No. 18-

IN THE

Supreme Court of the United States

NEW WEST, AN ILLINOIS LIMITED PARTNERSHIP, AND NEW BLUFF, AN ILLINOIS LIMITED PARTNERSHIP,

Petitioners,

v.

CITY OF JOLIET, AN ILLINOIS MUNICIPAL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners filed this legal action in Federal court for violations of the Fair Housing Act and Civil Rights Act ("FHA Action"). Petitioners demanded a jury trial to which they were entitled as a matter of law. Six months later, Respondents filed an equitable action condemning the same property that was the subject of the FHA Action. The Condemnation Action was removed to Federal court where the Judge overseeing the FHA Action asked that it be assigned to him as a related case. His request was granted. Petitioners moved to have their first-filed FHA Action tried first. The Judge denied the request. Petitioners asserted their FHA and CRA claims as affirmative defenses to the valid public purpose of the Condemnation Action, as required lest they be waived. The District Court tried the Condemnation Action to the bench without a jury and then dismissed the FHA Action based on collateral estoppel, thereby denying Petitioners a jury trial on their FHA and CRA claims. This Court in *Beacon Theatres* mandated that the discretion to deprive a party of a jury trial "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). This Court further stated: "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.* at 510-11.

The questions presented are:

1. When a single district court Judge has control over all legal and equitable claims before it in a single

proceeding, even though the proceeding involves separate actions, can that Judge avoid the mandate of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) that the discretion to deprive a party of a jury trial "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial"?

2. Should *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) be extended so that a jury trial of legal claims can be lost through a prior determination of equitable claims in the absence of imperative circumstances and where all claims are before the same Judge at all times?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are New West, an Illinois limited partnership and New Bluff, an Illinois limited partnership; collectively "Petitioners" or "New West".

Respondents, defendants below, are City of Joliet, an Illinois municipal corporation; Estate of Arthur Schultz; Jim Shapard, an individual; John M. Mezera, an individual; Thomas Giarrante, an individual; and Thomas Thanas, an individual; collectively "Respondents" or "Joliet".

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioners make the following disclosure:

Neither New West, an Illinois limited partnership, nor New Bluff, an Illinois limited partnership, have any parent companies, nor do any publicly held companies own ten percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this case. This Court's review is important to address and limit the Seventh Circuit's evisceration of *Beacon Theatres* and its significant extension of *Parklane* by which collateral estoppel can be given to a ruling on an equitable claim to deny a jury right on a legal claim in a first-filed case when all claims at all times are before the same Judge.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois granting Respondents' motion to dismiss was entered on August 14, 2017 and is available at 2017 WL 6540046. *See* Appendix B, pp. 6a-14a.[1] The opinion of the Seventh Circuit upholding the District Court ruling was entered on May 23, 2018 and is published at 891 F.3d 271. *See* Appendix A, pp. 1a-5a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on May 23, 2018. The Petitioners timely filed this petition for writ of certiorari on August 20, 2018. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

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1. References to the attached appendix include the page number followed by the suffix "a".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

The Fair Housing Act, 42 U.S.C. § 3601, *et. seq.*[2]

The Civil Rights Act, 42 U.S.C. §§ 1982 and 1983.[3]

STATEMENT OF THE CASE

Judge Charles R. Norgle, District Court Judge for the Northern District of Illinois, presided over Petitioners' first-filed Fair Housing Act and Civil Rights Act action (the "FHA Action") as well as Respondents' second-filed action for condemnation (the "Condemnation Action"). Despite repeated demands by Petitioners for a jury trial on their FHA and CRA claims (the "FHA Claims"), Judge

2. The text of the relevant provisions is provided in Appendix C, pp. 15a-21a.

3. The text of the relevant provisions is provided in Appendix C, pp. 22a-23a.

Norgle used his discretion to try the Condemnation Action first to the bench, including Petitioners' FHA and CRA affirmative defenses (the "FHA Affirmative Defenses"), and then dismiss the FHA Action based on collateral estoppel. In dismissing the FHA Action Judge Norgle relied on *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) for the proposition that *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) and its progeny only apply when legal and equitable claims are present in the same action. *See* 14a; *see also Opinion and Order* at 6, *New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. Jan. 31, 2012), Doc. No. 145.

On appeal from the District Court's dismissal of the FHA Action, the Seventh Circuit ignored *Beacon's* mandate to do everything to preserve a jury right, concluding: that *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Beacon Theatres* merely "concern the exercise of discretion to determine the order in which the issues presented in a single suit are resolved"; that the District Court's discretion to sequence the FHA Action before the Condemnation Action was limited not by *Beacon Theatres* but by the Seventh Circuit's directive "to resolve the condemnation suit first"; and that *Parklane* governs this case because it holds there is no Seventh Amendment concern "when issues arise in separate trials". *See* 3a-4a. Neither the Seventh Circuit nor the District Court cited any "imperative circumstances" but instead limited their analysis to whether all claims were present in a single action. Finally, in an effort to completely avoid *Beacon's* mandate, Judge Easterbrook decided *sua sponte* that Petitioners had waived their Seventh Amendment right to a jury trial in the FHA Action merely by raising the FHA arguments as affirmative defenses in the Condemnation

Action. *See* 4a-5a. The holdings of the District Court and Seventh Circuit have ignored the mandate of *Beacon* and extended *Parklane* beyond its holding.

