

No. 06-3665

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**UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**NEW WEST, an Illinois Limited Partnership,  
Plaintiff-Appellant,**

**v.**

**CITY OF JOLIET, an Illinois Municipal  
Corporation, ARTHUR SCHULTZ, both  
individually and officially as the Mayor of Joliet,  
JOHN M. MEZERA, both individually and officially  
as the City Manager of Joliet, and JIM SHAPARD,  
both individually and officially as the Deputy City Manager of Joliet.**

**Defendants-Appellees.**

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**Appeal From The United States District Court  
For the Northern District of Illinois, Eastern Division,  
Case No. 05-C-1743  
The Honorable Judge Charles R. Norgle**

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**BRIEF AND REQUIRED SHORT APPENDIX OF  
PLAINTIFF-APPELLANT NEW WEST**

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**ORAL ARGUMENT REQUESTED**

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Appellate Court No: \_\_\_\_\_

Short Caption: \_\_\_\_\_

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**TABLE OF CONTENTS**

DISCLOSURE STATEMENT.....

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES.....iii

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF THE ISSUES ..... 3

STATEMENT OF THE CASE ..... 3

STATEMENT OF FACTS ..... 4

    A.    The Parties ..... 4

        1.    Plaintiff-Appellant New West ..... 4

        2.    Defendants-Appellees Joliet And Its Officials ..... 4

    B.    Evergreen Terrace, Its Tenants And Its Relationship  
        With HUD..... 4

    C.    Defendants Seek To Do Away With Evergreen Terrace..... 7

        1.    Joliet’s Campaign to Discredit the Site ..... 8

        2.    Defendants Carry Out Their Threats To Litigate ..... 12

    D.    HUD Issues The 2005 Restructuring Commitment ..... 13

    E.    Damages ..... 13

    F.    The Proceedings Thus Far ..... 14

SUMMARY OF ARGUMENT..... 16

ARGUMENT ..... 18

    A.    Standard Of Review ..... 18

        I.    The District Court Erred In Dismissing New West’s Fair Housing  
            Act Claim For Lack of Standing..... 19

II.	The District Court Erred In Dismissing New West’s Supremacy Clause Claims For Lack of Subject Matter Jurisdiction .....	27
A.	The District Court Had Federal Question Jurisdiction.....	27
B.	“Complete Preemption” Was Not Required Or Relevant .....	32
III.	New West Properly Pled A Section 1983 Claim .....	33
IV.	New West Properly Pled A Case Under Section 1982.....	37
	CONCLUSION .....	41
	CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(A)(7).....	42
	CIRCUIT RULE 31(E)(1) CERTIFICATION.....	42
	PROOF OF SERVICE.....	43
	CIRCUIT RULE 30(D) STATEMENT.....	46
	TABLE OF CONTENTS TO APPENDIXES .....	47
	ATTACHED REQUIRED SHORT APPENDIX.....	

## TABLE OF AUTHORITIES

### CASES

<i>ACLU v. City of St. Charles</i> , 794 F.2d 265 (7 <sup>th</sup> Cir. 1986).....	26
<i>Alliant Energy Corporation v. Bie</i> , 277 F.3d. 916 (7 <sup>th</sup> Cir. 2002).....	26
<i>Arlington Heights v. Metropolitan Housing Development Corporation</i> , 429 U.S. 252 (1977) .....	23, 24
<i>Aroostook Band of Micmacs v. Ryan</i> , 404 F.3d 48 (1 <sup>st</sup> Cir. 2005) .....	31, 32
<i>Baytree of Inverrary Realty Partners v. City of Lauderhill</i> , 873 F. 2d 1407 (11 <sup>th</sup> Cir. 1989) .....	34
<i>Brokaw v. Mercer County</i> , 235 F.3d 1000 (7 <sup>th</sup> Cir. 2000) .....	36
<i>Burke v. Johnston</i> , 452 F.3d 665 (7 <sup>th</sup> Cir. 2006).....	19
<i>Cutting v. Muzzey</i> , 724 F.2d 259 (1 <sup>st</sup> Cir. 1984).....	34
<i>Dennis v. Higgins</i> , 498 U.S. 439 (1991).....	33
<i>Duke Power Co. v. Carolina Environmental Study Group, Inc.</i> , 438 U.S. 59 (1978) .....	40
<i>Ex Parte Young</i> , 209 U.S. 123 (1908) .....	29, 32
<i>Family &amp; Children’s Center, Inc. v. School City of Mishawaka</i> , 13 F.3d 1052 (7 <sup>th</sup> Cir. 1994) .....	19
<i>Fedor v. Cingular Wireless Corp.</i> , 355 F.3d 1069 (7 <sup>th</sup> Cir. 2004) .....	33
<i>First National Bank of Eastern Arkansas v. Taylor</i> , 907 F.2d 775 (8 <sup>th</sup> Cir. 1990) .....	31
<i>Flenner v. Sheahan</i> , 107 F.3d 459 (7 <sup>th</sup> Cir. 1997).....	18, 19
<i>Frank Bros., Inc. v. Wisconsin Dept. of Transportation</i> , 297 F. Supp. 2d 1140 (W.D. Wis. 2003) .....	31
<i>Gladstone Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979) .....	19, 20
<i>Gordon v. City of Cartersville</i> , 522 F. Supp. 753 (N.D. Ga. 1981).....	39

<i>Gorski v. Troy</i> , 929 F.2d 1183 (7 <sup>th</sup> Cir. 1991) .....	17, 20
<i>Growth Horizons, Inc. v. Delaware County</i> , 983 F.2d 1277 (3d Cir. 1993) ..	25
<i>Halprin v. Prairie Single Family Homes</i> , 388 F.3d 327 (7 <sup>th</sup> Cir. 2004) .....	21
<i>Hampton v. Hanrahan</i> , 600 F.2d 600 (7 <sup>th</sup> Cir. 1978) .....	35
<i>Hanrahan v. Hampton</i> , 446 U.S. 754 (1980) .....	35
<i>Harris v. Harvey</i> , 605 F.2d 330 (7 <sup>th</sup> Cir. 1979) .....	35
<i>Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan</i> , 360 F.3d 674 (7 <sup>th</sup> Cir. 2004) .....	32, 33
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982) .....	19
<i>Hispanics United of DuPage County v. Village of Addison</i> , 958 F. Supp. 1320 (N.D. Ill. 1997) .....	25
<i>Hovsons, Inc. v. Township of Brick</i> , 89 F.3d 1096 (3d Cir. 1996) .....	25
<i>Hudson Valley Freedom Theater v. Heimback</i> , 671 F. 2d 702 (2d Cir. 1982) .....	38
<i>Illinois v. General Electric Co.</i> , 683 F.2d 206 (7 <sup>th</sup> Cir. 1982) .....	30
<i>Illinois Ass'n of Mortgage Brokers v. Office of Banks and Real Estate</i> , 308 F.3d 762 (7 <sup>th</sup> Cir. 2002) .....	30
<i>Katris v. City of Waukegan</i> , 498 F. Supp. 48 (N.D. Ill. 1980) .....	36
<i>Kujawski v. Board of Commissioners</i> , 183 F.3d 734 (7 <sup>th</sup> Cir. 1999) .....	36
<i>Lawrence County v. Lead-Deadwood School Dist.</i> , 469 U.S. 256 (1985) .....	29, 31
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	19
<i>Malone v. City of Fenton</i> , 592 F. Supp. 1135 (E.D. Mo. 1984), <i>aff'd</i> 794 F. 2d 680 (8 <sup>th</sup> Cir. 1986) .....	25
<i>Meadows of West Memphis v. City of West Memphis</i> , 800 F.2d 212 (8 <sup>th</sup> Cir. 1986) .....	20

