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Brief of Appellants in Support of Reversal of District Court Decision in Favor of Defendants' Motion for Summary Judgment, Bloch v. Frischholz, Docket No. 06-3376, 533 F.3d 562, 587 F.3d 771 (Seventh Circuit Court of Appeals 2009)

F. Willis Caruso
John Marshall Law School, 6caruso@jmls.edu

John Marshall Law School Fair Housing Legal Clinic

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No. 06-3376

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Lynne Bloch, Helen Bloch, and
Nathan Bloch,

Plaintiffs-Appellants,

v.

Edward Frischholz, and
Shoreline Towers Condominium
Association, an Illinois not-for-profit
Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Case No. 05-C-5379
The Honorable Judge George Lindberg

BRIEF OF APPELLANTS IN SUPPORT OF REVERSAL OF DISTRICT COURT DECISION IN FAVOR OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

F. Willis Caruso
James C. Whiteside
Tara M. Alhofen
Attorneys for Plaintiffs
Jeanne S. Goslin
Aaron S. Rosenblatt
Senior Law Students
The John Marshall Law School
Fair Housing Legal Clinic
28 E. Jackson Blvd., Suite 500
Chicago, Illinois 60604
(312) 786-2267

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Appellate Court No: 06-3376

Short Caption: Bloch, et al. v. Frischholz and Shoreline Towers

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Lynne Bloch, Helen Bloch, Nathan Bloch

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The John Marshall Law School Fair Housing Legal Clinic

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: _____ Date: _____

Attorney's Printed Name: James C. Whiteside, The John Marshall Law School Fair Housing Legal Clinic

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** x **No** _____

Address: 28 E. Jackson Blvd., Suite 500, Chicago, Illinois 60657

Phone Number: 312-786-2267 Fax Number: 312-786-1047

E-Mail Address: 6whiteside@jmls.edu

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JURISDICTIONAL STATEMENT

The action from which this appeal is taken was filed September 16, 2005 in the United States District Court for the Northern District of Illinois. R. 1. Plaintiffs complained against Defendants, Edward Frischholz and Shoreline Towers Condominium Association (collectively, "Defendants"), for violations of Sections 3604(a), 3604(b), and 3617 of the federal Fair Housing Act, 42 U.S.C. 3601, et seq., violations of the federal civil rights statute 42 U.S.C. § 1982, and violations of the Illinois Condominium Property Act, 765 ILCS 605/18. R. 32. Jurisdiction was conferred on the District Court by Article 3, Section 2, Clause 1, United State Constitution; and under 28 U.S.C. §§ 1331, 1343(a), 1367(a) and 2201, and 42 U.S.C. § 3613(a). R. 32.

This is an appeal of the final judgment of August 7, 2006 and entered August 24, 2006 by the Honorable Judge George W. Lindberg. R. 192. Plaintiffs Lynne Bloch, Helen Bloch, and Nathan Bloch, filed its Notice of Appeal on September 1, 2006. R. 194. This Court has jurisdiction of this appeal under 28 U.S.C §§ 1291 and 1294, as an appeal of a final decision of the District Court.

STATEMENT OF ISSUES

1. Did the District Court err in granting summary judgment when there were disputed issues of material fact to be decided?
2. Under the facts of this case, did the District Court err in granting summary judgment on Section 3604 by applying Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328-29 (7th Cir. 2004) to the disputed facts of this case?
3. Did the District Court err in granting summary judgment on Section 3604 by applying Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328-29

(7th Cir. 2004) to determine that Section 3604 does not cover post-acquisition discrimination?

4. Did the District Court err in finding no issues of material fact as to whether Defendants conduct towards the Blochs and Jewish residents and their application and enforcement of the Shoreline Towers "Hallway Rule" demonstrated intentional discrimination or a disparate impact under 42 U.S.C. § 3617?

5. Did the District Court err in finding no issues of material fact as to whether Defendants conduct towards the Blochs and Jewish residents and their application and enforcement of the Shoreline Towers "Hallway Rule" demonstrated intentional discrimination under 42 U.S.C. § 1982?

STATEMENT OF THE CASE

On September 16, 2005, Plaintiffs Lynne Bloch, Helen Bloch, and Nathan Bloch (collectively referred to herein as "Plaintiffs" or the "Blochs") filed their original Complaint against Defendants' Edward Frischholz ("Frischholz") and Shoreline Towers Condominium Association ("Shoreline Towers" or the "Association") (Frischholz, the Association, and the Association's Board are sometimes collectively referred to herein as "Defendants"). R. 1.[1] On September 22, 2005, the parties appeared before the Honorable Judge Morton Denlow on the Blochs' Motion for a Temporary Restraining Order ("TRO"). (R. 18) On Judge Denlow's recommendation, the parties drafted an interim hallway rule permitting religious symbols, including mezuzot, to be displayed by unit owners on their exterior doors or doorposts while this

[1] Cites to the Record have the following key: R – Record Docket Number; exh.- Exhibit; p.- Page; para. - Paragraph. Therefore "170, exh. 7, p. 3" would be Docket Number 170, Exhibit 7, page 3. Some exhibits are contained as one (1) docket number, such as "170-2." As such, some cites are clearer if the cite is referenced under its collective page number, for example "170-2, exh. 1, p. 5" would be Docket Number 170-2, Exhibit 1 (of Docket Number 170), Page 5 of Docket Number 170-2. Also, "R. 1, 2, 3, 4" would be Docket Number 1, Docket Number 2, ect.; and "para. 1, 3-4" would be paragraphs 1, 3, and 4 of a specific Docket Number.

litigation is pending. (R. 199; R. 19, exh. A) The interim hallway rule was approved, and subsequently ratified, by the Board. The Blochs' Motion for a TRO was withdrawn on November 3, 2005. R. 29.

On November 16, 2005, Plaintiffs filed an Amended Complaint (R. 30), which they subsequently amended on December 1, 2005. R. 32. The eight-count Second Amended Complaint against Defendants' Frischholz and Shoreline Towers alleged Defendants' violated 1) 42 U.S.C. §3604; 2) 42 U.S.C. §3617; 3) 42 U.S.C. §1982; 4) Illinois Condominium Act §18.4; and 5) fiduciary duties pursuant to 765 ILCS 605/18.4. Id.

On December 7, 2005, the case was reassigned to the Honorable Judge George W. Lindberg based on relatedness to Debra Gassman v. Shoreline Towers Condominium Association, Case No. 05 C 5377 (and presently Appeal No. 07-2213). R. 34.

Defendants filed their Motion for Summary Judgment against all Plaintiffs and a Motion for Judgment on the Pleadings against Plaintiff Helen Bloch on June 14, 2006. R. 109, 111. On June 30, 2006, Plaintiffs filed their Response to Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings. R.129, 130, 132, 134, 135, 136, 137, 140. Defendants filed their Reply and a Motion to Strike Plaintiffs' Responses to Defendants' Statement of Facts and a Response to Plaintiffs' Statement of Facts that Show Defendants are Not Entitled to Summary Judgment and Judgment on the Pleadings on July 10, 2006. R. 143, 145, 147.

