

RECORD NOS. 00-15925, 00-17040

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IN THE  
United States Court of Appeals  
For the Ninth Circuit

FAIR HOUSING OF MARIN, a California  
non-profit corporation,

*Plaintiff/Appellee,*

v.

JACK COMBS, individually and doing  
business as WATERS EDGE  
APARTMENTS,

*Defendant/Appellant.*

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BRIEF OF AMICI CURIAE NATIONAL MULTI HOUSING  
COUNCIL AND NATIONAL APARTMENT ASSOCIATION IN  
SUPPORT OF APPELLANT

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## **THE INTERESTS OF THE AMICI CURIAE**

Amici, the National Apartment Association (“NAA”) and National Multi Housing Council (“NMHC”), are the primary national trade associations whose members own and manage residential rental properties. They provide leadership for the apartment industry on legislative and regulatory matters and promote the desirability of apartment living. The two organizations provide education programs to their members to foster professional conduct in the apartment industry on issues such as Fair Housing.

The Ninth Circuit has not previously addressed the issue of whether a Fair Housing organization has standing to bring an action under the Fair Housing Act. Amici are concerned that this case is not an appropriate vehicle for the first articulation of a standard in the Ninth Circuit for the requisite injury to confer standing for a Fair Housing organization. The record in this appeal is not suitable for a determination of standing insofar as the issue below was decided by default judgment entered as a discovery sanction.

Defendant Combs has never been a member of either amicus organization. His contumacious conduct before the district court, though clearly sanctionable, should not give rise to an incorrect application of Article III to the Fair Housing Act.

## **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Amici are unaware of any related cases presently pending in this Court.

## **ISSUES PRESENTED**

### **I**

Whether the District Court abused its discretion in imposing default as a discovery sanction thereby extinguishing Combs' ability to require plaintiff to prove its injury.

### **II**

Whether the resultant record on appeal is sufficient for the Court to issue an opinion on the standing of Fair Housing of Marin to bring the underlying action.

## **STATEMENT OF JURISDICTION**

Amici agree with appellant's statement of jurisdiction, which was adopted by appellee.

## **STATEMENT OF THE CASE**

The underlying action was filed by Fair Housing of Marin on April 9, 1997, charging violations of the Fair Housing and Civil Rights Acts. There were no individual plaintiffs.

Defendant Combs moved to dismiss the complaint arguing that plaintiff lacked standing because it had suffered no injury.

The district court denied the motion to dismiss giving plaintiff the benefit of all available inferences from its complaint in accordance with F.R. Civ. P. 12(b).

Thereafter, Combs engaged in a pattern of discovery abuse which was ultimately sanctioned by the district court by entering a default judgment on March 29, 2000, awarding Fair Housing of Marin compensatory damages of \$23,377 and punitive damages in the amount of \$74,400. Thereafter the district court awarded attorneys fees and costs in the amount of \$508,606.78.

The entry of the default judgment effectively relieved plaintiff of its burden of proving the injury necessary to establish standing and precluded defendant from challenging that issue at trial.

### **STATEMENT OF FACTS**

Amici adopt the statements of facts filed by Appellant and the United States as amicus curiae.

## ARGUMENT

### **I The District Court Abused Its Discretion in Awarding Terminal Sanctions**

Amici submit that Combs' abuse of discovery and violations of court directives clearly called for the imposition of sanctions. However, the entry of a default judgment, which included punitive damages, was an excessive reaction to Combs' behavior and not supported by the case law.

The parties all recognize that the factors identified in Adriana Intern. Corp. v. Theoren et. al., 913 F.2d 1406, 1408 (9<sup>th</sup> Cir. 1990) cert. denied 498 US 1109 (1991) collectively determine the degree of sanction to be imposed pursuant to F.R. Civ. P. 37(b). They disagree on the conclusion drawn by the district court.

Combs' belated production of additional documents two weeks before the trial precipitated the court's ruling, yet it need not have further delayed the trial as alleged by Fair Housing of Marin. Appellant correctly cited Payne v. Exxon Corporation, 121 F.3d 503 (9<sup>th</sup> Cir. 1997), to argue that there was insufficient time to follow up on information contained in the documents. Yet, the existence of this additional data could only have a marginal impact, given plaintiff's already overwhelming evidence of Fair Housing violations.

Combs' behavior undoubtedly prejudiced plaintiff to some degree, but apparently not to an extent which might have impacted the outcome. The district court observed “. . . while direct evidence of racial animus is rare, it is amply present in this record” (ER285). Moreover, the impeachment value of the documents themselves would have had a devastating impact on Combs' credibility since he had denied their existence under oath at an earlier date. Thus the actual prejudicial impact on plaintiff's case could only be construed as minimal.