<i>Metro Hydroelectric Co. LLC v. Metro Parks</i> , 443 F. Supp. 2d 938 (N.D. Ohio 2006) .....	31
<i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978) .....	18, 33, 35, 36
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961) .....	33, 35
<i>Narragansett Indian Tribe v. Rhode Island</i> , 449 F.3d 16 (1 <sup>st</sup> Cir. 2006) .....	31
<i>Park View Heights Corporation v. City of Black Jack</i> , 467 F.2d 1208 (8 <sup>th</sup> Cir. 1972) .....	25, 39
<i>Planned Parenthood of Houston and Southeast Texas v. Sanchez</i> , 403 F.3d 324 (5 <sup>th</sup> Cir. 2005) .....	31
<i>Qwest Corp. v. City of Santa Fe</i> , 380 F.3d 1258 (10 <sup>th</sup> Cir. 2004) .....	33
<i>ReMed Recovery Care Centers v. Township of Willistown</i> , 36 F. Supp. 2d 676 (E.D. Pa. 1999) .....	25
<i>Scott v. Greenville County</i> , 716 F.2d 1409 (4 <sup>th</sup> Cir. 1983) .....	34
<i>Self-Insurance Institute of America, Inc. v. Koriath</i> , 993 F.2d 479 (5 <sup>th</sup> Cir. 1993) .....	31
<i>Shaw v. Delta Airlines, Inc.</i> , 463 U.S. 85 (1983) (7 <sup>th</sup> Cir. 1986) .....	29, 31, 32
<i>Sisters of Providence of St. Mary’s of the Woods v. City of Evanston</i> , 335 F. Supp. 396 (N.D. Ill. 1971) .....	39
<i>Speciale v. Seybold</i> , 147 F.3d 612 (7 <sup>th</sup> Cir. 1998) .....	33
<i>Steel Co. v. Citizens for Better Environment</i> , 523 U.S. 83 (1998) .....	30
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969) .....	38
<i>Swierkiewicz v. Sorema, N.A.</i> , 534 U.S. 506 (2002) .....	19, 34
<i>Taylor v. First National Bank of Eastern Arkansas</i> , 498 U.S. 972 (1990) ....	31
<i>United States General, Inc. v. Joliet</i> , 432 F. Supp. 346 (N.D. Ill. 1977) .....	22, 23

<i>Verizon Maryland, Inc. v. Public Service Commission</i> , 535 U.S. 635 (2002) .....	29, 30, 31, 32, 33
<i>Village of Bellwood v. Dwivedi</i> , 895 F.2d 1521 (7 <sup>th</sup> Cir. 1990).....	38
<i>Vorhees v. Naper Aero Club</i> , 272 F.3d 398 (7 <sup>th</sup> Cir. 2001).....	32, 33
<i>Waters v. City of Chicago</i> , 416 F. Supp. 2d 628 (N.D. Ill 2006) .....	36

**STATUTES**

28 U.S.C. §1291.....	1
28 U.S.C. §1331.....	1, 2, 17, 27, 29
28 U.S.C. §1343.....	2
28 U.S.C. §1367.....	2
42 U.S.C. §1437 <i>et seq.</i> .....	5, 28
42 U.S.C. §1437f.....	5, 28
42 U.S.C. §1982.....	1, 14, 18, 37
42 U.S.C. §1983.....	1, 14, 17, 33
42 U.S.C. §3601 <i>et seq.</i> .....	14
42 U.S.C. §3602.....	20, 24
42 U.S.C. §3604.....	1, 17, 21, 23, 24
42 U.S.C. §3613.....	20, 24
42 U.S.C. §3617.....	1, 17, 21, 23, 24

**OTHER AUTHORITIES**

24 C.F.R. § 100.400(c)(2).....	21
Fed. R. Civ. P. 12(b)(6).....	2, 15, 18
Fed. R. Civ. P. 12(c).....	2, 15, 18

Pub.L 106-74 (“MAHRA”) §511 .....	7, 28
U.S. CONST. amend. V.....	1
U.S. CONST. art. VI, cl. 2 .....	1

## **Jurisdictional Statement**

This is an appeal of the final judgment entered September 8, 2006 by the Honorable Judge Charles R. Norgle. R.<sup>1</sup> 84. Plaintiff-Appellant New West, an Illinois limited partnership (“New West”), filed its Notice of Appeal on October 4, 2006. R. 86. This Court has jurisdiction of this appeal under 28 U.S.C. §1291, as an appeal of a final decision of the District Court.

The action from which this appeal is taken was filed March 24, 2005 in the United States District Court for the Northern District of Illinois. R. 1. New West sued Defendants-Appellees the City of Joliet and certain of its officials, both individually and in their official capacities (collectively, “Defendants”), for violation of Sections 3604 and 3617 of the federal Fair Housing Act, 42 U.S.C. §§3604 and 3617, violations of the Supremacy Clause in Article VI, Clause 2 of the United States Constitution, violations of Sections 1982 and 1983 of the federal civil rights statutes, 42 U.S.C. §§1982 and 1983, violation of the due process clause of the Fifth Amendment of the United States Constitution and for tortious interference with contract under Illinois law. R. 1 at 2, 12, 13, 14; R. 18 at 19, 20, 21, 22.

The District Court had jurisdiction of the Fair Housing Act, Supremacy Clause and due process clause claims under 28 U.S.C. §1331, which states

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<sup>1</sup> “R. \_\_” refers to citations to a document in the appellate record, where the number following “R” represents the document number listed on the top of each page of the record. The number following “R” may be hyphenated (*e.g.*, “18-2”) to mirror the document numbers listed on the top of each page in the record. “R. \_\_ at \_\_” refers to a particular page within a record document. “R. \_\_ at \_\_, ¶ \_\_” refers to a particular paragraph on a page within the record document. “AttA. \_\_” refers to citations to the appendix attached to this brief. “A. \_\_” refers to citations to the separately bound appendix.

that “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.” R.1 at 2.

The District Court had jurisdiction of the civil rights claims under 28 U.S.C. §1343, which states, in relevant part, that:

- (a) The district courts shall have original jurisdiction of any civil action authorized to be commenced by any person:
  - (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, ...;
  - (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
  - (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights ...