Defendants raised new arguments in their Reply; therefore Plaintiffs were granted leave to file a Surreply, which was filed on July 24, 2006. R. 168. Also on July 24, Plaintiffs filed an Amended 56.1 Statement of Facts. R. 170. On August 7, 2006, the District Court granted in part and denied in part, the Defendants' Motion to Strike Plaintiffs' Responses to Defendants' Amended Statement of Facts. R. 184. That same day, the District Court entered an Order

granting Defendants' Motion for Summary Judgment as to Counts I through VI of Plaintiffs' Second Amended Complaint, and the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims in Counts VII and VIII. R. 186. On August 24, 2006 and August 30, 2006, the Court entered a final judgment dismissing the lawsuit without prejudice. R. 192, 193.

STATEMENT OF THE FACTS

I. The Blochs

The Blochs are Jewish and reside in Units 12R, 12K, and 12L at Shoreline Towers, a condominium high rise building located at 6301 North Sheridan Road, Chicago Illinois 60660. R. 10, p. 1. Lynne Bloch ("Lynne") is the mother of Plaintiffs Helen Bloch ("Helen") and Nathan Bloch ("Nathan"). Id. Helen has maintained two residences since her marriage, one of which is at Shoreline Towers with her mother, Lynne, and her brother, Nathan. R. 170-2, p. 3. In addition, Helen is an owner of Unit 12R. R. 170-2, p. 2. Nathan is Lynne's son and a resident of Shoreline Towers. Id.

II. The Blochs' Mezuzah

The Blochs are observant Jews who adhere to the commandments, or "mitzvahs" of the Jewish religion mandated by the Torah. R. 140, exh. 11, p. 2. One such mitzvah mandates that Jews affix a mezuzah[2] to each exterior doorpost of their home. R. 8, p. 1-2. Jews touch the mezuzah and kiss their fingers while entering the home. R. 140, exh. 9, p. 2. The Blochs have done so during the entire period of their residency at Shoreline Towers, which is in excess of thirty (30) years, until prohibited to do so by the Defendants. R. 14, exh. 4.

[2] A Mezuzah (or the plural mezuzot) is a small case, sometimes decoratively embossed, that contains a holy scroll reciting chapters from the Torah. The rules for its display are intricate, but generally the Mezuzah is placed on the right side of the doorpost as one enters, and faces the opposite doorframe. R. 170-2, exh. 7.

III. Shoreline Towers Condominium Association

Defendant Association is the condominium association for Shoreline Towers located at 6301 N. Sheridan Road, Chicago, Illinois. R. 32, p.2, para. 8. Defendant Frischholz is an owner and resident of Shoreline Towers and serves as President of the Condominium Association Board of Directors (the "Board"), a position he has held at all times relevant to this lawsuit. R. 32, p. 2, para. 7.

Lynne has served on the Board for over fifteen (15) years. R. 140, exh. 3, p. 1. During her tenure on the Board, Lynne served on many committees, one (1) of which was a rules and regulations committee. R. 140, exh. 5, p. 3. In 2001, the rules and regulations committee sent the residents a revised set of rules which were subsequently approved by Shoreline Towers' residents and ratified by the Board in September, 2001. R. 140, exh. 1, p. 3. The rule at issue in this case prohibits owners and residents from placing "…mats, boots, shoes, carts, or objects of any sort outside unit entrance doors." (the "Hallway Rule"). R. 49, p. 82. Up until the spring of 2004, mezuzot were affixed to the exterior doorposts of unit entrances and undisturbed by the Board, the Association, and building management. R. 140, exh. 6, p. 6.

IV. The Hallway Rule Dispute

On or about May 2004, Defendants began renovating the Shoreline Towers' hallways, which included the re-painting of the walls and doors. R. 10, p. 2. Defendants instructed residents to remove all objects from their doors in preparation for the renovation. Id. The Blochs removed their mezuzot in compliance with this request. R. 52, p. 4-5; R. 170, exh. 8. After the hallway renovation was completed, the Blochs replaced their mezuzot on the exterior doorposts of their unit entrances. R. 52, p. 5. The Blochs did so because their mezuzot had gone undisturbed for over thirty (30) years. R. 178, p.4; R. 14, exh. 4, p. 3.

After the Blochs replaced their mezuzot on the exterior doorposts of their unit entrances, Defendants and/or building maintenance staff began to continuously remove and confiscate the mezuzot without notice to or permission from the Blochs. R. 52, p. 6. Defendants justified their actions by alleging they were merely enforcing the Hallway Rule. R. 52, p. 5. By enforcing the Hallway Rule in such a manner as to prohibit the display of religious articles, only Jewish residents displaying mezuzot, as mandated by their closely held religious beliefs, were affected. R. 14, exh. 4. Defendants received letters from Jewish authorities and organizations on the mezuzot requirement (R. 170-2, exh 7, 8, 9), including a letter stating "[a] Jew who is not permitted to affix mezuzohs… to all doorposts of his dwelling would therefore be required by Jewish Law not to live there." R. 170-2, exh 7, p. 3.

The Hallway Rule was never intended to cover, thought of as covering, nor understood to apply to religious articles such as mezuzot. R. 170-2, exh. 12, p. 3. Lynne was a member of the rules committee when the Hallway Rule was enacted. R. 111, exh. E, p. 52. It was never understood that the rule in which she voted on would be enforced in such a manner as to place her in violation of Jewish law, or be inconsistent with her closely held religious beliefs. R. 140, exh. 3, p. 4. In fact, the Hallway Rule was never enforced in the manner employed by Defendants after the hallway renovations, despite having been ratified three (3) years earlier in September, 2001. Id., R. 32, p. 3.

Between May 2004 and September 2005, Shoreline Towers' maintenance staff repeatedly confiscated the Blochs' mezuzot. R. 52, p. 4-5. At one point, the Blochs were informed by and/or on behalf of Defendants that if they put up their mezuzah again, the Blochs would be fined by the Board. R. 52, p. 7. During the time the Blochs were observing Shiva, a seven-day Jewish mourning period following the death of Dr. Marvin Bloch, Lynne's husband and Helen and

Nathan's father, the Blochs contacted the Board about their mezuzot. R. 10, p. 4. An attorney representing the Blochs wrote a letter to the Board requesting that the mezuzah be allowed to remain during the Shiva. R. 14, exh. 4, p. 17. Though Defendants dispute having agreed to refrain from interfering with the Blochs' mezuzah, such an agreement was referenced in the Blochs' attorney's letter to the Board. R. 14, exh. 4, p. 18. Defendants removed and confiscated the Blochs' mezuzot before the Blochs returned home from Dr. Bloch's funeral; this caused great embarrassment, humiliation, pain, and distress to their mourning family. R. 10, p. 4.