This case began on March 24, 2005, when New West filed the FHA Action against the City of Joliet in the United States District Court for the Northern District of Illinois alleging violations of the Fair Housing Act ("FHA") and the Civil Rights Act ("CRA"). *See New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill.), Doc. Nos. 1, 18-2, 122. Thereafter, in October 2005, Joliet filed an eminent domain action in Illinois State Court to condemn New West's privately owned apartment buildings (the "Property") (05 ED 39) which was removed to the United States District Court for the Northern District of Illinois on November 30, 2005 (the "Condemnation Action"). *Notice of Removal*, *City of Joliet v. Mid-City Nat'l Bank of Chicago*, 05 CV 6746 (N.D. Ill. Nov. 30, 2005), Doc. No. 1. Judge Norgle, already overseeing the FHA Action, requested that the Executive Committee reassign the Condemnation Action to him as a related case. *See Order of the Executive Committee*, *City of Joliet v. Mid-City Nat'l Bank of Chicago, et al.*, 05 CV 6746 (N.D. Ill. Dec. 12, 2005), Doc. No. 7. His request was granted. *Id.*

New West sought an order consolidating the suits for trial in order to preserve New West's Seventh Amendment jury right under the FHA and CRA. *See New West's and the Tenants' Brief in Support of Consolidation for Trial* at 3, *New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. Aug. 31, 2011), Doc. No. 117. The FHA Claims were necessary affirmative defenses to the condemnation, which would be waived for all purposes if not asserted in the Condemnation Action. New West asserted that if the

Condemnation Action were tried first and if findings made by the District Court on the FHA Affirmative Defenses in the Condemnation Action were given preclusive effect in the FHA Action, there would be a violation of New West's Seventh Amendment right to a jury trial on those claims. *See Id*. at 6-11.

The District Court ruled against consolidation but acknowledged that the Seventh Circuit, in a previous unrelated appeal, had not addressed the Seventh Amendment issue:

> Although this court is obliged to follow the instruction of the Seventh Circuit [to resolve the Condemnation Action first] . . . the panel never got a chance to consider the Seventh Amendment issue. This court therefore will follow the panel's instructions to the extent they are consistent with the Seventh Amendment rights of [New West].

Opinion and Order at 5, *New West, et al. v. City of Joliet, et al*., 05 CV 1743, (N.D. Ill. Jan. 31, 2012), Doc. No. 145. The District Court then ordered separate trials and stayed the FHA Action until resolution of the Condemnation Action. *See Id*. at 14-15.

Also in its January 31, 2012 ruling, the District Court further found that because the legal and equitable claims were not present "*in the same action*," *Beacon Theatres* did not apply and did not require that a jury trial on the FHA Action precede the Condemnation Action bench trial. *See Id*. at 6-7 (original emphasis). Acknowledging, but without deciding, that the outcome of the Condemnation

Action might have a preclusive effect on the FHA Action[4], the District Court nonetheless held that issue preclusion would not violate New West's Seventh Amendment right under *Parklane*. *See Id.* at 6-8. It stated: "[b]ecause the Seventh Circuit's instruction to resolve the condemnation action first does not intrude on the plaintiffs' Seventh Amendment rights, the court proceeds [with separate trials] accordingly." *Id.* at 14.

New West petitioned for a writ of mandamus on March 7, 2012 demanding a jury trial on the FHA Claims. *See Petition for Writ of Mandamus*, *In re New West, L.P. et al.*, 12-1536 (7th Cir. Mar. 7, 2012), Doc. No. 1-1. The Seventh Circuit denied the petition and Judge Easterbrook stated:

> If, as plaintiffs contend, the Seventh Amendment prevents using resolution of issues in the condemnation proceeding as a basis of preclusion (res judicata or collateral estoppel), then there may need to be a second round of litigation. The district court thought not, observing that the condemnation proceeding and the civil-rights actions are separate suits, and that the principle of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), deals with the sequence of decision in a single action. If the judge is right, then there will be no problem with using the findings preclusively later; *if the judge is wrong, then the findings cannot*

4. *Opinion and Order* at 6 n.4, *New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. Jan. 31, 2012), Doc. No. 145 ("The court is not actually deciding the issue of preclusion. Rather, the court assumes *arguendo* preclusion would apply to certain of the civil rights claims.").

> *be used preclusively*. Either way, there is no reason to delay the condemnation trial further.

Order at 2, *New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. March 27, 2012), Doc. No. 149 (emphasis added).

The Condemnation Action proceeded with a bench trial adjudicating New West's FHA Affirmative Defenses. *See City of Joliet v. Mid-City Nat'l Bank of Chicago, et al.*, 05 CV 6746, 2014 WL 4667254 (N.D. Ill. Sept. 17, 2014), *aff'd sub nom. City of Joliet, Illinois v. New West, L.P.*, 825 F.3d 827 (7th Cir. 2016). New West appealed and the Seventh Circuit again affirmed the decision below and declined to rule on the Seventh Amendment issue finding that the "request [was] premature." *City of Joliet, Illinois v. New West, L.P.*, 825 F.3d 827, 830 (7th Cir. 2016), *cert. denied sub nom. Mid-City Nat. Bank of Chicago v. City of Joliet, Ill.*, 137 S. Ct. 518, 196 L. Ed. 2d 407 (2016).

Judge Easterbrook wrote:

> This appeal concerns Joliet's condemnation suit, not New West's suit under the Fair Housing Act. There is no right to a jury trial of the takings issue (as opposed to the compensation issue) in a condemnation action under Illinois law, which controls, so the decision to hold a bench trial did not violate any of New West's rights *in this proceeding*. New West predicts that the judge will dismiss its statutory suit as barred by principles of issue preclusion given the findings made in the condemnation action. If the judge does that, the Seventh Amendment

> argument then will be ripe…The order denying the petition [for mandamus] has no bearing on the merits of the Seventh Amendment question.