The District Court had supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. §1367, which states, in relevant part, that:

in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

R. 1 at 2.

On September 8, 2006, after *sua sponte* converting Defendants’ Motion to Dismiss the First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the District

Court entered its Opinion and Order granting Defendants' motion and dismissing New West's First Amended Complaint in its entirety. R. 85. An order stating that Defendants' motion was granted and that the case had been terminated also was entered September 8, 2006. R. 84. No claims or parties remain for disposition before the District Court.

### **Statement Of The Issues**

- I. Whether the District Court properly dismissed New West's Fair Housing Act claim for lack of standing.
- II. Whether the District Court properly dismissed New West's Supremacy Clause claims for lack of subject matter jurisdiction.
- III. Whether the District Court properly dismissed New West's Section 1983 Civil Rights claim for failure to plead a policy or practice.
- IV. Whether the District Court properly dismissed New West's Section 1982 Civil Rights claim for lack of standing.

### **Statement Of The Case**

This is an appeal from the District Court's September 8, 2006 Opinion and Order and minute order dismissing all seven counts of New West's First Amended Complaint and terminating the case (collectively, the "Order"). R. 84 and 85. The District Court held that (i) New West lacked standing to bring its Fair Housing Act claim, (ii) there was no subject matter jurisdiction of New West's two Supremacy Clause claims, (iii) New West lacked standing to bring its claim under Section 1982 of the Civil Rights Act, (iv) New West failed to state a claim for violation of either Section 1983 of the Civil Rights Act or the due process clause, and (v) jurisdiction was relinquished with respect to the remaining state law tortious interference with contract claim. R. 85 at 7, 8, 9,

10. New West seeks reversal of the Order because (i) New West has standing to bring a Fair Housing Act claim, (ii) there is federal question jurisdiction of the Supremacy Clause claims, (iii) the Section 1982 claim was properly pled, and (iv) the Section 1983 claim was properly pled.

### **Statement Of Facts**

#### **A. The Parties**

##### **1. Plaintiff-Appellant New West**

Plaintiff Appellant New West is an Illinois limited partnership (“New West”) that owns the real estate and property commonly known as Evergreen Terrace, a 100% Section 8-subsidized apartment complex in downtown Joliet, Illinois. R. 18-2 at 2, ¶2. New West is providing, and seeks to continue providing, affordable housing at Evergreen Terrace. R. 18-2 at 14, ¶52.

##### **2. Defendants-Appellees Joliet And Its Officials**

Defendant-Appellee the City of Joliet (“Joliet”) is an Illinois municipal corporation with offices at 150 West Jefferson Street in Joliet, Illinois. R. 18-2 at 2, ¶3. Defendant-Appellee Arthur Schultz (“Schultz”) is the Mayor of Joliet; Defendant-Appellee John Mezera (“Mezera”) is the Joliet City Manager; Defendant-Appellee Jim Shapard (“Shapard”) is the Joliet Deputy City Manager. R. 18-2 at 2, ¶¶4-6. Schultz, Mezera and Shapard are sued both individually and in their official capacity. *Id.* Joliet, Shultz, Mezera and Shapard, collectively, are referred to herein as “Defendants.”

#### **B. Evergreen Terrace, Its Tenants And Its Relationship With HUD**

Evergreen Terrace covers approximately 7½ acres and can house up to 1,000 residents. R. 18-2 at 3, ¶10. Built originally as low income housing in

the 1960s, in the early 1980s it was redeveloped as low income housing in two phases, Evergreen Terrace I (“ETI”) and Evergreen Terrace II (“ETII”). *Id.* ETI has approximately 500 residents. In excess of 90% of the heads of households are female and under 25 years of age. More than 96% of the heads of households are African-American; and two thirds of the heads of households have an adjusted income of less than \$5,000 per year. R. 18-2 at 4, ¶14. ET II has approximately 200 residents. 74% of the heads of households are female; many are under 25 years of age; over 80% are African-American. Roughly 75% have a household income of less than \$10,000 per year. *Id.* Thus, collectively, the heads of households are overwhelmingly female, African-American and poor. *Id.*; *see also* R. 18-2 at 14, ¶51.

Since 1982, Evergreen Terrace has been operated as a Section 8-subsidized low and moderate income housing development, R. 18-2 at 4, ¶11, with subsidies provided by the United States Department of Housing and Urban Development (“HUD”). *Id.* The Section 8 program arises under the United States Housing Act of 1937, 42 U.S.C. § 1437, *et seq.*, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. §1437f.

Evergreen Terrace and the federal subsidies therefore are governed by an array of HUD contracts. R. 18-2 at 4-5, 18 and 20, ¶¶14, 75, 76 and 90. For ETI, HUD provides rental subsidies directly to New West pursuant to a Housing Assistance Payments Contract (“HAP Contract”). *Id.* at 4-5, ¶14. The mortgage on Evergreen Terrace is insured by HUD. The mortgage, the HAP Contract and the Regulatory Agreement between New West and HUD all require that

Evergreen Terrace be maintained as affordable housing under HUD programs, including the Section 8 program. R. 18-2 at 18, 20, ¶¶75, 90. Further, the Commitment (discussed below) requires New West to enter into a Use Agreement governed by federal law that requires, among other things, that for the next thirty years Evergreen Terrace will be used solely as affordable housing. R. 18-2 at 18, 20, ¶¶76, 91.

New West's Local Rule 56.1 Statement of Undisputed Material Facts in Support of its Motion for Partial Summary Judgment, R. 37-2 at 5-36, which the District Court had before it as part of New West's partial summary judgment submission, included copies of the HUD contracts referenced above. They provide, *inter alia*, that:

- The owner may not convey, transfer, encumber or sell the property without HUD approval. R. 37-3 at 8, ¶ 8(a).
- The owner may not remodel, add to or reconstruct the property without HUD approval. R. 37-3 at 8, ¶ 8(d).
- The owner may make accommodations and services available only at rents in accordance with a schedule approved in writing by HUD. R. 37-3 at 7, ¶ 4(a).
- Subleasing of dwelling accommodations may be undertaken only with the express written approval of HUD. R. 37-3 at 7, ¶ 4(a).
- Any management contract entered into by the owners is subject to immediate termination at the direction of HUD. R. 37-3 at 9, ¶ 12(a).
- The books and accounts of the operations must be kept as directed by HUD. Annual reports, periodic inspections and access to all ownership records of operation are to be provided to HUD and are subject to HUD directives and follow-up. R. 37-3 at 9, ¶ 12(c), (d), (e), (f).

- The owner may not permit the taking of the property under judicial process, including eminent domain. HUD specifically obligates the owner to vigorously oppose such proceedings. R. 37-3 at 8, 9, ¶¶ 8(a), 11.
- HUD is empowered to inspect the property, take appropriate remedial measures, review all records of the property, and direct the owner to respond to specific questions about the operation and condition of the property. R. 37-3 at 9, ¶ 12(c), (d), (e), and (f).