In September, 2004, Lynne moved the Association's Board to allow mezuzot to be posted on the exterior doorframes of unit entrances; the Board denied this motion. R. 170-3, exh. 14, p.9; R. 186, p. 2. Eventually, an amended hallway rule was passed allowing religious symbols, including mezuzot, on the exterior doors or doorposts of unit entrances while this litigation is pending. R. 199, p. 4.

SUMMARY OF THE ARGUMENT

The District Court has erred in its grant of summary judgment for the Defendants. Summary judgment should not have been granted because there were disputed issues of material fact to be decided. The District Court erred in its reliance on Halrpin v. Prairie Single Family Homes of Dearborn Park Ass'n to dismiss the Blochs claims on the facts of this case. The Fair Housing Act does reach acts of post-acquisition discrimination, and the discriminatory enforcement of a homeowner association's rule is conduct prohibited by the Fair Housing Act. Finally, the District Court erred in making factual determinations to conclude there was no evidence of intentional discrimination or disparate impact.

ARGUMENT

Standard of Review

The District Court's ruling in favor of summary judgment is reviewed de novo. Abdullahi v. City of Madison, 423 F.3d 763, 769 (7th Cir. 2005). On review, the court should determine whether there are any issues of material fact that require a trial. Waldridge v. Am. Hoeschst Corp., 24 F.3d 918, 920 (7th Cir. 1994). A party seeking summary judgment must prove, through "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits … that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The facts are reviewed in the light most favorable to the non-moving party. Fed.R.Civ.P 56(c); Paz v. Wauconda Healthcare and Rehabilitation Centre, 464 F.3d 659 (7th Cir. 2006). When deciding summary judgment, "a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for the fact finder." Paz, 464 F.3d 659;(quoting Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003)).

I. ON THE FACTS OF THIS CASE AT SUMMARY JUDGMENT, THE DISTRICT COURT ERRED IN ITS RELIANCE ON HALPRIN.

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, et seq., universally known as the Fair Housing Act of 1968 (sometimes hereafter as "Act"), declares it unlawful to "otherwise make[s] *unavailable* or deny" any dwelling to any person because of race or any other protected characteristic. 42 U.S.C. § 3604(a)(emphasis added). Additionally, it is unlawful to "discriminate against any person in the terms, conditions, or *privileges of sale* or rental of a dwelling" because of race or any other protected characteristic. 42 U.S.C. § 3604(b)(emphasis added). In Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327 (7th Cir. 2004)(sometimes hereafter referred to as "Halprin"), this Court recognized that the statutory

language of the Act may cover cases of constructive eviction. 388 F.3d at 329. When the District Court granted summary judgment in favor of Defendants, the District Court stated the Act "does not reach post-acquisition discrimination." R. 186. However, the disputed facts of this case are distinguishable from Halprin.

A. Material Disputes Exist Under 3604(a) Analysis.

Section 3604(a) of the Act, in pertinent part, prohibits discrimination which makes housing "otherwise unavailable." 42 U.S.C. 3604(a). In this case, without the permanent ability to place a mezuzah on their doorposts, the Blochs' units are "unavailable" to them as a home and residence. R. 170-2, exh. 7. The result will be the Blochs must move out and can not inhabit their units at Shoreline Towers.

Courts have consistently interpreted 3604(a)'s language "otherwise make unavailable" to include discriminatory practices that prevent a person from obtaining housing. See, e.g., City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086 (7th Cir. 1992)(racial steering); United States v. Yonkers Bd. of Ed., 837 F.2d 1181 (2d Cir. 1987)(discriminatory zoning); NAACP v. American Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992)(insurance redlining); Cartwright v. American Savings & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989)(mortgage redlining). Additionally, Courts apply 3604(a) to instances where discriminatory conduct causes an aggrieved party to lose or abandon housing, such as instances of discriminatory evictions (See, e.g., Harris v. Itzhaki, 183 F.3d 1043 (9th Cir. 1999); Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1986)) or harassment that actually deprives a person of his or her dwelling. See, e.g. Whisby-Myers v. Kiekenapp, 293 F.Supp. 845, 851 (N.D.Ill. 2003); Byrd v. Bandenburg, 922 F.Supp. 60 (N.D.Ohio 1996); DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993); Woods v. Foster, 884

F.Supp. 1169 (N.D.Ill. 1995); Stirgus v. Benoit, 720 F.Supp. 119 (N.D.Ill. 1989). Furthermore, a Court in this circuit has found that 3604 applies when "[p]laintiffs will be evicted actually, not constructively, by the [a]ssociation's actions." George v. Colony Lakes Property Owners Ass'n, 2006 WL 1735345 at *2 (N.D.Ill. 2006).

In Halprin, this Court acknowledged the language of 3604 may reach constructive eviction, but that the Halprin case would be "more precisely" characterized as "attempted constructive eviction." Halprin, 388 F.3d at 329. This separates the instant case. When Defendants banned mezuzot, they rendered the Blochs' residence uninhabitable. R. 170-2, exh. 7. This is tantamount a person's house burning down or being destroyed by fire. Once burned down, there is no home to enter. Similarly, once the mezuzot are taken down, Jewish law prohibits a Jew from residing in such a home. R. 170-2, exh. 7. Any action precluding the posting of mezuzot, other than for a temporary reason, forces the Blochs and other Jewish Shoreline Towers residents to move out of their existing homes. R. 170-2, exh. 3, 7, 8, 9. The removal of mezuzot from the doorposts of Jewish residents at Shoreline Towers creates a similar environment to a person staying in a hotel room after their house has burned down. Without the permanent ability to post a mezuzah on their doorposts, the Blochs must look elsewhere for accommodations. R. 9; R.10; R.11; R. 170-2, exh. 6.

B. Material Disputes Exist Under 3604(b) Analysis.

i. The Facts Determine Post-Acquisition Coverage Under 3604(b).

Section 3604(b) makes no direct reference to acquiring property but is perhaps the most versatile of the Act's provisions and has been found to apply in seven distinct contexts, including discrimination in terms and conditions of sale and discrimination in the privileges of a dwelling, and instances of discriminatory harassment. Rigel Oliveri, *Is Acquisition Everything*? *Protecting*

the Rights of Occupants Under the Fair Housing Act, at 6 (2007)(unpublished manuscript, on file with University of Missouri-Columbia). This Court recognized the statute may cover actions occurring while inhabiting the dwelling, but that the scope of the Act could not be applied to the facts of Halprin. 388 F.3d at 329. However, the facts in this case separate it from a similar analysis. As a result, the District Court erred by misapplying Halprin to the disputed facts of the instant appeal at the summary judgment stage of litigation.

a. The Hallway Rule And Discrimination.

