common nucleus of operative facts" as that of a "substantial" federal fee claim, which has been raised in the same case but has not been decided by the court. It is not necessary for plaintiffs to prove a prima facie case with respect to their federal fee claim in order for a fee to be granted since they easily satisfy the two-pronged Hagans/Gibbs test.

The Appellate Division misconstrued plaintiffs' argument:

> Boiled down, plaintiffs argue that when a fee claim is appended to a nonfee claim and there is recovery on the nonfee claim but no disposition is made of the fee claim, a court should follow the same nucleus of operative facts' doctrine and decide whether to allow

> attorney fees and costs pursuant to §3612(c). Plaintiffs argue that a court should simply look at the complaint that was filed in 1974 to see if plaintiffs alleged fee (federal constitutional or statutory violations) as well as nonfee (state constitutional or statutory) violations. If both were alleged and plaintiffs became a prevailing party' within the meaning of 3612(c), then attorney fees and costs should be awarded pursuant to R. 4:42-9(a)(8). (Slip op. at 9-10).

Plaintiffs' actual position, which follows the Maher decision, is that since there was no adverse determination with respect to a plaintiff's fee claim, a fee award may be predicated upon that claim if plaintiffs satisfy the Hagans/Gibbs test. This critical requirement is omitted from the Appellate Division's synopsis. If plaintiffs' federal claims were not "substantial" as required by the Hagans prong of this test, defendants could have moved to dismiss them at any phase of the extensive litigation below. Defendants were put on notice of plaintiffs' fee claim in the original complaint and Hagans/Gibbs was the law of the land throughout the ensuing litigation. Defendants' failure to acknowledge applicable federal law does not excuse them from its operation.

Second, while it is not clear precisely what the Appellate Division means by "a court should follow the same nucleus of operative facts doctrine," it is plain that the Court has failed to distinguish between "a common nucleus" and "the same nucleus" of operative facts. The former is the Gibbs formulation. The latter, although required by a minority of jurisdictions, is not

the law in this state. By requiring plaintiffs to prove their fee claim on precisely the same record that established their nonfee claim, the Appellate Division effectively imposes a "same facts" test. There is no legal authority for doing so.

It is well established in the majority of jurisdictions, including the United States District Court for the District of New Jersey, that Gibbs merely requires an evidentiary overlap between the state and federal claims. Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981). The evidentiary overlap between plaintiffs' Title VIII claim, in which they alleged that the zoning ordinances in 23 municipalities operated to exclude lower income blacks, and their state constitutional claim, in which they alleged that those same ordinances in those same communities operated to exclude all lower income persons, clearly met that standard.[3]

The Appellate Division further found that plaintiffs "mistakenly relied on a series of federal cases" involving pendent jurisdiction. (Slip op. at 10.) Again, plaintiffs rely on these cases pursuant to the Supreme Court mandate. The Appellate Division may question the appropriateness of the adoption by Congress of what was originally a jurisdictional test

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3 See J. Payne, "From the Courts," 11 Real Est. L.J. 72, 74 (1982) (noting linkage of racial and economic exclusion in U.S. v. Parma, 661 F.2d 562 (6th Cir. 1981) aff'g in part, 494 F. Supp. 1049, 504 F. Supp. 913 (N.D. Ohio 1980).

for determining entitlement to fees. It is well established, however, that federal law as interpreted by the United States Supreme Court is binding on state courts. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 341 (1816).

Moreover, the Appellate Division's decision indicates a fundamental misunderstanding with respect to fee and nonfee claims. Not all federal statutory violations are addressed by the Fees Act. Indeed, the federal statute on which the Maher plaintiffs prevailed was just such a nonfee federal claim. The question is not whether plaintiff prevails on a federal or a state claim, but whether plaintiff prevails on a fee or nonfee claim. Thus, there is no basis for the Appellate Division's attempt to distinguish the instant case on the grounds that some of the cases relied on by plaintiffs involved federal claims:

> In [Maher, Singer, Frank's Chicken House] the plaintiff prevailed in a settlement or based on a determination made from the evidence presented that either a federal statute or the federal Constitution had been violated. Slip op. at 14.

There is no question that where the claim on which plaintiffs prevail is addressed by the Fees Act, as in Frank's Chicken House v. Manville, 208 N.J. Super. 542 (App. Div. 1986), plaintiffs may be granted fees. Even where plaintiffs prevail on a nonfee federal claim, as in Maher, fees may be awarded. The crucial point here is that parties prevailing on nonfee state claims may also be granted fees under the Fees Act. Smith v. Robinson, 468

U.S. 992 (1984).