Less drastic sanctions were available to the district court, which was undoubtedly annoyed at Combs' failure to comply with earlier directives. The district court had broad discretion regarding the admission or exclusion of this material had either party sought to introduce it. Monetary fines, curbs on trial conduct, and the contempt power were all within the arsenal of available sanctions.

Adriana and subsequent cases recognize the public policy favoring the disposition of cases on their merits. This appeal illustrates one aspect of that policy. This case was not decided on its merits. A ruling denying a motion to dismiss and accepting the complaint at face value is no substitute for a dispassionate review of evidence. The decision below is now viewed by the Fair Housing amici as a vehicle to advance a minimalist approach to Article III

standing.<sup>1</sup> Amici urge the Court to decline that invitation until a case presents itself with a fully adjudicated trial record.

## **II Terminal Sanctions Precluded an Adjudication of Plaintiff's Standing**

### **A) The Rulings Below Produced an Inadequate Appellate Record**

The district court applied Geddes v. United Financial Corp., 559 F.2d 557, 560 (9<sup>th</sup> Cir. 1977) by accepting as true the allegations pled in the complaint after entry of the default judgment. Similarly, the court's earlier denial of Combs' Motion to Dismiss, necessarily was premised upon the acceptance of the allegations in the complaint as true as well as any reasonable inferences to be drawn therefrom. See Pelletier v. Fed. Home Loan Bank of San Francisco, 968 F.2d 865, 872 (9<sup>th</sup> Cir. 1992) "On a motion to dismiss, the court must accept the complaint's allegations as true in their entirety, and must draw all reasonable inferences in favor of the nonmoving party" (citations omitted).

This combination of rulings has produced a record on appeal that Fair Housing of Marin was "injured" without ever having offered proof of injury. Its standing to bring the action was accepted by the district court only in the limited context of a motion to dismiss and as a discovery sanction.

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<sup>1</sup> Brief of Amici Curiae Fair Housing and Civil Rights Advocacy Organizations at p.13-15.

**B) The Havens Decision Does Not Support the Expansive Interpretation Urged by Appellee**

The Supreme Court first addressed the issue of an organization's standing to bring suit under the Fair Housing Act in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens*, a fair housing organization (HOME) filed suit against an apartment complex owner on the basis of the latter's alleged "racial steering" practices in violation of Section 804 of the Fair Housing Act, 42 U.S.C. Sec. 3604. *Id.* at 366-367.

The HOME complaint alleged Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [*sic*] racially discriminatory steering practices. (cite)

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities - with the consequent drain on the organization's resources - constitutes far more than simply a setback to the organization's abstract social interests, *see Sierra Club v. Morton*, 405 U.S., at 739. We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.

*Id.* at 379.

It is particularly significant that the damages to HOME were not speculative nor intangible. In fact, through a consent decree, the damages had been liquidated so there was never a serious issue that a real injury had occurred. *Id.* at 371.

Later, in *Lujan v. Defenders of Wildlife*, 504 U.S. 550 (1992), the Supreme

Court articulated the test as follows:

First, the plaintiff must have suffered an injury in fact - an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 560 (internal quotation marks, parentheses, and citations omitted).

Nothing in *Havens* nor *Lujan* permits an inference of injury on mere allegations of diversion of resources or frustration of purpose.

**C) Three Circuit Courts Have Held That A Mere Allegation of Diversion of Resources or Frustration of Purpose is Insufficient to Confer Standing**

The arguments advanced by appellee have been rejected by appellate courts in three federal circuits.

The District of Columbia Circuit

In *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), the Court found that Fair Housing agencies had standing to challenge advertising policies of an apartment complex because those agencies had sufficiently alleged actual injuries distinct from mere abstract concerns. The Court cautioned against

litigants who might attempt to manufacture standing by the mere expenditure of resources on litigation. Id. at 27.

Four years later, the Court decided Fair Employment Council v. BMC Marketing Corp., 28 F.3d 1268 (D.C. Cir. 1994), an interlocutory appeal from the denial of a motion to dismiss. The decision observed that “[c]ourts addressing such [12(b)] motions usually must presume that general allegations embrace those specific facts that are necessary to support the claim. Havens establishes that such a presumption is unwarranted when the allegations are too general.” Id. At 1275. In that case, the Fair Employment Council had proffered that its expense in testing BMC diverted resources from other programs. The Court specifically rejected the concept that this expense was an “injury in fact” and described the harm as “self-inflicted” Id. at 1276. It further criticized plaintiff’s argument as the product of the circular reasoning (earlier criticized in Spann) which effectively abolishes the requirement of an injury.