Id. at 830-31 (original emphasis).

On remand, the District Court gave preclusive effect to its findings in the Condemnation Action. Relying on *Parklane*, the District Court on August 14, 2017 held that the use of collateral estoppel was not a violation of New West's Seventh Amendment right to a jury trial and dismissed all counts of New West's FHA complaint. *See* 13a-14a.

New West appealed and on May 23, 2018, the Seventh Circuit affirmed the District Court's dismissal. *See* 1a-5a.

REASONS FOR GRANTING THE PETITION

When this Court granted certiorari in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) it stated that it did so because "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Beacon*, 359 U.S. at 501 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). Almost sixty years after *Beacon*, Petitioners have been denied their Seventh Amendment right to a jury trial on their first-filed claims that Respondents violated the Fair Housing Act and Civil Rights Act merely because Joliet filed a separate Condemnation Action that the District Court decided to try first. *See Curtis v. Loether*, 415 U.S. 189, 192 (1974); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999).

Petitioners respectfully submit that this petition should be granted because of the profound intrusion on the Seventh Amendment jury right that this case presents. What occurred in this case lays out the blueprint for a defendant to deprive a plaintiff of a Constitutional right to trial by jury on legal claims. New West filed their legal claims first and demanded a jury trial. Joliet later filed their equitable claims. The claims were all brought before a single Judge, at that Judge's request, and that Judge then tried the equitable claims before the legal claims with the real potentiality that those bench findings would be applied collaterally to deny New West of their Seventh Amendment right.

This Court in *Beacon Theatres* mandated that the discretion to deprive a party of a jury trial "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon*, 359 U.S. at 510. "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon*, 359 U.S. at 510-11.

Rather than follow the mandate of *Beacon Theatres* that a Judge use all discretion available to preserve a party's jury right, the District Court with complete control of all claims used its discretion to extinguish that right. Unlike *Parklane*, (1) no "imperative circumstances" were present in this case to permit the District Court to disregard the mandate of *Beacon*, and (2) all claims were before a single Judge. Nothing prevented the District Court or Seventh Circuit from protecting New West's Seventh Amendment right. The District Court had

complete control over both the FHA and Condemnation Actions and could have preserved Petitioners' Seventh Amendment jury right in a number of ways: try the first-filed FHA Action to a jury before the second-filed Condemnation Action; consolidate the FHA Action and Condemnation Action for trial with a jury deciding the FHA Claims and FHA Affirmative Defenses; try the FHA Affirmative Defenses to a jury in the Condemnation Action; or permit the FHA Action to proceed after the Condemnation Action but not apply collateral estoppel. The Seventh Circuit did not tell the District Court Judge how to try the Condemnation Action, to try it without a jury, or what to do with the result.

Instead of using its discretion to preserve New West's Seventh Amendment jury right, as mandated by *Beacon Theatres*, the District Court used its discretion to deprive Petitioners of their Seventh Amendment jury right. The Seventh Circuit affirmed by diminishing the mandate of *Beacon* and by *sua sponte*, and wrongly, finding that New West had waived its Seventh Amendment jury right by raising the FHA Claims as affirmative defenses. If the mandate of *Beacon* had been followed there would have been no possibility of waiver of a jury right.

The District Court and Seventh Circuit's decisions strip the Seventh Amendment jury right from any legal claim necessary to defend an equitable action when all claims are before one Judge. The question before this Court today is just as important as it was when *Beacon* was decided, can Petitioners' Seventh Amendment jury right be curtailed by the discretion of a trial court presiding over both the legal and equitable claims where no imperative circumstances are cited or exist? Affirmance

of such an exercise of discretion reverses the mandate of *Beacon* to exercise discretion to preserve rather than deny a jury right.

I. *Parklane* And *Beacon Theatres* Do Not Limit Their Mandate And Holdings To Whether Legal Claims And Equitable Claims Are Present In A Single Action; Their Holdings Focus On Judicial Control Over All Claims And The Presence Of Imperative Circumstances.

The District Court dismissed Petitioners' FHA Action based on collateral estoppel pointing to *Parklane* for the proposition that *Beacon Theatres* only applies "when the legal and equitable claims are present in the same action." *See* 13a-14a; *see also Opinion and Order* at 6, *New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. Jan. 31, 2012), Doc. No. 145. The Seventh Circuit affirmed the reasoning of the District Court when it stated that under *Parklane*, "when issues arise in separate trials, there is no constitutional problem with using the first trial's outcome to resolve the second, even if the first trial was to a judge." 3a-4a (citing *Parklane*, 439 U.S. at 333-37). But *Beacon* set forth the rule for dealing with causes or claims before one Judge and contemplated the sequencing of trials of those causes, even though contained in one suit. In *Parklane* one Judge never controlled the two cases, and the imperative circumstances of the Congressional mandate to try an SEC enforcement action promptly and to the court permitted the extinction of a jury right on legal claims in a wholly separate case. Both the Seventh Circuit and District Court ignored the significance of all claims, legal and equitable, being before one Judge at the same time. All the claims were present before one Judge

in *Beacon*, as they are here. And neither the Seventh Circuit nor the District Court cited any "imperative circumstances" in this case.