Congress enacted the federal Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, codified at 42 U.S.C. §1437f Note, amended by Pub.L 106-74 (“MAHRA”). R. 36-1 at 7, 8. MAHRA created the Mark to Market program, the purpose of which is to identify appropriate market rents, facilitate site improvements and restructure project finances with the goal of preserving Section 8 units. HUD administers the Mark to Market program.

In 2002, as the expiration of the ETI HAP Contract grew close, New West advised HUD it intended to apply to refinance and restructure Evergreen Terrace through the Mark to Market program. R. 18-2 at 5, ¶15.

HUD designated the low and moderate income housing development state agency Illinois Housing Development Authority (“IHDA”) as its “participating administrative entity” (“PAE”) to evaluate Evergreen Terrace for refinancing under the Mark to Market program. R. 18-2 at 5, ¶16.

**C. Defendants Seek To Do Away With Evergreen Terrace**

Evergreen Terrace now sits across the river from the Harrah’s Casino. It has become a desirable property. R. 18-2 at 1-2, ¶1. Joliet wishes to obtain control of the site so that it may redevelop the area without the affordable

housing and its African-American residents. R. 18-2 at 5, 14, ¶¶53-55. Defendants seek to redevelop the site as luxury houses/condominiums or parkland. R. 18-2 at 1, 2, 5, ¶¶ 1, 18. If Joliet is successful, there is no reasonable alternative in and around Joliet to which the residents of Evergreen Terrace could be relocated. R. 18-2 at 13, ¶¶45-47. Defendants have undertaken a campaign of harassment, threats and deception to force New West and HUD to abandon the property and to drive out Evergreen Terrace's affordable housing for low income families.

### **1. Joliet's Campaign to Discredit the Site**

When Defendants learned that New West was seeking to refinance Evergreen Terrace, they saw an opportunity to force out low-income African-American residents in anticipation of gaining a redevelopment corridor by convincing HUD to discontinue its support of Evergreen Terrace. R. 18-2 at 5, ¶¶17-18. Defendant Schultz, with the assistance and approval of Defendants Mezera and Shapard, demanded that HUD not renew the Section 8 program at Evergreen Terrace and forwarded to HUD a report on Evergreen Terrace claiming the property was a "blight" and posed grave public safety risks. R. 18-2 at 5, ¶18.

These claims were false and Defendants knew they were false when they were made. R. 18-2 at 5, 6. When IHDA set up a meeting with Joliet police to discuss security concerns, Defendant Mezera cancelled the meeting. R. 18-2 at 6, ¶20. When IHDA requested a list of purported code or safety violations at Evergreen Terrace, Defendants failed to produce one. *Id.*

In June 2002, as part of the Mark to Market process, IHDA directed an architectural firm to inspect Evergreen Terrace. The firm found the property appropriate for refinancing. R. 18-2 at 6, ¶19. Several months later, the Chief of HUD's Chicago office confirmed these findings. R. 18-2 at 6, ¶21.

In May, 2003, HUD approved the refinancing and restructuring plan for Evergreen Terrace and signed a binding Restructuring Commitment. R. 18-2 at 6, ¶22 and R. 18-2 at 24 *et seq.* HUD gave New West an estimated closing date of July 15, 2003. R. 18-2 at 6, ¶ 22.

Upon learning that HUD was proceeding despite their misrepresentations, Defendants intensified their campaign to derail the refinancing, insisting that no closing take place and repeating misrepresentations as to conditions at the site. R. 18-2 at 6-7, ¶¶23-24. Critically, Defendants claimed they had an alternative housing plan that would accommodate both the tenants' needs for shelter and HUD's need to preserve affordable housing. *Id.* HUD, over strenuous objections by New West, agreed to further delay the closing in reliance on Defendants' promises to provide the alternative plan. *Id.*

Months later, Defendants produced the plan. R. 18-2 at 7, ¶26. It was a sham. It offered no realistic housing alternatives. *Id.* Some of the addresses proposed as housing were, in fact, vacant lots; still others were "red tag" units that Joliet itself previously had designated as unsuitable for occupancy. *Id.* There was no housing at all for the majority of Evergreen Terrace tenants. R. 18-2 at 6-8, 13, ¶¶ 24, 28, 46. Further, unlike Evergreen Terrace, which

operated on project-based subsidies, Defendants' plan relied on market vouchers. Such vouchers rely on market availability of units and landlord willingness to accept them. R. 18-2 at 7, ¶26. There was absolutely no market for such vouchers in or around downtown Joliet. *Id.* Vouchers would force African-Americans tenants to move far from the core area of Joliet and away from public transportation, schools and social services. *Id.*

Defendants knew their plan did not provide an acceptable alternative for Evergreen Terrace tenants. R. 18-2 at 7-9. Vacant lots and boarded up buildings are not housing. The Joliet Housing Authority already had tried and failed to meet its housing commitments with market vouchers. *Id.* at 8-9, ¶28.

Defendants meanwhile stepped up their efforts to harass New West. At the direction of Defendants, Joliet's Building Services and Fire Departments tried to intimidate both New West and the tenants with accusations of numerous and dangerous code violations. R. 18-2 at 7, ¶25. Only a year before, the Fire Department had found no code violations on site. *Id.*

In a November, 2003 report to HUD, IHDA found explicitly that Defendants had misrepresented both the condition of the property and the conduct of the residents.

The City's very vocal assertions about Evergreen Terrace being crime ridden while long, loud frequent and frequently repeated in the local press are not supported by the facts. This is another example of the City's pattern of exaggeration . . .

R. 18-2 at 8-9, ¶¶27-28.

As a result of the closing delay caused by Defendants, New West had to seek multiple extensions of the HAP Contract. *Id.* The delay resulted in higher debt service and fees to keep the project going. The adverse publicity also created higher vacancy rates and lower income: existing tenants began to leave and prospective tenants were frightened away. R. 18-2 at 9, 15, ¶¶29, 57. Defendants knew that their campaign would inflict such damage. R. 18-2 at 9, ¶29. Their hope was that the higher costs and threat of closure would pressure New West into abandoning the site. *Id.*

In early 2004, HUD assigned a new firm, Heskin Signet Partners (“Heskin”) and its subcontractor JPS & Associates (“JPS”), to evaluate the property as part of the updated Mark to Market review. R. 18-2 at 9, ¶¶30, 31. They examined the property in detail. They, too, concluded that the property was entirely acceptable for Mark to Market refinancing. *Id.*

Undeterred, Defendant Mezera continued to misrepresent the state of the property, disparaging Evergreen Terrace, its management company and its African-American residents to HUD, JPS and Heskin. R. 18-2 at 9-10, ¶32.