The Halprin case was about harassment, the continual harassment against existing owners partially based on religion. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 208 F.Supp. 2d 896 at 899 (N.D.Ill. 2002). In contrast, this case is about a property owner's association's rule. R. 49, p. 82. The rule as applied under its original purpose. R. 170-2, exh. 3, para. 14. The rule as promulgated by the association's board president. Id., para. 13. How the association reinterpreted the rule. Id., para. 15. What the association knew about the effect and impact of the reinterpreted rule's enforcement on Jewish residents. R. 170-2, exh. 7, 8, 9. And the continued efforts of an association to interfere with a class of residents use and enjoyment of their home by determining how those residents could practice their closely held religious beliefs. R. 170-2, exh. 2, p. 66; exh. 3, para. 10-16.

In Halprin, the plaintiffs were continuously harassed by fellow property owners within the homeowners association because of the Jewish religion of one (1) of the plaintiffs. 388 F.3d 327. Simply stated, Halprin was about post-acquisition harassment by neighbors which included discrimination. But the instant appeal is about discrimination by the association's president and a majority of the board against a class of association members, which includes harassment. R. 170, para. 11-16, 20-24, 26-28.

The coverage of the Act has been recognized to prohibit discrimination during the "occupancy of housing." U.S. v. Koch, 352 F.Supp.2d 970, citing 114 Cong.Rec. 2270 (1968). This is evident when an association's rule is enforced in a manner preventing certain association members from *inhabiting* their homes. R. 170-2, exh. 7. A discriminatorily enforced rule falls within the coverage of 3604(b) as articulated in Halprin. The conduct in the instant case is more analogous to the hostile living environment claims in landlord-tenant relationships successfully litigated under the Act. See, e.g. Neudecker v. Boisclar Corp., 351 F.3d 361 (8th Cir. 2003); DiCenso v. Cisneros, 96 F.3d 1004 (7th Cir. 1996); Honce v. Vigil, 1 F.3d 1085 (10th Cir. 1993). The Defendants used their ongoing relationship with unit owners to create a hostile housing environment and remove Jewish residencies. R. 140, exh. 25; R. 170-2, exh. 7. Enforcement of the Hallway Rule after the hallway renovation created a hostile and uninhabitable environment for Jewish owners and interfered with Jewish residents use and enjoyment their homes. R. 170-2, exh. 3, para. 16; R. 170-2, exh. 8, 9, 10; R. 11, para. 23. Accordingly, the trier of fact should determine whether the association's conduct was discriminatory.

b. Association Rules Relate To The Purchase Of A Unit.

The District Court determined that the alleged discrimination did not occur in connection with the Blochs acquisition of their units. However, the Blochs alleged discrimination in the enforcement of Shoreline Towers' Hallway Rule. R. 32, para. 9. Naturally, any rules or regulations that members of a property owners' association are subjected to relates back to their purchase as part of a continuing transactional relationship. Oliveri, p. 51-52; citing Restatement (3d) of Servitudes, Ch. 6, Intro. Note p. 67. Therefore, the District Court erred when it concluded that the alleged discrimination did not occur in *connection* with the acquisition of the units.

A condominium owners association and the condominium owners have an ongoing relationship with respect to housing rights and responsibilities. Oliveri, at 50. This ongoing relationship between the association and unit owners invests a great deal of control in the association, making the condominium association relationship more analogous to landlord-tenant than buyer-seller. Id., See, e.g., Krieman v. Crystal Lakes Apts., Ltd., 2006 WL 1519320, at *5, n.2 (N.D.Ill. May 31, 2006)("[t]he position of power held by an association in relation to the owners bears strong similarity to the power wielded by a rental housing manager over a renter"). The instant case must address this ongoing relationship and an association's retained powers throughout ownership as it relates to the "provision of services" in a "planned community where some types of services are in fact part and parcel with home ownership." Savanna Club Worship, Inc. v. Savanna Club Homeowners' Ass'n, 456 F.Supp.2d 1223, at 1229 (S.D.Fl. 2005).

In the context of the association-member relationship, "where association members have rights to use designated common areas as incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under the [Act]." Id. at 1230; citing Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472 (11th Cir. 1993). Furthermore, the Department of Housing and Urban Development ("HUD") has promulgated a regulation interpreting 3604(b) which prohibits conduct "limiting the use, privileges, services or facilities associated with a dwelling because of religion… of an owner." 24 C.F.R. § 100.65(b)(4). This regulation will be discussed further infra, but in this section the Blochs assert that the regulation distinguishes the instant case from a Halprin-type fact pattern. Pursuant to this regulation, it naturally follows that "if an association member was completely denied access to… a common area because they were Jewish… such denial would clearly be a deprivation of full use of incidents of ownership actionable under the [Act]." Savanna Club, at 1230. The Blochs'

decision to assert their religious identity in contravention to the Defendants wishes may have caused further deprivation of full use of incidents of ownership (R. 170-2, exh. 19, 20, 21), creating material disputes of fact to be decided by a jury at trial.

ii. 24 C.F.R. 100.65(b)(4) Is A Valid Interpretation Of The Reach Of Section 3604(b).

Congress gave HUD the power to make substantive rules in order to implement the Act. 42 U.S.C. § 3614(a). Section 3604(b) of the Act states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. 3604(b). Regulation 24 CFR 100.65(b)(4) states:

> ***
> (b) Prohibited actions under this section include, but are not limited to:
> * * *
> (4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an *owner*, tenant or a person associated with him or her. (emphasis added)

A court is obliged to "review an agency's construction of the statute which it administers." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, at al., 467 U.S. 837, at 842-43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue" or, specifically, whether 3604(b) itself covers discrimination which occurs during occupancy. Id. The prohibition on discrimination against "any person in the terms, conditions, or privileges of sale or rental of a dwelling" in the text of the statute is clear evidence that Congress directly and explicitly included a right to be free from discrimination during occupancy (i.e. post-acquisition). The freedom to live in the home a person purchases, is a privilege which directly flows from that purchase. Likewise, the terms and conditions a person

lives under as a result of their purchase, naturally flows from the purchase of the home. Thus, pursuant to Chevron, because "the intent of Congress is clear, that is the end of the matter." Id.

Alternatively, if the Court determines that the text of 3604 does not directly speak to the precise question at issue, then we must answer the second question: "whether the agency's answer [to the question at issue concerning the interpretation of the status] is based on a permissible construction of the statute. Id. at 843. Thus, the second question is whether HUD's answer to whether 3604(b) itself extends to discrimination which occurs post-acquisition is based on a permissible construction of the statute. Additionally, in answering this question, the court should be mindful "that *considerable weight* should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. (emphasis added).

HUD's construction and interpretation of 3604(b) of the Act prohibits the discriminatory actions that limit the use of services and facilities associated with a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of an owner. The use of "services and facilities" includes the right of owners to be free from discrimination in all aspects of home ownership, including occupancy. See, Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 Ala. L. Rev. 203, at 215-16 (2006); citing Fair Hous. Cong. v. Weber, 993 F.Supp. 1286, at 1292-93 (C.D. Cal. 1997)(a rule prohibiting children from playing in common area violated §3604(b)); United States v. M.Westland Co., CV-93-4141, 3 Fair Hous. Fair Lend. (P-H) ¶ 15,941 (C.D. Cal. Aug. 3, 1994)(prohibiting children from using billiards room and shuffleboard violated §3604(b)); HUD Preamble I, 53 Fed. Reg. 44992, 45,001 (Nov. 7, 1988). Examples are the right to mourn in your home following the death of a loved one, exhibiting religious expression in the home, and freedom from interference with Religious practices different from others in your community.