Congress never intended to require plaintiffs to prove their fee claims in a separate proceeding after prevailing on the nonfee claim, or settling the case, before fees could be granted. Federal circuit courts have agreed, applying the Maher test in innumerable cases: Seals v. Quarterly County Court, Inc., 562 F.2d 390 (6th Cir. 1977); Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423 (8th Cir. 1978); Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1980); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978); Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981); White v. Veal, 447 F. Supp. 788 (E.D. Pa. 1978).

This principle is as applicable to proceedings brought in state court as to those brought in federal court. Maine v. Thiboutot, 100 S. Ct. 2502, 2507 (1980). The Maher test has been properly applied in state court actions. In International Association of Machinists v. Affleck, 504 A.2d 468 (S.Ct. R.I. 1986), for example, union and striking employees moved for an award of attorney fees after prevailing on their claim that a regulation denying public assistance benefits to striking employees was void as a matter of state law. There, like here, the court did not address plaintiff's federal fee claim. In awarding fees, the Rhode Island Supreme Court held:

> Attorneys' fees may be awarded to a prevailing plaintiff pursuant to 42 U.S.C.A. §1988 when, in an action involving a substantial constitutional claim, the case is resolved on the basis of a wholly statutory, non-civil-rights

> claim arising out of a common nucleus of operative fact. To conclude otherwise would both contravene the congressional goal of encouraging vindication of constitutional rights and undermine the judicial policy of avoiding unnecessary decision of important constitutional issues.
> 504 A.2d at 470. (Emphasis added.)

Although the court in Slawik v. State, 480 A.2d 636 (Del. 1984) decided that plaintiff's federal constitutional claim was "without merit" and thus denied fees, it too applied the Maher test, citing the legislative footnote.

Maine, too, has adopted the Hagans/Gibbs test mandated by Maher. Jackson v. Inhabitants of Searsport, 456 A.2d 852 (Me. 1983). See also Kay v. David Douglas Sch. Dist. No. 40, 79 Or. App. 384, 719 (P.2d 875 (1986); Filipino Accountants v. State Bd. of Accounting, 155 Cal. App.3d 1023, 204 Cal. Rptr. 913 (Cal. App.3 Dist. 1984); Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979); Davis v. Everett, 443 So.2d 1232 (Ala. 1984); County Exec., Prince Geo's Co. v. Doe, 479 A.2d 352 (Md. 1984).

Under well-settled law, plaintiffs should not be required to prove their Title VIII claim -- and the trial court should not be required to rule on that claim -- as a prerequisite to a fee award. If plaintiffs are required to do so, however, they should be permitted a full evidentiary hearing. The Appellate Division notes that plaintiffs' attorney indicated at oral argument that plaintiffs did not "want" such a hearing. (Slip op. at 13.) As explained above, plaintiffs do not "want" this kind of hearing

ARGUMENT

I. DEFENDANT MUNICIPALITIES' PETITION FOR CERTIFICATION SHOULD BE DENIED

To grant certification would merely extend already interminable proceedings, generating substantial additional legal fees and requiring yet a further commitment of judicial resources. Moreover, as noted by the Appellate Division, the procedural posture of this case is unique. (Slip op. at 12.) A rule of law designed to accommodate its peculiar contours may well prove an awkward fit for future more conventional cases. There is no reason to let this "hard case make bad law," and defendants have no right to compel such an adjudication. In view of the unique facts of this Mount Laurel litigation and the well-established law on the issue presented, it is respectfully submitted that grounds for certification do not exist. See In re Contract for Rt. 280, 89 N.J. 1 (1982).

A. Because of the Unique Facts of the Mount Laurel Litigation, No Question of "General" Public Importance is Presented Here

This case presents a unqiue fact-pattern, one almost certain not to recur in the future. Despite their claims of its significance, defendants are unable to cite even one other Mount Laurel case with a Title VIII claim. Few if any such cases are likely to be brought in the future because of the historic Mount

Conclusion

Congress never intended to deny attorneys' fees to an otherwise entitled plaintiff merely because of a judicial election to award relief on the basis of an alternative cause of action. The Appellate Division recognized this principle, but applied its own test rather than the Maher test explicitly mandated by the Supreme Court.

For the reasons set forth above, plaintiffs urge this Court to deny certification and let that test stand, albeit flawed. If certification is granted, however, it is respectfully submitted that New Jersey should comply with well-established federal law and apply the Hagans/Gibbs test, remanding this matter to the trial court for a determination of fees.

Dated: February 15, 1988

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