Beacon and *Parklane* do not limit themselves to whether one case or two, they focus on judicial control over all claims and the presence of imperative circumstances. *Beacon Theatres* holds:

> If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, *that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.* As this Court said in *Scott v. Neely*, 140 U.S. 106, 109—110, 11 S.Ct. 712, 714, 35 L.Ed. 358: 'In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.' This long-standing principle of equity dictates that *only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules*

> *we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.*

Beacon, 359 U.S. at 510–11 (emphasis added). *Beacon* mandates: (1) when a Judge has the discretion to preserve a party's Seventh Amendment jury right that Judge must use that discretion to preserve the jury right, and (2) only in the presence of imperative circumstances can a party be collaterally estopped from litigating legal claims to a jury based on a prior determination of equitable claims to the bench. *See Id.*

The *Parklane* SEC suit, based on a Congressional mandate to proceed promptly and without a jury right, was necessarily separate from the private class action legal claims of the shareholders. *See Parklane*, 439 U.S. 322. Pending before separate Judges, the equitable SEC action in *Parklane* was tried well prior to the legal shareholder class action. *Id.* Furthermore, in *Parklane*, neither Judge had any discretion over the sequence of all of the claims. *See Parklane*, 439 U.S. at 334. And the Parklane defendant itself never even protected its jury right on its defenses in the legal case until after the SEC case was concluded.

> [A]lthough [Parklane] were fully aware of the pendency of the present suit throughout the non-jury trial of the SEC case, they made no effort to protect their right to a jury trial of the damage claims asserted by plaintiffs, either by seeking to expedite trial of the present action or by requesting Judge Duffy, in the exercise of his discretion pursuant to Rule 39(b), (c), F.R.Civ.P., to order that the issues in the SEC case be tried by a jury or before an advisory jury.

Shore v. Parklane Hosiery Co., Inc., 565 F.2d 815, 821–22 (2d Cir. 1977), *aff'd*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

Here, unlike in *Parklane,* both the FHA Action and Condemnation Action were throughout their lives before a single District Court Judge and Petitioners repeatedly demanded that the FHA Action proceed first, that the FHA Affirmative Defenses be tried to a jury, or that the FHA and Condemnation Actions be consolidated with a jury deciding the FHA Claims. When the Condemnation Action was removed to Federal court Judge Norgle specifically requested "that the Executive Committee order [the Condemnation Action] be reassigned to my calendar as a related case." *Order of the Executive Committee*, *City of Joliet v. Mid-City Nat'l Bank of Chicago, et al.*, 05 CV 6746 (N.D. Ill. Dec. 12, 2005), Doc. No. 7. Judge Norgle by his action had discretion to control the sequence of trial on the equitable and legal claims. When one Judge has control over all "causes" its "discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *See Beacon*, 359 U.S. at 510. The assignment of the Condemnation Action to the same Judge overseeing the FHA Action eliminated one of the factors that distinguished *Parklane* from *Beacon Theatres.*

While *Parklane* involved an SEC action based on a Congressional mandate, this case involves a municipal ordinance for condemnation under Illinois law. The Congressional mandate underpinning the SEC action in *Parklane* provided imperative circumstances to permit a jury trial of the legal issues to be lost through prior determination of equitable claims. Here the mandate is a Constitutional one that civil rights cases be tried to

a jury. *See Curtis v. Loether*, 415 U.S. 189, 192 (1974); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999). While acknowledging Illinois condemnation law and the Seventh Circuit's directive to try the Condemnation Action first, neither the Seventh Circuit nor the District Court suggested that either the state law or the directive rose to the level of the imperative circumstances present in *Parklane*. *See* 1a-14a. *Dairy Queen* reaffirmed the mandate of *Beacon* regarding imperative circumstances when it held:

> [I]n a case such as this where there cannot even be a contention of such 'imperative circumstances,' *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury.

Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473 (1962).

The District Court and Seventh Circuit's complete focus on the issue of "single action" and disregard of (1) the pendency of all causes, claims or issues before one Judge throughout, and (2) the imperative circumstances requirement of *Beacon*, resulted in the unconstitutional denial of Petitioners' Seventh Amendment jury right. Nowhere in the decisions of the District Court or Seventh Circuit are imperative circumstances even mentioned. Nor does either court acknowledge the importance of Judge Norgle's complete control over the FHA Action and Condemnation Action throughout.

II. New West Did Not Waive Its Seventh Amendment Right To A Jury Trial In The FHA Action By Asserting The FHA Claims As Affirmative Defenses To The Condemnation Action.

In a last ditch effort to preserve the District Court's decision and to avoid the Constitutional issues present, the Seventh Circuit held, *sua sponte*, that Petitioners waived their Seventh Amendment right to a jury trial on the FHA Claims in the FHA Action as a matter of law because they raised the FHA Claims as affirmative defenses to the Condemnation Action.[5] *See* 4a-5a. The Seventh Circuit stated: "New West was free to reserve the FHA claim for this suit, where it would have been entitled to a jury trial. Its FHA claim was resolved in a bench trial only because New West insisted on presenting it there." 5a.

The Seventh Circuit treated the FHA Affirmative Defenses as optional; that conclusion was wrong. *See Id.* Under Seventh Circuit precedent, decided by a panel including Judge Easterbrook, the affirmative defense that

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5. It is noteworthy that despite being before the Seventh Circuit on multiple occasions that this was the first and only time in which the Seventh Circuit raised the issue of waiver. If, as Judge Easterbrook contends, New West waived its right to a jury trial upon raising the FHA Claims as affirmative defenses, the Seventh Circuit could have found waiver in denying mandamus in 2012 or in denying New West's appeal of the District Court's holding in the Condemnation Action in 2016. *See Order, New West, et al. v. City of Joliet, et al.*, 05 CV 1743, (N.D. Ill. March 27, 2012), Doc. No. 149.; *see City of Joliet, Illinois v. New West, L.P.*, 825 F.3d 827 (7th Cir. 2016). Instead, without Joliet asserting waiver, the Seventh Circuit *sua sponte* found waiver as a basis to abrogate New West's Seventh Amendment jury right.

a condemnation action is unconstitutional must be raised in the condemnation action or else it is waived. *See Garry v. Geils*, 82 F.3d 1362, 1368 (7th Cir. 1996).