The right to be "free of unlawful harassment has been held to be a protected 'privilege' of sale of a dwelling." Short, at 215-16. This right does not stop upon purchase; this right extends to occupancy of a dwelling. Id. "It is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein . . . without discriminatory harassment." Koch, 352 F. Supp. 2d at 976. Therefore, Regulation 110.65(b)(4) is a permissible construction of 3604(b) of the Act and, pursuant to Chevron, such permissible construction must be deferred to and the Act's ability to combat housing discrimination extends to instances of post-acquisition discrimination.

iii. Broad Construction Of Section 3604(b) Preserves The Rights Of Owners To Use And Enjoy Their Homes Free From Discrimination.

Support for applying the Act to cover post-acquisition discrimination comes directly from the United States Supreme Court's application of the Act. The Supreme Court has stated in clear terms that the Act "*broadly* prohibits discrimination in housing throughout the Nation." Gladstone Realtors v. Bellwood, 441 U.S. 91, 93 (1979)(emphasis added). Furthermore, the "language of the Act is *broad* and *inclusive*." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972)(emphasis added).

Additionally, further inspection of fair housing legislation reveals that congressional concern analysis supports a broad interpretation of 3604 to cover post-acquisition discrimination. Congress drew its power to enact the Act based upon the Commerce Clause and the Fourteenth Amendment. See Short, at 234; citing *Hearings on S. 1358, S. 2114, and S. 2280 Relating to Civil Rights and Housing Before the Subcomm. On Housing and Urban Affairs of the S. Comm. On Banking and Currency*, 90th Cong. 5 (1967). The initial policy behind the Act articulated a concern with use and occupancy. 112 Cong. Rec. 18,739-40 (1966). The actual policy statement of the Act was broadened from this initial point to "provide… for fair housing throughout the

United States." 42 U.S.C. § 3601. The amended policy statement derived from a concern that the Act might cause forced sales. See, Short, at 233. The plain words of 3604(b) "seem to mean" (Halprin, 388 F.3d at 330) a concern with occupancy, and the altering of the initial policy because of concern with an acquisition issue further demonstrates that the words of the statute still speak to occupancy. "[T]o discriminate against any person in the terms, conditions, or privileges of sale" under 3604(b) means a prohibition on discrimination in the terms, conditions, and privileges obtained from the sale of a dwelling, and without a line drawn when these rights are extinguished.

Courts have unequivocally held that acts of discrimination that occur during a tenant's occupancy are actionable under Section 3604(b). Woods-Drake v. Lundy, 667 F.2d 1198, 1201 (5th Cir. 1982). The landlord-tenant relationship is analogous to an association-member relationship. The discrimination actionable in Woods-Drake occurred after the rental of the unit, indicating that the Act does not erect a wall between pre-and post-possession discrimination. 667 F.2d at 1199. In this context, it is "evident" that when an association "imposes" a condition that a member may reside in their unit "only if they agree not to" act in conformance to their status as a member of the Jewish race and religion, then the association has discriminated against their members in the "terms, conditions, and privileges" of sale on the grounds of "race." Id. at 1201.

To enjoy the exercise of civil rights in housing, the Act must ensure "formal freedom to acquire *and use* housing" and protect the "freedom to acquire *and enjoy* housing." Short, at 236; citing 90th Cong. 133 (statement of Jefferson Fordham, Dean, University of Pennsylvania Law School)(emphasis added). In viewing the Act in this context, it is evident that at the passage of the Act there was an understanding that actual denials of housing was an ill to be address, but that problems of segregation and discrimination did not stop when the door to the home was

opened. See, e.g., Short at 236-37. Ensuring the freedom to live in the home and creating sustainable integrated communities by protecting occupants is consistent with a desire to provide for fair housing throughout the United States.

II. SUMMARY JUDGMENT IMPROPER WHEN DISPUTED ISSUES OF MATERIAL FACT EXIST.

On a motion for summary judgment, the non-moving party does not have to persuade the court in their cause, but need only to demonstrate through appropriate evidence that there is a pending dispute of material fact. Waldridge, 24 F.3d 920; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986)(quoting First Nat. Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, at 288-89 (1968). When deciding summary judgment, the court does not make determinations of credibility, weigh the evidence, or determine their own conclusions from the facts. Paz, 464 F.3d 659. At summary judgment a court must avoid the "temptation to decide which party's version of the facts is more likely true." Payne, 337 F.3d at 770. The Blochs assert that the District Court erred in its review of the facts and evidence before the court at the summary judgment stage of litigation.

A. Reasonable For A Jury To Find In Blochs Favor.

A review of the pleadings and exhibits in the record reveal both lay testimony and expert evidence that Defendants' prohibition on the display of mezuzot on the exterior doorposts of Jewish owners and residents' units created a hostile and uninhabitable environment for members of the Jewish community at Shoreline Towers. This evidence reasonably permits a finder of fact to find in the Blochs favor on material questions of fact.

Lay testimony suggesting that mezuzot are a symbol of Jewish racial and religious identity was offered by the Blochs. Avikam Hamieri is a Jew raised in Israel and testified in his deposition that having a mezuzah on the door is a particularly basic part of being Jewish. R. 170-

2, exh. 22. Plaintiff Lynne Bloch testified in her deposition that, as an observant Jew, it was her understanding that Jewish religious law *requires* Jewish persons to affix a mezuzah to the exterior doorposts of their homes and that failure to do so would render their home uninhabitable for a Jew. R. 10, para. 7; R. 170-2, exh. 1, 2. Any prohibition on posting mezuzot to the exterior doorposts of units not only affects the habitability of current Jewish residents, but affects the marketability of Shoreline Towers units to prospective Jewish buyers. R. 170-2, exh. 7.

The Blochs offered as exhibits in their Response to Defendants' Motion for Summary Judgment: (1) a letter from the Chicago Rabbinical Council to the Shoreline Towers Board of Directors explaining the necessity under Jewish religious law of placing a mezuzah on the exterior doorpost of a Jewish person's home (R. 170-2, exh. 8); and (2) a letter from the Decalogue Society addressed to the Shoreline Towers Board of Directors which explains the religious significance of the mezuzah to Shoreline Towers Board of Directors. Id., exh 9. Furthermore, the Blochs produced to Defendants their Rule 36 expert disclosure of Rabbi Aron Wolf, in which the Rabbi confirmed the Blochs' understanding of Jewish law regarding the mezuzah requirement and confirmed the mezuzah requirement explained in the Chicago Rabbinical Council letter. R. 170-2, exh 7. Rabbi Wolf's expert opinion and other authoritative evidence produced by both parties directly supports the Blochs' contention that the Board's prohibition and removal of mezuzot created a hostile living environment for Jewish residents because of the religious *requirement* that Jewish persons display a mezuzah on their exterior doorpost. Id. Defendants offered no evidence of a similar religious requirement ever being imposed as to another religious group at Shoreline Towers, leaving a material dispute between the parties.