In February, 2005, representatives of New West met with Defendants Mezera and Shapard. R. 218-2 at 10, ¶34. Mezera openly stated that Joliet intended to stop the HUD closing and made derogatory and racist comments about the residents at Evergreen Terrace. R. 18-2 at 10, ¶35. He also threatened New West with condemnation proceedings to take and demolish Evergreen Terrace if New West and HUD consummated the refinancing. *Id.*

## **2. Defendants Carry Out Their Threats To Litigate**

Defendants then launched a campaign of litigation, believing it would drive up the costs of the project and so complicate the task of refinancing that HUD would change course and abandon the property. R. 18-2 at 10-11, ¶36.

On April 13, 2005, though well aware that the proceeds of the closing with HUD were to be used to defray the costs of police security services at Evergreen Terrace, Joliet filed an action to recover sums it knew would be paid, *City of Joliet v. New West and Burnham Management Co.*, Case No. 05 L 246, in the Circuit Court of Will County, Illinois. R. 18-2 at 11, ¶39.

On August 17, 2005, the Joliet City Council passed a Resolution authorizing the initiation of eminent domain proceedings against Evergreen Terrace based on factual assertions already rejected by HUD, IHDA and their agents. R. 18-2 at 11-12, ¶40 and R. 18-2 at 38, *et seq.*

On August 19, 2005, the City filed another suit in the Circuit Court of Will County, this time seeking fines for a laundry list of claimed violations of the Joliet Building Code at ETI. *City of Joliet v. Mid-City National Bank et al.*, Case No. 2005 OV 4533. R. 18-2 at 12, ¶41.

On August 29, 2005, Joliet gave notice that it would institute demolition proceedings against Evergreen Terrace. R. 18-2 at 12, ¶42.

This Court may take judicial notice that on September 28, 2005, Joliet filed in the Circuit Court of Will County a demolition action against Evergreen Terrace, *Joliet v. Mid-City Nat'l Bank, et al.*, Case No. 05 CH 1800.

This Court may take judicial notice that on October 5, 2005, Joliet filed in the Circuit Court of Will County a code violation case against ETII, *City of Joliet v. Mid-City National Bank et al.*, Case No. 2005 OV 5696.

This Court may take judicial notice that on October 7, 2005, Joliet filed in the Circuit Court of Will County a Complaint for Condemnation against Evergreen Terrace, *City of Joliet v. Mid-City National Bank, et al.*, No. 05 ED 39. The case was removed to the United States District Court for the Northern District of Illinois, *City of Joliet v. Mid-City National Bank, et al.*, No. 05 C 6746, because though HUD was not named, GNMA was. On March 29, 2006, after HUD was added as a necessary party over Joliet's objection and Joliet's motions to dismiss HUD and remand the case to state court were denied, Joliet filed a Petition for Writ of Mandamus, *In re City of Joliet*, No. 06-1887, asking this Court to direct the District Court to remand the case to state court. On May 9, 2006, this Court (Judges Bauer, Posner and Wood) denied the petition.

**D. HUD Issues The 2005 Restructuring Commitment**

In September, 2005, despite Defendants' ongoing opposition and the rising tide of lawsuits, HUD notified New West that Evergreen Terrace had passed its annual inspection. R. 18-2 at 13, ¶44. HUD gave New West a new binding Commitment to refinance the property with an estimated closing date of October, 2005. R. 18-2 at 12-13, ¶43.

**E. Damages**

Three years of delay added greatly to the financing costs of the development; substantial additional fees have been incurred in defending

Evergreen Terrace from Joliet's campaign of intimidation and harassment; existing tenants have fled the property and new ones have been frightened away creating significant vacancies and loss of rental income. R. 18-2 at 9, 15, 17, ¶¶29, 56-57, 69. These are continuing injuries. The federal eminent domain proceedings and multiple other state lawsuits that falsely claim the property is blighted remain pending.

**F. The Proceedings Thus Far**

New West filed this suit in the United States District Court for the Northern District of Illinois on March 24, 2005, after Defendants threatened to condemn the property. R. 1 at 1. New West pled that Defendants' conduct violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, violated 42 U.S.C. §§1982 and 1983 of the Civil Rights Act and constituted tortious interference with its contract with HUD. R. 1 at 12, 13, 14. New West sought declaratory and injunctive relief from Defendants' efforts to illegally interfere with New West's operation of the property and contractual relationship with HUD, as well as damages, punitive damages and attorneys' fees. R. 1 at 15-16, ¶ 61.

On April 21, 2005, Defendants filed an Answer and Affirmative Defenses which challenged the substantive allegations but largely admitted the existence of the HAP Contract and the existence of HUD-funded Section 8 subsidies at the site. R. 10 at 5, 6, ¶¶ 11, 14; R. 11 at 1, 2, ¶¶ 1, 4-6. Defendants also admitted that subject matter jurisdiction was proper over the federal claims and that there was supplemental jurisdiction over the tortious interference claim. R. 10 at 4, ¶¶ 7, 8.

On September 30, 2005, New West was granted leave to file *instanter* its First Amended Complaint. R. 28. The First Amended Complaint included the same four counts as the initial complaint and added three additional counts alleging that the eminent domain and demolition proceedings were barred by the Supremacy Clause and the due process clause of the United States Constitution. R. 18-2 at 17, 19.

On November 2, 2005, New West moved for partial summary judgment, arguing that the Supremacy Clause prohibited both the eminent domain and condemnation actions. R. 35, R. 36, R. 37. Briefing on the motion for summary judgment was stayed by the District Court over New West's objection. R. 51-1 at 2, ¶ 5.

On November 4, 2005, Defendants filed a motion to dismiss the First Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. R. 40, R. 41-2.

On September 8, 2006, though Defendants had never filed an answer to the First Amended Complaint, the District Court *sua sponte* converted Defendants' motion to a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. The District entered an order and an Opinion and Order that granted the motion and dismissed the entire action. R. 84, R. 85.

This appeal followed. R. 86, R. 87.

### **Summary of the Argument**

This appeal raises the question of whether New West, the owner of a federally subsidized Section 8 development in Joliet, Illinois known as Evergreen Terrace, can challenge the racially-motivated efforts of Joliet and its public officials to eliminate Evergreen Terrace and remove its low income African-American residents from the City.

Congress enacted a law to preserve existing affordable housing. New West applied to HUD to refinance Evergreen Terrace under that law. It was met with an extraordinary effort by Defendants to block such refinancing despite the fact that independent federal agencies and their agents agreed that Evergreen Terrace was entirely suitable for refinancing. Joliet and the individual Defendants have engaged in a duplicitous, misleading and racially driven campaign to prevent HUD and New West from consummating the refinancing transaction.

New West's First Amended Complaint alleges that Defendants violated the Fair Housing Act, ("FHA"), the Civil Rights Acts (42 U.S.C. §§ 1983 and 1982) and tortiously interfered with New West's contractual arrangements with HUD. In addition, New West alleges that Joliet's efforts to demolish or seize control of the site by eminent domain or condemnation proceedings were barred by the Supremacy Clause of the United States Constitution given the clear federal interest in Evergreen Terrace and the Congressional mandate to preserve affordable housing.