In *Garry* the Village of Bensenville brought a condemnation action against property owned by Garry. Following the granting of condemnation Garry brought a § 1983 action against the Village alleging that the condemnation was unconstitutional as political retaliation. Garry's action was dismissed on res judicata grounds. The Seventh Circuit affirmed, holding:

> the power of eminent domain is not being properly exercised if it is being unconstitutionally exercised, as plaintiffs allege. If the plaintiffs desired to challenge the condemnation action against them as unconstitutional, they should have done so through the Illinois condemnation process, and ultimately to the United States Supreme Court if necessary.

Id. at 1368.

Under *Garry,* New West was required to challenge the constitutionality of the Condemnation Action through its FHA Affirmative Defenses or waive the FHA Claims in their first-filed FHA Action. *See Id*. The District Court itself acknowledged the necessity of raising FHA Claims as affirmative defenses to rebut Joliet's purported public purpose in the Condemnation Action, stating:

> Defendants have pled that Joliet is using its municipal authority to pursue condemnation for the express purpose of denying African-

> Americans their right to housing in Joliet. If proven at trial, this is a defense to Joliet's assertion that it has a legitimate public purpose.

Opinion and Order at 6, *City of Joliet v. Mid-City Nat'l Bank of Chicago, et al.*, 05 CV 6746 (N.D. Ill. June 28, 2012), Doc. No. 369. The District Court further stated:

> given that the 'federal civil rights challenges to condemnation actions should be resolved in the condemnation action itself,' disparate impact, as defined in *Arlington Heights II*, is a proper theory for establishing an FHA violation and, therefore, a prima facie affirmative defense to Joliet's condemnation action.

Id. at 11 (quoting *New West*, 2012 WL 384574, at *7).

Federal courts have consistently held that affirmative defenses must be raised or they are waived. *See Gen. Teamsters, Chauffeurs, Helpers & Warehousemen Union of Am. v. Lawrence-Mercer County Builders Ass'n*, 88 F.R.D. 644, 647 (W.D. Pa. 1980) ("Plaintiff's omission of an 8(c) defense, however, can be analogized to the failure to raise a compulsory counterclaim as provided for by Fed. R. Civ. P. 13(a)…Both [Rules 8(c) and 13(a)] provide for a waiver in the event that an affirmative defense or a compulsory counterclaim is not raised.").

New West had no choice other than to raise its FHA Claims as affirmative defenses in the Condemnation Action or waive them in the FHA Action. *See Garry v. Geils*, 82 F.3d 1362, 1368 (7th Cir. 1996). If the mandate of *Beacon* had been followed the issue of waiver would never even have arisen.

CONCLUSION

None of the reasons provided by the Seventh Circuit justify their affirmance of the District Court's decision. Judge Easterbrook's reasoning ignores the fundamental mandate of *Beacon Theatres* that the discretion to deprive a party of a jury trial "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon*, 359 U.S. at 510. "[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon*, 359 U.S. at 510-11.

The Seventh Circuit's affirmance of the District Court constitutes a rejection of *Beacon Theatres*' mandate that discretion be used to preserve the Seventh Amendment jury right and an extension of *Parklane* to the point that Justice Rehnquist specifically warned about in his dissent in *Parklane*.

> [T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land.

Parklane, 439 U.S. at 350 (Rehnquist, J., dissenting) (quoting *Dimick v. Schiedt*, 293 U.S. at 485 (1935)). The decisions of the District Court and Seventh Circuit have extended *Parklane* beyond the circumstances of that case.

However inconvenient, Petitioners are entitled to a jury trial on their FHA Claims. As this Court stated in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990):

> Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights. The relitigation of factual issues before a jury is no more "needless" in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal, see, *e.g.*, *Dairy Queen, Inc., v. Wood*, 369 U.S. 469 (1962), or that resolution of an equitable claim can precede resolution of a legal claim, see, *e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

For the foregoing reasons, we respectfully submit that this Petition for a Writ of Certiorari should be granted so that the Court may consider the important and Constitutional issues raised by this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MAY 23, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-2865

NEW WEST, L.P., AND NEW BLUFF, L.P.,

Plaintiffs-Appellants,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,

Defendants-Appellees.

May 15, 2018, Argued
May 23, 2018, Decided

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 05 C 1743 **Charles R. Norgle**, *Judge.*

Before EASTERBROOK, SYKES, and BARRETT, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* This is the fourth published appellate opinion in a long-running dispute between New West and the City of Joliet. New West filed this suit in March 2005, contending that the City had interfered with the way in which it set rents at the

Evergreen Terrace apartment complex under the national government's mark-to-market program for rates at subsidized apartments. New West also contended that the City was violating the Fair Housing Act (FHA), 42 U.S.C. §§ 3601-31, and many other rules of state and federal law. Our first decision held that these claims belong to New West, not its renters (as the district court had held). 491 F.3d 717 (7th Cir. 2007).

In October 2005 the City filed an eminent-domain suit in state court, proposing to acquire the complex, raze it, and add the land to an existing public park. New West removed the action to federal court, where the Department of Housing and Urban Development joined it in contending that a recipient of federal financing is immune from the power of eminent domain. Our second decision rejected that contention and directed the district court to resolve the condemnation proceeding with dispatch. 562 F.3d 830 (7th Cir. 2009).