#### The Fifth Circuit

In Association for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Center Board of Trustees, 19 F.3d 241, 244 (5<sup>th</sup> Cir. 1994), the Court affirmed the dismissal of a Fair Housing complaint filed by an advocacy group. While noting that the individuals affected by defendants’

actions had standing, the Court held that the sponsoring groups did not. It observed “the mere fact that an organization redirects some of its resources to litigation and legal counseling in response to the actions or inactions of another party is insufficient to impart standing upon the organization” Id. at 244.

### The Third Circuit

In Fair Housing Council v. Montgomery Newspapers, 141 F.3d 71 (3<sup>rd</sup> Cir. 1998), the plaintiff had alleged that discriminatory advertising had frustrated its organizational mission causing it to divert resources to respond. The Court explicitly followed Havens but noted that Havens had been an appeal from a ruling on a motion to dismiss where the case before the Court had the benefit of a more extensive summary judgment record in which the Fair Housing Council had been unable to produce proof in support of its claims of injury. Accordingly, the Court specifically rejected the arguments that the mere allegations of “frustration of mission” or “diversion of resources” are sufficient to confer standing. Id. at 80.

The circumstances presented by Fair Housing of Marin are indistinguishable from these cases but for the terminal sanctions imposed by the district court and the probative inferences to be drawn therefrom.

**D) Allegations of Injury Are Illusory Where Fair Housing Organizations Receive Federal Funding to Act As Private Attorneys General**

In its brief, the United States correctly notes (at p.1) that the Secretary of Housing and Urban Development “contracts with private, non-profit fair housing organizations to onduct testing, complaint investigation, and enforcement litigation under the Act.” HUD routinely issues grants and contracts to organizations to enable them to conduct what are essentially governmental functions of investigation and enforcement of Fair Housing laws. (Brief of the United States at p. 6).

Yet, there is a distinction between a government contractor paid to perform enforcement functions and an “aggrieved person”, as that term is defined<sup>1</sup> by the Fair Housing Act. Fair Housing of Marin claimed that it “diverted resources” and had its mission “frustrated” (Appellee’s brief at p. 21). These claims of injury cannot be reconciled with its assumed role as a government-funded “private attorney general.” Trafficante v. Metropolitan Life Ins. Co., 409 US 205, 211 (1972).

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<sup>1</sup> ... any person who. . . claims to have been injured by a discriminatory housing practice. 42 U.S. Code 3602(i)(1).

Actual injury is required by Article III. Yet, how can an organization be “injured” by its purposeful use of the government funds for which it applied? This federally funded activity cannot be construed as a “diversion of resources” where the organization sought and expended government resources for this very purpose. These activities become part and parcel of its corporate purpose, not a “frustration” of it.

The situation is analogous to a claim of a private plaintiff under the False Claims Act, 31 U.S. Code §3729 et. seq. In a qui tam action, the private litigant files on behalf of the federal government. The injury is the federal government’s not the relator’s. The relator has no standing on his own (because he has no injury) and therefore must file on behalf of the government. For several years Fair Housing organizations have simply repeated the mantra that they diverted resources or had their purpose frustrated despite the fact that Fair Housing litigation is an integral part of their activities rather than an actual injury.

By contrast, HOME, the Fair Housing plaintiff in Havens, was an aggrieved plaintiff which had expended its own resources thereby qualifying it to pursue a Fair Housing action. In addition, there were individual plaintiffs who themselves had suffered from discriminatory conduct.

Fair Housing of Marin is, upon information and belief,<sup>2</sup> an organization which regularly applies for and receives federal funding to conduct investigations against persons such as Mr. Combs to the extent that those activities have become part of its corporate “purpose.” Obviously, there can be no injury in fact if none of plaintiff’s resources were in fact “diverted.”

In making this argument, amici seek only to demonstrate the paucity of the evidence of plaintiff’s injury and concomitant standing to bring this action. Presumably, these facts and others could have been presented had a trial occurred. The Court has been deprived of a full record because of the contumacious antics of Combs and the district court’s overreaction to them. The danger seen by amici is that the singular factual circumstances in this case might produce a result creating a poor precedent for other cases.

### **CONCLUSION**

Amici respectfully submit that this Court should reverse the decision below and remand for a factual determination regarding standing or, should the Court affirm the district court, do so without creating legal precedent on Article III standing on the limited record before the Court.

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<sup>2</sup> Amici are aware that this statement is not reflected in the record below but represent that undersigned counsel has verified that fact with HUD.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), and Ninth Circuit Rule 32-1, I hereby certify that the foregoing Appellee's Brief is double spaced, is proportionally spaced in 14-point Times New Roman typeface, and contains 3224 words.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief of Amici Curiae National Multi Housing Council and National Apartment Association in Support of Appellant was sent by first class mail this \_\_\_\_ day of May, 2001, to the following counsel of record:

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