Additionally, and of great importance to this case, the Blochs and other Shoreline Towers residents understood that the Hallway Rule was not applicable to mezuzot. R. 170, para 7. However, Defendants dispute the rule did not apply to mezuzot. R. 178, p. 4-5. Furthermore, Defendants assert that posting a mezuzah is merely a practice. R. 178, p. 4. In fact, upon receipt of letters from Rabbi Aron Wolf, Director of the Chicago Mitzvah Campaigns, Inc., Rabbi Dr. Joseph S. Ozarowski, Executive Director of the Chicago Rabbinical Council, and Michael B. Hyman, President of The Decalogue Society of Lawyers, Defendants dispute that such law requiring the post of a mezuzah even exists. R. 178, p. 3. This illustrates material disputes on whether Defendants discriminated against the Blochs.

Plaintiffs assert the basis for determining in favor of Defendants on summary judgment was the District Court's conclusions in favor of Defendants on the requirements of Jewish law. This Court should reverse the grant of summary judgment in favor of Defendants and remand this case to the District Court for a jury to weigh the evidence of discrimination at trial.

B. Material Determinations Improperly Made In Defendants Favor.

In the District Court's order granting the Defendants motion for summary judgment, the court implied the Hallway Rule was intended to include a prohibition of the display of mezuzot. Rec. 186. The District Court states "[p]laintiffs argue that the Shoreline Board's *refusal to make an exception to the hallway rule* for mezuzahs beginning in 2004 shows defendants' discriminatory intent." Id.(emphasis added) To determine that the Blochs were asking for an *exception* to the rule assumes that the Defendants' interpretation of the Hallway Rule – that "objects of any sort" *includes* mezuzot – is the correct interpretation of the rule, because making an exception for an object assumes the object was subject to the rule to begin with. The Blochs stated that "objects of any sort" was never intended to include mezuzot (R. 170-2, exh. 3, para.

14); and the Defendants intention of interpreting the rule to include mezuzot was to prevent the Blochs and other Jewish residents from acting in conformance with their closely held religious beliefs. Id., para. 16.

The Blochs did not complain of "discontinuing *special* treatment." R. 186 (emphasis added). The Blochs complain that Defendants reinterpreted the Hallway Rule to prohibit mezuzot and to intimidate, threaten, and interfere with the Blochs and other Jewish residents. R. 170, para. 13. Defendants dispute this material fact by stating the Blochs only offer self-serving evidence. R. 178, p. 6. However, this Court has held that evidence presented in a "self-serving" affidavit or deposition prevents granting summary judgment. Payne, 337 F.3d at 771-73.

Throughout the instant case, the Blochs have continuously maintained that the Hallway Rule was not understood to include and was never intended to include mezuzot. R. 32, para. 16; R. 170, para. 7. There is testimony from both parties that the rule was enforced until 2004 to prohibit objects specifically listed in the hallway rule and objects that were offensive. R. 170-2, exh. 3, para. 14; R. 170-2, exh. 12, p. 3. It is clear that the parties' different interpretations of the Hallway Rule, and the intentions of those interpretations, present disputed issues of material fact that a jury should decide at the conclusion of a trial.

Additional matters of dispute include the Blochs assertion that the Defendants actions were a result of Defendant Frischholz's control over the Shoreline Towers Board (R. 170, para. 15-16), and that Defendants knew the detrimental effect of their prohibition of mezuzot on Jewish residents (R. 170-2, exh. 7, 8, 9, 10) while continuously removing mezuzot. R. 170, para. 11-12.

There is also the disputed fact of whether the Hallway Rule ever was meant to include Unit entrance doors and doorposts as part of the common elements. R. 130, p. 7, para. 10(a). The

Hallway Rule at issue does not reference common elements, but its does prohibit "objects of any sort" "outside Unit entrance doors." R. 49, p.82. Also, if the Hallway Rule was intended to be interpreted as Defendants have stated, it makes little sense for another rule stating "[s]igns or name plates must not be placed on Unit doors." Id. The Board's inclusion of the rule disallowing signs or nameplates on the unit doors is superfluous unless the Hallway Rule was created and originally interpreted not to include certain items, such as mezuzot on the post, or nameplates on the Unit door. At the very least, Defendants decision to fight for enforcing the rule to prohibit mezuzot shows a material dispute as to whether removing mezuzot was discriminatory. A material dispute exists as to whether Defendants used their legitimate interest in protecting the hallways as a pretext for discrimination.

III. SUFFICIENT SHOWING OF DISCRIMINATION UNDER 3617 AT THE SUMMARY JUDGMENT STAGE OF LITIGATION.

The District Court dismissed the Blochs' Section 3617 claim by stating, without explanation, that the Blochs had offered "no admissible evidence" and "failed to show that defendants intentionally discrimination against them based on their race or religion under Section 3617." R. 186. However, the evidence of discrimination before the District Court on Defendants' motion for summary judgment was limited. Defendants initially argued the Blochs' claim under Section 3617 failed because it was dependent on their claim under Section 3604. R. 111, p. 7. Therefore, the District Court's determination on any evidentiary issues was improper. Furthermore, the evidence of discrimination that was before the District Court demonstrated material disputes requiring a trial.

Section 3617 states, in pertinent part, that "[i]t 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 3603, 3604, 3605, or 3606 of this title." 42 U.S.C. 3617. HUD has promulgated its interpretation in a federal regulation: 24 C.F.R. § 100.400. This regulation states that 3617 prohibits, among other things, "[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race… religion of such persons, or of visitors or associates of such persons." Krieman v. Crystal Lake Apts. L.P., 2006 WL 1519320, at *8-9 (N.D. Ill. 2006); citing 24 C.F.R. § 100.400(c)(2). As a result of this regulation, contrary to the language of 3617, "there need not be a violation of 42 U.S.C. §§ 3603-3606 in order to establish a violation of 3617." Id; See also, Halprin, 388 F.3d at 330 (Regulation 100.400(c)(2) cuts 3617 from 3604, contrary to the language of 3617").

In order for Plaintiffs to prevail on a 3617 claim, they must establish a prima facie case by showing that (1) the Blochs are protected individuals under the Act (R. 9,10,11); (2) the Blochs were engaged in the exercise or enjoyment of their fair housing rights(R. 170, para. 5); (3) Defendants were motivated in part by an intent to discriminate, or their conduct produced a disparate impact (discussed infra); and (4) the Defendants coerced, threatened, intimidated, or interfered with the Blochs on account of their protected activity under the Act (R. 170, para. 10-13,18-20,25-28). East-Miller, 421 F3d at 563.