More than three years later, the condemnation trial began. It ran 100 trial days over 18 calendar months. The judge found that Joliet is entitled to take ownership of the apartment complex; a jury then set the amount of just compensation at about $15 million. Our third decision affirmed the final judgment. 825 F.3d 827 (7th Cir. 2016). The trial lasted so long in large part because New West contended that condemnation would violate the Fair Housing Act. (New West relied on 42 U.S.C. §§ 1982 and 1983 in addition to the FHA; we refer to its theories collectively as the FHA claim.) We held that New West had not shown a violation. *Id.* at 829-30. New

West predicted that the judge would use the result of the condemnation suit to block its pending suit against the City, thus violating the Seventh Amendment by depriving it of a jury trial. We replied that this contention was unripe and should be presented later if New West's prediction proved to be true. *Id.* at 830-31.

It did prove to be true. The district judge dismissed New West's suit as barred by the preclusive effect of the final decision in the City's condemnation action. New West then took this appeal. It concedes that ordinary principles of issue preclusion (collateral estoppel) prevent relitigation of the FHA claim. But New West contends that, under *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962), and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), the Constitution entitles it to a new trial anyway, lest the judgment in a bench trial displace the jury's constitutional role.

The problem with New West's argument is that *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979), held that *Dairy Queen* and *Beacon Theatres* are not constitutional decisions. They instead concern the exercise of discretion to determine the order in which the issues presented in a single suit are resolved. Judges usually ought to put jury-trial issues ahead of bench-trial issues because that order is most respectful of constitutional interests, not because the Constitution commands that order. And it follows, *Parklane* adds, that when issues arise in separate trials, there is no constitutional problem with using the first

trial's outcome to resolve the second, even if the first trial was to a judge. 439 U.S. at 333-37, 99 S. Ct. 645.

Parklane entailed nonmutual preclusion: even though not a party to the first suit, the plaintiff in the second claimed its benefit. A majority of the Court concluded that offensive nonmutual issue preclusion is both proper as a maler of common-law development and consistent with the Constitution. *Id.* at 326-33, 99 S. Ct. 645. Nonmutual preclusion is not at issue in the dispute between New West and Joliet, making this case easier than *Parklane*.

New West does not deny that *Parklane* would be dispositive if the condemnation suit had been resolved by a state court. If the suits had been in two judicial systems, they could not have been coordinated. But because both suits ended up in federal court, and before the same judge, New West believes that the judge should have put the condemnation action on hold while setting its FHA suit for a jury trial.

The district court did not have that discretion. We directed it to resolve the condemnation suit first, because the City professed concern about ongoing crime and deterioration at the apartment complex. The FHA suit could be deferred because it deals only with how accounts are settled among the adversaries—and if New West prevailed in the condemnation action it probably would not be necessary to resolve the FHA claim at all.

New West's current problem is of its own making. It concedes that the FHA was not a compulsory counterclaim

in the condemnation suit. New West's lawyer asserted at oral argument that it presented the FHA arguments as defenses to the City's suit because it was afraid that, otherwise, the judge would have deemed them forfeited or waived. That's inconceivable. This suit began six months before the condemnation action; nothing in it has been forfeited or waived. When New West imported its FHA claim into the condemnation action, Joliet protested, asking the judge to rule that the FHA has no place in an eminent-domain action. Joliet thus waived any argument that the FHA theories had to be presented as defenses in the City's suit. New West was free to reserve the FHA claim for this suit, where it would have been entitled to a jury trial. Its FHA claim was resolved in a bench trial only because New West insisted on presenting it there.

The condemnation action could have been resolved speedily by leaving the FHA claim to this suit. Once we held in 2009 that federal financing did not block the use of state and local eminent-domain powers, the condemnation claim could have gone to trial with a simple question: Was the taking for a public purpose? Then the FHA claim could have been resolved, by a jury, in this suit. But New West wanted the FHA to be treated as a defense to condemnation, and the district court acquiesced. New West's own choice is responsible for the fact that a judge rather than a jury brought the FHA claim to a conclusion.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED AUGUST 14, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 05 CV 1743

NEW WEST, *et al.*,

Plaintiffs,

v.

CITY OF JOLIET, *et al.*,

Defendants.

Honorable Charles R. Norgle

ORDER

Plaintiffs' Motion for Lift and Removal of Stay, to Modify the Scheduling Order and/or Set Trial Date, and for Stay of Related Litigation [170] is granted in part and denied in part. Defendants' Motion to Dismiss for Collateral Estoppel [175] is granted.

STATEMENT

Plaintiffs New West ("New West") and New Bluff, L.P. ("New Bluff") (collectively, "Plaintiffs") bring this

action against Defendants City of Joliet ("Joliet"), Thomas Giarrante, John M. Mezera, Arthur Schultz, Jim Shapard, Thomas Thanas (collectively, "Defendants"). Plaintiffs' Second Amended Complaint ("Complaint") contains five-counts, alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("FHA"); the Civil Rights Act, 42 U.S.C. §§ 1982-1983 ("Sections 1982, 1983); the Supremacy Clause, U.S. Const. art. VI, cl. 2; and the Due Process Clause, U.S. Const. amend. V. Before the Court is Plaintiffs' Motion for Lift and Removal of Stay, to Modify the Scheduling Order and/or Set Trial Date, and for Stay of Related Litigation. Also before the Court is Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, Defendants' Motion is granted and Plaintiffs' Motion is granted in part and denied in part.