The District Court dismissed these claims, arguing that New West (a) did not have standing to pursue claims under the FHA; (b) did not establish subject matter jurisdiction of the Supremacy Clause counts; (c) did not plead a policy or custom under Section 1983 sufficient to prosecute the action; and (d) did not have standing under Section 1982 because it was a partnership rather than a “citizen”. Each of the District Court’s conclusions is incorrect.

First, there is no question that New West has sustained injury due to Defendants’ racially motivated efforts in violation of 42 U.S.C. §§ 3604, 3617 and therefore has standing under the FHA. It is well-established that non-tenants who suffer injury as a result of discrimination against tenants or other improper conduct may sue to redress their own injury and any injury to the protected class.

Second, the District Court clearly had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over claims that Joliet and its officials should be enjoined from exercising eminent domain over or condemning Evergreen Terrace in violation of the Supremacy Clause of the Constitution. The pervasive federal interest in Evergreen Terrace and the Congressional mandate to preserve affordable housing cannot, under the Supremacy Clause, be subject to state eminent domain or condemnation proceedings that have the effect of extinguishing such federal interests.

Third, with regard to claims under 42 U.S.C. § 1983, the District Court’s insistence that a policy or custom must be pleaded should be rejected. The District Court failed to consider that the individual Defendants were sued in

their individual capacities and, as such, may be held liable without reference to any policy or custom. Moreover, the individual Defendants are final or determinative policymakers which is sufficient to comply with the requirements of *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

Fourth, the rejection of New West's claims under 42 U.S.C. § 1982 because the company is not a "citizen" was incorrect. While Section 1982 seeks to protect the rights of citizens to own, rent or otherwise possess real estate, the ability to sue to recover damages under the Act is considerably broader. Partnerships or corporations or advocacy groups may sue in response to discriminatory acts against the protected class if they can plead concrete injury to themselves, as well as the protected class. This New West has done.

The District Court decision should be reversed.

## **Argument**

### **Standard of Review**

Defendants' motion to dismiss pursuant to Rule 12(b)(6) was converted by the District Court into a motion for judgment on the pleadings pursuant to Rule 12(c) despite the fact that no answer had been filed. R. 85 at 1, 4-5. This Court reviews *de novo* an order granting a motion for judgment on the pleadings under Rule 12(c). *Flenner v. Sheahan*, 107 F.3d 459, 461 (7<sup>th</sup> Cir. 1997).

A Rule 12(c) motion is reviewed under the same standard as a motion to dismiss under Rule 12(b). "[T]he motion is not granted unless it appears beyond doubt the plaintiff can prove no facts sufficient to support his claim for

relief and the facts in the complaint are viewed in the light most favorable to the nonmoving party.” *Flenner v. Sheahan*, 107 F.3d at 461. Thus, on a motion to dismiss the complaint a court must indulge every factual inference in the plaintiff’s favor. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508n.1 (2002).

A district court’s decision on subject matter jurisdiction also is reviewed *de novo*. See, e.g., *Burke v. Johnston*, 452 F.3d 665, 667 (7<sup>th</sup> Cir. 2006).

**I. The District Court Erred In Dismissing New West’s Fair Housing Act Claim For Lack of Standing**

It is well-established that so long as a plaintiff has met the requirements for Article III standing he or she may bring claims under the Fair Housing Act (“FHA”) for violation of his or her own rights or for violation of the rights of third parties. Federal courts “lack the authority to create prudential barriers to standing” in FHA suits. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Standing under the FHA is as broad as is permitted by Article III of the Constitution. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 108-109 (1979). This Court has noted that the requirements “are rather ‘undemanding.’” *Family & Children’s Center, Inc. v. City of Mishawaka*, 13 F.3d 1052, 1058 (7<sup>th</sup> Cir. 1994).

For Article III standing, a plaintiff must have suffered an actual or threatened injury that is fairly traceable to the defendant’s allegedly illegal conduct and that likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 590 (1992). A plaintiff need not allege that his own rights have been violated, but can as an “aggrieved person”

who has suffered an injury because of a violation of the underlying provisions of the Act, sue to enforce another party's rights. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. at 102-03. See also *Gorski v. Troy*, 929 F.2d 1183, 1188 (7<sup>th</sup> Cir. 1991) (stating that "Congress intended to extend broad standing principles to those seeking redress under the FHA" for violation of their own rights and the rights of others); 42 U.S.C. §3602 (defining "aggrieved person" to include any person who "claims to have been injured by a discriminatory housing practice" or "believes that such person will be injured by a discriminatory housing practice that is about to occur"); 42 U.S.C.A. §3613 (providing that aggrieved persons may bring civil actions to enforce the FHA).

New West alleged that Defendants' discriminatory conduct caused economic and other injury to it, such as increased debt service, administrative costs, interest carry and vacancies, see *Meadows of West Memphis v. City of West Memphis*, 800 F.2d 212, 215 (8<sup>th</sup> Cir. 1986) (recognizing that blocking and delaying government financing for an impermissible reason constitutes actual injury) as well as the prospect of losing its property entirely. It also alleged that Defendants' discriminatory conduct caused injury to the tenants of Evergreen Terrace (discrimination, harassment, intimidation and moving expenses).

New West sought declaratory and injunctive relief to prohibit Defendants from continuing with their efforts to do away with Evergreen Terrace and the affordable housing it provides and damages to compensate for the economic losses caused by Defendants' attack on the refinancing and rehabilitation of the property and driving down of occupancy. The relief New West requested

would redress its injuries. Accordingly, New West had standing to pursue FHA claims on behalf of both itself and the tenants.

Defendants did not initially contest New West's FHA standing. Instead, they argued in their motion to dismiss that New West did not state a FHA claim. Relying on *Halprin v. Prairie Single Family Homes*, 388 F.3d 327 (7<sup>th</sup> Cir. 2004), they claimed that all the events alleged in the First Amended Complaint constituted post-acquisition conduct because they occurred after New West acquired Evergreen Terrace and that Sections 3604 and 3617 afforded relief only to those seeking housing and not to those who already had obtained housing. R. 41-2 at 18. In its Response, New West pointed out that the Seventh Circuit actually held in *Halprin* that, while Section 3604 applied only to pre-acquisition conduct, Section 3617, in conjunction with HUD regulation 24 C.F.R. §100.400(c)(2) -- any challenge to the validity of which had been waived -- did not require a violation of Section 3604 and afforded relief for both pre- and post-acquisition of rental conduct. R. 54-1 at 9 citing *Halprin*, 388 F.3d at 329-30. New West also demonstrated that the HUD regulation is valid under current law and, even if that were that not the case, New West had pled pre-acquisition conduct, *i.e.*, that it "is providing, and seeks to continue providing, affordable housing" at Evergreen Terrace and was trying to refinance to make this possible. *Id.* See also R. 18-2 at 14, ¶ 52.

Defendants later, at the unsolicited invitation of the District Court, R. 73, filed a supplemental brief where they argued that New West had not alleged injury to itself or to the tenants sufficient to confer FHA standing. R. 76.