A. Intentional Discrimination

First, to survive summary judgment under 3617, the Blochs "must establish discriminatory intent by presenting evidence of prejudice either through direct evidence, circumstantial evidence, or the burden-shifting *McDonnell-Douglas* test." East-Miller, 421 F3d at 563, quoting Kormoczy v. Secretary, United States Dep't of Hous. & Urban Dev. ex. rel. Briggs, 53 F.3d 821, at 823-24 (7th Cir. 1995).

i. Direct or Circumstantial Evidence of Discriminatory Intent

One of the material facts vehemently disputed by the parties was the interpretation of the "Hallway Rule." The Hallway Rule is facially neutral, in that it makes no reference to religious objects, but states that "[m]ats, boots, shoes, carts or objects of any sort are prohibited outside Unit entrance doors." R. 49, p. 82. Whether "objects of any sort" was intended to include mezuzot is relevant to whether Defendants discriminated against the Blochs, or otherwise interfered with their housing rights under 3617. Up until the spring of 2004, mezuzot were affixed to the exterior doorposts of unit entrances and undisturbed by the Board, the Association, and building management. R. 140, exh. 6, p. 6. The Blochs also contend the Hallway Rule was never intended to cover, thought of as covering, nor understood to apply to religious articles such as mezuzot. R. 170-2, exh. 12, p. 3. Therefore, enforcement of the Hallway Rule after renovation to prohibit mezuzot, which would only affect Jewish residents, can be viewed as a direct discriminatory act against the Blochs or circumstantial evidence of the discriminatory intent of Defendants. It is a material dispute which a jury should determine at trial.

ii. *McDonnell-Douglas*

Under the *McDonnell-Douglas* test (Mcdonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973)), the Blochs bear "the initial burden of proving a prima facie case of housing discrimination by a preponderance of the evidence." After this burden is satisfied, then the Blochs have "created a presumption of illegality and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged actions." If the Defendants meet their burden, then the Blochs have "the opportunity to prove by a preponderance of the

evidence that the nondiscriminatory justification asserted by the defendant is only a pretext for discrimination." See generally, Id.; Cavalieri-Conway, 992 F. Supp. at 1005.

When attempting to present direct evidence to prove intentional discrimination, a plaintiff must show either an acknowledgment of discriminatory intent by the defendant or its agents, or circumstantial evidence that provides the basis for an inference of intentional discrimination. Troupe v. May Dept. Stores Co., 20 F.3d 734 at 736 (7th Cir. 1994). When attempting to present circumstantial evidence under the direct method, such can be done using three (3) forms. Troupe, 20 F.3d at 736. The first form consists of suspicious timing, ambiguous statements, or behavior toward or comments directed at others in the protected group. Marshall v. AHA, 157 F.3d 520, 525 (7th Cir. 1998); Troupe, 20 F.3d at 736. The second form consists of evidence that others similarly situated to the plaintiff, other than in the characteristic on which the defendant is forbidden to base a difference in treatment (e.g. race), received systematically better treatment. Huff v. UARCO Inc., 122 F.3d 374 (7th Cir. 1997); Marshall, 157 F.3d at 525; Troupe, 20 F.3d at 736.

The plaintiff seeking to defeat a summary judgment motion must produce some evidence, which can be either direct or circumstantial, indicating that the defendant's reason was not a legitimate justification. Wilson v. Souchet, 168 F. Supp. 2d 864-865 (circumstantial evidence based on phone calls of potential applicants supports inference of intentional discrimination). This evidence can not be the same as the basic facts that were required to establish the prima facie case because the plaintiff cannot rely solely on a potential finding that the defendant's explanation is implausible. Chauhan, 897 F.2d 127-128. In order to survive summary judgment, a plaintiff needs only to point to evidence which calls into question the defendant's intent. Id.

The Blochs' have shown evidence of discriminatory intent; by showing that the Defendants implemented the Hallway rule with knowledge of the rule's adverse impact on Jews. R. 170-2, exh. 7,8, 9,10. The evidence needs to be only suggestive and not conclusive. Phillips v Hunter Trails Community Assn., 685 F.2d 184, 190 (7th Cir. 1982). One court has found that knowledge of the discriminatory impact is suggestive of intent. Hispanics United v Village of Addison, 988 F.Supp. 1130, 1159 (N.D. Ill 1997). The Blochs notified Defendants that removal of the mezuzot would adversely impact members of the Jewish faith. R. 170-2, exh. 7, 8, 9, 10. Members of the board believed removing mezuzot would violate the unit owners' rights and expressed this to the Board. R. 170, para. 7. Despite knowing the impact of the Hallway Rule on Jewish residents, Defendants still had mezuzot removed. R. 170, para. 11. Active knowledge of the affect of the Hallway Rule is evidence of intent to discriminate against the Blochs. This evidence is sufficient to allow a reasonable jury to find discriminatory intent on behalf of Defendants and shows the District Court erred in determining at the summary judgment stage that there was no evidence of discrimination.

B. Disparate Impact

The Court must consider four (4) factors in determining whether there is enough evidence to prove disparate impact: 1) how strong is the showing of discriminatory effect; 2) is there some evidence of discriminatory intent; 3) what is the defendant's interest in taking the action; and 4) does the plaintiff seek to compel the defendant or merely restrain the defendant. Metropolitan Housing Development Corp. v Village of Arlington Heights, 558 F.2d 1283, 1290 (7th. Cir. 1977).

First, the Blochs showed discriminatory effect, because the evidence shows that Jewish residents were disproportionately impacted by the Hallway Rule's interpretation after the

hallway renovation. R. 170-2, exh. 8,9,10. Discriminatory effect can be shown by demonstrating a greater adverse impact on one racial group. Village of Arlington Heights. 558 F.2d at 1290-91. To show a greater adverse impact the Robinson v Parkshore court required the plaintiffs to produce evidence that the African-American population in an apartment building was treated more harshly relative to the non-African-American population. 2002 WL 1400322 at *3 (N.D. Ill., June 27, 2002). The court in Village of Arlington Heights inquired as to what percentage of adversely affected people were members of the suspect class, in order to determine if a suspect class was disparately impacted. Village of Arlington Heights, 558 F.2d at 1291. The argument for discriminatory effect becomes very strong when all or most of the adversely affected people are members of the suspect class. Id.

Practitioners of Judaism are required to display a mezuzah on the outside of their doorpost. R. 170-2, exh. 8. In fact, Jewish law states that a Jewish person failing to display a mezuzah will be excommunicated from heaven. R. 170-2, exh. 7, p. 3. The Hallway Rule's harsh treatment of Jewish residents – i.e. Jewish residents must violate their religious beliefs to comply with the rule – strongly suggests an adverse impact on Jews; and accordingly the question of discriminatory intent is for the jury at trial.