The instant action (the "FHA Action") is based on alleged contract interference and civil rights violations arising out of the Joliet's condemnation of the Evergreen Terrace properties ("Evergreen Terrace"), owned by Plaintiffs at the time of condemnation. On January 30, 2012, the Action was stayed pending the resolution of a related case, *New West, et al. v. City of Joliet*, Case No. 05-CV-6746 (the "Eminent Domain Action"). In that case, the Joliet brought suit against New West/New Bluff to condemn Evergreen Terrace. After seven years of litigation, including appeals to the Seventh Circuit and an unsuccessful petition for writ of certiorari before the United States Supreme Court, the Eminent Domain Action proceeded to bench trial on September 27, 2012.

Appendix B

The bench trial for the Eminent Domain Action lasted approximately one hundred days and concluded on May 21, 2014. On September 17, 2014, the Court issued an Opinion and Order ruling in favor of the Joliet on all of its claims and against New West/New Bluff on all of their claims and defenses. *See New West, et al.*, Case No. 05-CV-6746, Dkt. 911. The Eminent Domain Action proceeded to a jury trial for the valuation of Evergreen Terrace, and the jury awarded New West/New Bluff $15,077,406 in compensation. *Id*. Dkt. 932.

New West appealed from judgments in both phases of the Eminent Domain Action and all prior interlocutory orders to the Seventh Circuit. Case No. 05-CV-6746, Dkt. 959. On June 17, 2016, the Seventh Circuit affirmed the Court's judgment in the Eminent Domain Action. *City of Joliet, Illinois v. New W., L.P.*, 825 F.3d 827 (7th Cir. 2016). On November 28, 2016, New West's petition for writ of certiorari before the United States Supreme Court was denied. *Mid-City Nat. Bank of Chicago v. City of Joliet, Ill.*, 137 S. Ct. 518 (2016).

Plaintiffs now seek to lift and remove the stay in the FHA Action, arguing that the Eminent Domain Action has been decided and therefore the stay is no longer needed. Plaintiffs further seek to modify the scheduling order pursuant to Rule 16(b)(4) and stay the enforcement of the Eminent Domain Action pending the outcome of the FHA Action. Defendants agree that the stay should be lifted, but argue that the FHA Action should be dismissed under Rule 12(b)(6), pursuant to the doctrine of collateral estoppel. The Court concludes that the stay

should be removed because the Eminent Domain Action has come to a close. The remainder of Plaintiffs' Motion, however, depends on the survival of of the FHA Action. Therefore, the Court will first address Defendants' Motion to Dismiss.

"Although a party need not plead 'detailed factual allegations' to survive a motion to dismiss [under Rule 12(b)(6)], mere 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Instead, [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). Complaints that fail to state a plausible basis for relief must be dismissed. *Moore v. Mahone*, 652 F.3d 722, 725 (7th Cir. 2011).

As an initial matter, the Court must consider whether Defendants' Motion to Dismiss pursuant to the doctrine of collateral estoppel is properly brought under Rule 12(b)(6). Plaintiffs argue that dismissal would be improper under Rule 12(b)(6) because a plaintiff's complaint need not anticipate affirmative defenses, including collateral estoppel. Plaintiffs further argue that collateral estoppel requires the Court to consider matters outside of the complaint, and therefore a motion raising this defense must be treated as one for summary judgment.

Appendix B

Collateral estoppel is an affirmative defense. Fed. R. Civ. P. 8(c). "[W]hen an affirmative defense is disclosed in the complaint, it provides a proper basis for a Rule 12(b)(6) motion." *Muhammad v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008). An affirmative defense is "disclosed in the complaint where (1) the facts that establish the defense are definitely ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice; and (2) those facts conclusively establish the defense." *Novickas v. Proviso Twp. High Sch. 209*, No. 09-CV-3982, 2010 WL 3515793, at *2 (N.D. Ill. Aug. 31, 2010); *see Geinosky v. City of Chicago*, 675 F.3d 743, 745 (7th Cir. 2012) ("[a] motion under Rule 12(b)(6) can be based only on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice"); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1080 (7th Cir. 1997) ("a district court [may] take judicial notice of matters of public record without converting a motion for failure to state a claim into a motion for summary judgment"). Court records are generally subject to proper judicial notice. *See Gen. Elec.*, 128 F.3d at 1081 ("[l]ike other court records, judicial approval of a class action settlement is an appropriate subject for judicial notice"); *see also Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996) (recognizing that proceedings in other courts, both inside and outside the federal system, may be judicially noticed).

In the instant case, all of the facts relevant to Defendants' collateral estoppel defense are ascertainable

from Plaintiffs' Complaint and judicially noticeable records from the Eminent Domain Action. Compl. ¶¶ 79-103; Case No. 05-CV-6746, Dkt. 911. Further, Plaintiffs fail to identify any issues in the FHA Action that were not decided in the Eminent Domain Action. *See Cook Cty. v. MidCon Corp.*, 773 F.2d 892, 904 (7th Cir. 1985) (affirming dismissal under Rule 12(b)(6) based on collateral estoppel when no dispute existed regarding resolution of issues in prior action). Therefore, Defendants' Motion to Dismiss for collateral estoppel is properly brought under Rule 12(b)(6).

Next, the Court must consider whether Plaintiffs' Complaint should be dismissed pursuant to the doctrine of collateral estoppel. "[C]ollateral estoppel precludes relitigation of issues in a subsequent proceeding when (1) the party against whom the estoppel is asserted was a party to the prior adjudication, (2) the issues which form the basis of the estoppel were actually litigated and decided on the merits in the prior suit, (3) the resolution of the particular issues was necessary to the court's judgment, and (4) those issues are identical to issues raised in the subsequent suit." *Farmer v. Lane*, 864 F.2d 473, 477 (7th Cir. 1988).