The District Court never addressed whether an FHA claim was stated. It dismissed New West's FHA claim solely on standing grounds, ruling that:

- (i) because New West was a for-profit business entity rather than an "individual tenant whose rights may be infringed, or suffered some sort of discrimination," New West lacked standing to sue on behalf of Evergreen Terrace's existing or prospective tenants;
- (ii) because New West had no contract with HUD it lacked standing to sue on its own behalf; and
- (iii) There was "not enough evidence in the record to support" a conclusion that Joliet had a discriminatory motive or intent towards the tenants.

R. 85-1 at 9, 10. This was error.

Perhaps the clearest discussion of standing in this setting is in *United States General, Inc. v. Joliet*, 432 F. Supp. 346, 350-52 (N.D. Ill. 1977) ("*USG*"), a case involving Joliet that neither Defendants nor the District Court cited in connection with the motion. In *USG*, a low income housing developer to whom Joliet had refused to issue building permits sued Joliet for violations of the FHA, the civil rights acts and tortious interference with contract. Joliet argued (like Defendants here) that the developer lacked standing itself because it had not suffered injury and could not represent the rights of prospective tenants. *Id.* at 350.

The *USG* court rejected these arguments. It found the developer had "satisfied the minimal constitutional requirement of injury in fact" necessary to bestow it with Article III standing because it had suffered "actual, concrete injury as a result of defendants' decision to withhold building permits" because

it was under contract at the time to build at least one building, had expended time and money in planning and had acquired or bought options on property for the development. *Id.* at 350, citing *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). It also addressed the developer's standing to assert the tenants' rights. First, it recognized that Section 3617 of the FHA:

grants a right of action to persons who have been interfered with as they aided others in their exercise of rights protected by §3604. Without more, the language of §3617 indicates that Congress intended to grant standing to persons who help others to exercise protected rights, even if those persons did not suffer injury to their own legal rights.

*Id.* at 352. The court then concluded the developer had standing to assert tenants' rights:

First, Congress intended to expand standing under §3617 and created an exception to the prudential rule. Second, developers are essential participants in the growth of integrated public housing and it is consistent with the broad sweep of the Act to permit them to enforce its prohibitions.

*Id.* at 353-354.

New West alleged injury and therefore had standing to bring its FHA claim. The District Court found that New West lacked standing because it was a limited partnership and a for-profit business entity rather than an individual tenant who had suffered discrimination. R. 85 at 7, 9-10. This finding is contrary to both the plain language of the FHA and the case law.

New West's claims were brought under Sections 3604 and 3617 of the FHA. Section 3604 provides, in relevant part, that "it shall be unlawful ... [to]

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). Section 3617 provides 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 ... 3604 ... of this title.” 42 U.S.C. §3617.

The FHA expressly defines “person” as including “one or more individuals, corporations, *partnerships*, associations ...” 42 U.S.C. §3602(d) (emphasis added). New West, a limited partnership, falls within the definition. 42 U.S.C. §3602 defines “aggrieved person” to include any person who “claims to have been injured by a discriminatory housing practice” or “believes that such person will be injured by a discriminatory housing practice that is about to occur”). 42 U.S.C.A. §3613 provides that aggrieved persons may bring civil actions to enforce the FHA.

Further, numerous courts have recognized that non-individual and non-tenant owners, operators and developers of housing have standing under the FHA to sue for violation of their own rights, as well as for the violation of the rights of tenants and prospective tenants. *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977) (non-profit real estate developer with contract to buy land on which it intended to build affordable housing and who had spent money on plans and studies to obtain rezoning had standing to bring claims for injunctive and declaratory relief after

local authorities refused to rezone land to permit him to build the housing); *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1100 n.2 (3d Cir. 1996) (nursing home developer denied conditional use permit to build a home had standing to claim that denial discriminated against unidentified prospective handicapped occupants of the home); *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1282-83 (3d Cir. 1993) (corporation that provided residential placements for the mentally disabled had standing to sue county after county terminated its contract and refused to assume its leases because it had suffered economic injury in the form of having to pay rent on the leases as a result of defendant's discriminatory *animus* towards the disabled); *Malone v. City of Fenton*, 592 F. Supp. 1135, 1156 (E.D. Mo. 1984), *aff'd* 794 F. 2d 680 (8<sup>th</sup> Cir. 1986) (developer plaintiffs who had ownership interest in tract and had money invested in the project had standing to raise both their own rights and those of persons allegedly affected by defendant city's refusal to zone for multifamily housing project); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212-13 (8<sup>th</sup> Cir. 1972) (nonprofit corporation that had advanced seed money and expended time and energy in planning and developing housing project had standing); *ReMed Recovery Care Centers v. Township of Willistown*, 36 F. Supp. 2d 676, 682-83 (E.D. Pa. 1999) (for profit limited partnership that provided housing for brain damaged individuals had standing to sue township over ordinance that would restrict or prohibit the partnership from operating the housing); *Hispanics United of DuPage County v. Village of Addison*, 958 F. Supp. 1320, 1326 (N.D. Ill. 1997) (absentee property owners had standing to

challenge establishment of TIF district to redevelop Hispanic neighborhood because though they had suffered no financial harm to date, the imminent loss of use of their property conferred injury in fact).

The District Court's other findings had no bearing on FHA standing. They were also erroneous. A finding that there was no contract between New West and HUD is contrary to the allegations of the First Amended Complaint (which the District Court was obliged to accept for purposes of the motion). R. 85 at 9. New West pled the existence of federal subsidy contracts. R. 18-2 at 3, 4, ¶¶ 11, 14. It also pled the existence of a current binding contract between New West and HUD for the refinancing of Evergreen Terrace: the September, 2005 Commitment. R. 18-2 at 12, ¶ 43; R. 18-2 at 46 *et seq.* While that Commitment set forth an estimated October date for the closing of the refinancing of Evergreen Terrace, and the October closing did not take place, the Commitment stayed in effect. R. 18-2 at 46; R. 75 at 1-2.

The District Court's additional finding that there was "not enough evidence in the record to support" a conclusion that Joliet had a discriminatory motive or intent towards New West's HUD contract or the tenants, is similarly misplaced. R. 85 at 10. At the motion to dismiss stage, "the test for standing, as for jurisdiction generally, is the good faith allegations of the complaint, rather than what the evidence shows." *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7<sup>th</sup> Cir. 1986) (Posner, J.). *See also Alliant Energy Corporation v. Bie*, 277 F.3d. 916, 919 (7<sup>th</sup> Cir. 2002) (Easterbrook, J.). In any event, the First

Amended Complaint more than sufficiently alleged intent on Defendants' parts. R. 18-2 at 1, 5, 8, 9, 10, 14, 15, 16, ¶¶ 1, 17, 27, 32, 35, 53, 54, 55, 60, 65.