Second, the Blochs' have shown evidence of discriminatory intent; by showing Defendants implemented the Hallway Rule with knowledge of the rule's adverse impact on Jews. 170-2, exh. 7,8,9,10. Although the Blochs must show some evidence of discriminatory intent, this factor is the least important of the four (4) factors. Village of Arlington Heights, 558 F.2d at 1292. Once again, the evidence needs to be only suggestive (Hunter Trails, 685 F.2d at 190), and *knowledge* of the discriminatory impact is suggestive of intent. Hispanics United, 988 F.Supp. at 1159 (emphasis added). The Blochs took several steps to notify the Defendants that

removal of the mezuzahs would adversely impacted members of the Jewish faith. R. 170-2, exh. 7,8,9. One member of the board believed that removing mezuzahs would violate the unit owners' rights. R. 170-2, exh. 12, p. 62-64. This opinion was expressed to the members of the board. Id. Despite the Defendants' knowledge of the impact of the Hallway Rule on Jewish residents (Id.), the Defendants decided to remove the mezuzot, and continued removing mezuzot. R. 170-2, exh. 3, para. 13. This evidence is, at a minimum, some evidence of discriminatory intent and is sufficient to allow a reasonable jury to find discriminatory intent on behalf of Defendants.

Third, Defendants have no interest in prohibiting mezuzahs from being displayed. The defendants must show an interest in taking the action that produced the discriminatory impact. Village of Arlington Heights, 558 F.2d at 1293. At least one court has held that the burden of producing evidence is partially shifted to defendants to prove its legitimate justification, and plaintiffs have the burden of proving that there were less discriminatory options available; thus neither party has to prove a negative. Hispanics United, 988 F.Supp. 1162.

Defendants' reasoning for applying the Hallway Rule to mezuzot does not accomplish their stated objective, and there are less discriminatory ways to accomplish this objective. Defendants asserted that the rule was to protect the hallways. R. 127, para. 12. Yet, the removal of small religious items from unit doorways does nothing to further the protection of the hallways. Additionally, the rule was initially interpreted to prevent large items from being left in the hallways, which is more consistent with achieving the stated goal of keeping hallways clear of clutter. R. 170-2, exh. 1, p. 5. Finally, there are less restrictive and less discriminatory options available to the Defendants. Obviously, the easiest alternative would have been allowing the display of religious objects on the exterior of the door or doorpost in accordance with a resident's religious beliefs, without undue fighting. An uncompromising and strict enforcement of the rule

from June 2004 until September 12, 2005 seems far from the easiest alternative for a homeowners association attempting to protect their hallways and serve their members. R. 127, para. 20,26. Therefore, there is adequate evidence that Defendants did not have sufficient interest in removing religious objects, such as mezuzot, to create material disputes on the issue of discriminatory intent.

Fourth, the nature of the relief being sought is a restraint on Defendants actions, which is granted more freely than compelling an affirmative action. Courts are more reluctant to grant relief when defendants must be compelled to take affirmative action. Village of Arlington Heights, 558 F.2d at 1293.

The Blochs are merely seeking a permanent injunction and damages. R. 32. This would require no affirmative steps by the Defendants. All that is requested of Defendants is to permanently cease removing mezuzot from doorposts. R. 32. This is merely a restraint on the Defendants' actions, and a reasonable jury could find in favor of the Blochs.

In its Order granting summary judgment in favor of Defendants, the District Court improperly concluded the Blochs had not offered admissible evidence of disparate impact in support of their 3617 claim. Although the Blochs did offer both expert and lay testimony that Defendants' removal of mezuzot adversely impacted observant Jews, the Court declined to specify which evidence offered by Plaintiffs was considered inadmissible. In acting in this manner, the District Court erred by making a factual determination in favor of Defendants on the vigorously disputed interpretation of the Hallway Rule. Such conclusions on the credibility of evidence should be made by a jury, not at the summary judgment stage of litigation when evidentiary issues of discrimination are not argued in the movants' summary judgment motion.

IV. SUFFICIENT SHOWING OF DISCRIMINATION UNDER 1982 AT THE SUMMARY JUDGMENT STAGE OF LITIGATION.

In order to show racial discrimination in violation of Section 1982 the plaintiff must prove a discriminatory intent. Jones v. Alfred H. Mayer Co., 392 U.S. 409, at 421-22 (1968). In order to do this, a plaintiff shows intent to discriminate through the *McDonell-Douglas* burden-shifting approach.

Plaintiffs do not need direct evidence of pretext in order to survive summary judgment and intent to discriminate may be shown by the *McDonell-Douglas* burden-shifting approach, however mere disparate impact is not sufficient under Section 1982. Chauhan v. M. Alfieri Co., 897 F.2d 123, 127-128 (3d Cir. 1990); Mozee v. American Commercial Marine Service Co., 940 F.2d 1036, 1051 (7th Cir. 1991). As discussed supra under 3617 analysis, at the summary judgment stage the Blochs demonstrated the evidence was sufficient to allow a reasonable jury to find evidence of discriminatory intent. Therefore, any material disputes on the issue of racial discrimination in violation of Section 1982 should be decided by a jury at trial.

CONCLUSION

For the foregoing reasons, the judgment of the District Court on Defendants' Motion for Summary Judgment should be reversed and the case remanded to the District Court for trial.

Dated: August 6, 2007

Respectfully Submitted,

Lynne Bloch, Helen Bloch, and
Nathan Bloch, Plaintiffs-Appellants

By:_____
One of their Attorneys

F. Willis Caruso
James C. Whiteside
Tara M. Alhofen
Attorneys for Plaintiffs-Appellants
The John Marshall Law School
Fair Housing Legal Clinic
28 E. Jackson Blvd., Suite 500
Chicago, Illinois 60604
(312) 786-2267

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(b), as measured by word count provided by Microsoft Word XP, and in accordance with the provisions of Federal Rule of Appellate Procedure 32(a)(7)(b)(3)(iii).

By:_____
One of the Attorneys for Appellants

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One of the Attorneys for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 31(e)

Pursuant to Federal Rule of Appellate Procedure 31(e), I hereby certify that the brief and appendix have been submitted in digital form and hereby comply with Rule 31(e) requirements.

The John Marshall Law School
Fair Housing Legal Clinic

By:_____
One of the Attorneys for Appellants

CERTIFICATE OF FILING AND PROOF OF SERVICE

The undersigned does certify that 15 copies of the foregoing Plaintiffs-Appellants Brief and accompanying diskette were filed with Mr. Gino J. Agnello, Clerk of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Room 2722, Chicago, IL 60604 by personal delivery on August 6, 2007.

I further certify that on August 6, 2007, two copies of the foregoing Plaintiffs-Appellants Brief and an accompanying diskette were sent via U.S. Mail, first class postage prepaid to:

Counsel for Appellees:

David C. Hartwell
Penland & Hartwell, LLC
One N. LaSalle Street, 38th Floor
Chicago, Illinois 60602.

The John Marshall Law School
Fair Housing Legal Clinic

By:_____
One of the attorneys for Plaintiffs-Appellants