In the instant case, the first element of collateral estoppel is clearly satisfied, as Plaintiffs were defendants in the Eminent Domain Action. Plaintiffs raised the following issues as defenses in the Eminent Domain Action: the Supremacy Clause of the United States Constitution preempts Joliet's authority to condemn Evergreen Terrace; Joliet had no good faith or public purpose for the condemnation; Joliet's condemnation of

Evergreen Terrace was discriminatory and violated the FHA; and Joliet improperly interfered with the Housing of Urban Development's ("HUD") "mark-to-market" restructuring of Evergreen Terrace. *New West, et al.*, Case No. 05-CV-6746, Dkt. 274. All of these issues were actually litigated and decided on the merits during the course of the Eminent Domain Action.

Specifically, following the bench trial in the Eminent Domain Action, the Court ruled that Joliet had a valid public purpose and took Evergreen Terrace for a public use; Joliet negotiated in good faith for the sale of Evergreen Terrace prior to filing the Eminent Domain Action; Joliet properly exercised its eminent domain rights in accordance with Illinois law; Joliet's condemnation of Evergreen Terrace was not discriminatory or a violation of the FHA; Joliet did not have the power to "block" restructuring of Evergreen Terrace by HUD; and that Joliet did not engage in discrimination which interfered with HUD's restructuring of Evergreen Terrace. *See New West, et al.*, Case No. 05-CV-6746, Dkt. 911. Further, in *City of Joliet, Ill v. New W., L.P.*, 562 F.3d 830, 838 (7th Cir. 2009), the Seventh Circuit affirmed the Court's decision that the Supremacy Clause does not preempt Joliet's condemnation of Evergreen Terrace. The aforementioned issues were necessary to the Court's judgment in the Eminent Domain Action, as the issues were raised by Plaintiffs as defenses against Joliet's right condemn Evergreen Terrace.

Now, in the instant case, Plaintiffs attempt to relitigate the same issues that the Court decided in the Eminent

Domain Action. Counts I-III of Plaintiffs' Complaint assert that Defendants violated the FHA and Sections 1982-1983 by "intentionally and willfully" discriminating against residents of Evergreen Terrace and by seeking to "drive them out of Joliet."Compl. ¶¶ 79, 86, 90. Count II alleges that discrimination by Joliet "impaired Plaintiffs' ability to enter into contracts with HUD." *Id.* at ¶ 86. Count IV alleges that Joliet violated the Supremacy Clause in filing the Eminent Domain Action, and therefore that action was barred by the United States Constitution. *Id.* at ¶¶ 95-99. Count V alleges that Defendants violated Section 1983 and the Due Process Clause of the Fifth Amendment because Joliet's condemnation of Evergreen Terrace was not for a "public use" or done "in good faith," or otherwise violated Illinois law. *Id.* at 101-103. Thus, the allegations in Plaintiffs' Complaint are identical to the issues raised and decided by the Court in the Eminent Domain Action.

Plaintiffs do not contest that the FHA Action raises issues that were decided in the Eminent Domain Action. Plaintiffs do argue, however, that the FHA Action was filed before the Eminent Domain Action, and therefore the FHA Action is not a "subsequent suit" for the purposes of collateral estoppel. The Court rejects Plaintiffs' argument. Plaintiffs fail to cite any controlling authority providing that a later filed suit does not have a preclusive effect for the purposes of collateral estoppel.

Plaintiffs further argue that the preclusion of Plaintiffs' legal claims in the FHA Action based on the Court's equitable determination in the Eminent Domain Action would deprive Plaintiffs of their Seventh

Amendment right to a jury trial. The Court rejects Plaintiffs' argument, consistent with *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335-36 (1979) and the Court's January 31, 2012 Opinion and Order in the FHA Action. In *Parklane Hosiery*, the Supreme Court held that "an equitable determination can have collateral-estoppel effect in a subsequent legal action and that this estoppel does not violate the Seventh Amendment." *Parklane Hosiery* 439 U.S. at 335. The Supreme Court explained that an adverse factual adjudication in a bench trial may preclude the same issues in a subsequent legal action where "there is no further fact finding function for the jury to perform, since the common factual issues have been resolved in the previous action." *Id.* at 336. Accordingly, the Court's application of collateral estoppel in this case does not deprive Plaintiffs of their Seventh Amendment right to a jury trial.

For the foregoing reasons, Defendants' Motion to Dismiss is granted. Plaintiffs' Motion is granted in part, for lift and removal of the stay in the FHA Action. The remainder of Plaintiffs' Motion is denied, in light of the Court granting Defendants' Motion to Dismiss.

IT IS SO ORDERED.

ENTER:

/s/_____
CHARLES RONALD NORGLE, Judge
United States District Court

DATE: August 14, 2017

APPENDIX C — STATUTORY PROVISIONS INVOLVED

The Fair Housing Act, 42 U.S.C. § 3604, provides, in relevant 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 –
>
> > (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.

42 U.S.C. § 3604(a).

Appendix C

The Fair Housing Act, 42 U.S.C. § 3605, provides, in relevant part:

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

42 U.S.C. § 3605(a).

Appendix C

The Fair Housing Act, 42 U.S.C. § 3613, provides:

(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

Appendix C

> 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.

42 U.S.C. § 3613

Appendix C

The Fair Housing Act, 42 U.S.C. § 3617, provides, in relevant part:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section … 3604 … of this title. This section may be enforced by appropriate civil action.

42 U.S.C. § 3617.

Appendix C

The Civil Rights Act, 42 U.S.C. § 1982, provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

Appendix C

The Civil Rights Act, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.