## **II. The District Court Erred In Dismissing New West's Supremacy Clause Claims for Lack of Subject Matter Jurisdiction**

### **A. The District Court Had Federal Question Jurisdiction**

New West's Supremacy Clause claims allege that Defendants' efforts to condemn or demolish Evergreen Terrace are forbidden by the Supremacy Clause of the United States Constitution. The District Court dismissed these claims for lack of subject matter jurisdiction, finding that in the First Amended Complaint New West (i) pled only the Declaratory Judgment Act as a basis for jurisdiction and (ii) failed to plead the "complete preemption" exception to the "well-pleaded complaint" rule. R. 85 at 6-7. This ruling ignored controlling Supreme Court and Seventh Circuit precedent, as well as the allegations in the First Amended Complaint. It should be reversed.

New West specifically alleged that the District Court had jurisdiction over its Supremacy Clause claims under 28 U.S.C. §1331. R. 18-2 at 2, ¶ 7. 28 U.S.C. §1331, governing "federal question" jurisdiction, states that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

New West also specifically alleged that the claims were brought to redress state action in violation of the Supremacy Clause of the United States Constitution pursuant to Section 1983 of the Civil Rights Act and the due process clause of the Fifth Amendment to the United States Constitution. R. 18-2 at 17, 20, ¶¶ 71, 85. New West further alleged that Defendants' improper

conduct and efforts to condemn or demolish Evergreen Terrace and to block the refinancing of Evergreen Terrace interfered with Congressionally-mandated affordable housing law and the federal interest in the property. R. 18-2, ¶¶11, 15-16, 74-77, 89-92.

Evergreen Terrace participates in the Section 8 program under the United States Housing Act of 1937, 42 U.S.C. § 1437, *et seq.*, and in what HUD refers to as the “Mark-to-Market” program. R.18-2 at 4-5. The Mark to Market program governs housing contract renewals and mortgage restructuring pursuant to the federal Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, codified at 42 U.S.C. §1437f Note, amended by Pub.L 106-74 (“MAHRA”).

MAHRA sets forth Congress’ finding that 10,000 of the 14,000 rental properties in the insured multifamily housing portfolio of the Federal Housing Administration were assisted with project-based rental assistance under Section 8 and that many of the contracts for project-based assistance were going to expire. *See* MAHRA §511(a)(2)(A), (B) and (6). To remedy that development, MAHRA was passed, among other reasons, “to preserve low income rental housing affordability and availability” and “to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the United States through the Section 8 rental housing assistance programs.” *See* MAHRA §511(b).

Thus, Congress enacted a program to preserve affordable housing sites like Evergreen Terrace. HUD twice approved Evergreen Terrace for participation in the Mark to Market program. Because Defendants refused to accept the federal law or the decisions of the governing agencies, New West sought relief from the District Court. New West asked for, among other things, a declaration that the Supremacy Clause prohibited Defendants from exercising eminent domain over or demolishing Evergreen Terrace and for an injunction prohibiting Defendants from further wrongful conduct. R. 18-2 at 21-22.

28 U.S.C. §1331 provides an unambiguous basis for jurisdiction over New West's Supremacy Clause claims. In *Shaw v. Delta Airlines, Inc.* ("Shaw"), the United States Supreme Court ruled unequivocally that:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights ... A plaintiff who seeks injunctive relief from state regulation on the ground that such regulation, is pre-empted by a federal statute which, by virtue of the Supremacy Clause, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. 85, 96 n. 14 (1983), *citing Ex Parte Young*, 209 U.S. 123, 160-62 (1908). *Accord Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260 n.6 (1985) ("*Lawrence*").

The United States Supreme Court affirmed this more recently in *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002) ("*Verizon*"). There, the plaintiff sought declaratory and injunctive relief, claiming a Maryland Public Service Commission's order was, by virtue of the Supremacy

Clause, preempted by the Federal Telecommunications Act. The Supreme Court stated “[w]e have no doubt that federal courts have jurisdiction under Section 1331 to entertain such a suit.” *Id.* at 643. The Court declined to address the Commission’s argument that there was no jurisdiction because the Telecommunications Act did not afford a private cause of action, stating that

[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional *power* to adjudicate the case.

*Id.* (emphasis in original), *citing Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998). The Court then ruled that, unless a claim is clearly frivolous or made solely to obtain jurisdiction, federal question jurisdiction exists:

if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.

*Id.* (citations omitted).

The Seventh Circuit, too, has recognized that 28 U.S.C. §1331 supplies jurisdiction in actions seeking declaratory and injunctive relief against state regulation. *Illinois Ass’n of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762, 765 (7<sup>th</sup> Cir. 2002), *citing Illinois v. General Electric Co.*, 683 F.2d 206, 211 (7<sup>th</sup> Cir. 1982) (28 U.S.C. §1331 “supplies jurisdiction when the plaintiff seeks declaratory relief against regulation by a state agency and

contends that the agency has violated federal law by adopting particular regulations”).

Numerous other courts have come to the same conclusion. *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 331 (5<sup>th</sup> Cir. 2005) (citing *Verizon*, *Lawrence* and *Shaw*, above, and holding there was federal question jurisdiction over family planning providers’ claim that state statute precluding them from receiving federal funds was invalid under the Supremacy Clause); *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 56-57 (1<sup>st</sup> Cir. 2005), *overruled on other grounds by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24 (1<sup>st</sup> Cir. 2006); *Self-Insurance Institute of America, Inc. v. Koriath*, 993 F.2d 479, 483 (5<sup>th</sup> Cir. 1993) (a federal declaratory judgment action brought to determine whether a state law is preempted presents a valid basis for federal question jurisdiction); *First National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 777 n.3 (8<sup>th</sup> Cir. 1990), *cert. denied by Taylor v. First National Bank of Eastern Arkansas*, 498 U.S. 972 (1990); *Metro Hydroelectric Co. LLC v. Metro Parks*, 443 F. Supp. 2d 938, 941 (N.D. Ohio 2006) (federal preemption forms the basis for federal question jurisdiction under Section 1331 in a suit for equitable relief); *Frank Bros., Inc. v. Wisconsin Dept. of Transportation*, 297 F. Supp. 2d 1140, 1143 (W.D. Wis. 2003) (relying on *Shaw*, court held it had jurisdiction over claims of plaintiff who sought declaratory and injunctive relief against state regulation of its activities on the basis of the Supremacy Clause).

## **B. “Complete Preemption” Was Not Required Or Relevant**

Rather than applying the precedent above, the District Court, at Defendants’ urging, based its determination of whether jurisdiction was present on an analysis of whether the “complete preemption” exception to the well-pleaded complaint rule had been pled. R. 85 at 7. This was error.

The well-pleaded complaint rule recognizes that plaintiffs generally are masters of their own cases and that a federal court “may look only to the well-pleaded complaint, and not to any possible or anticipated defenses, to determine if the case arises under federal law.” *Vorhees v. Naper Aero Club*, 272 F.3d 398, 402 (7<sup>th</sup> Cir. 2001). New West met the requirements of the well-pleaded complaint rule. It pled federal question jurisdiction and sought declaratory and injunctive relief from local regulation by public officials. *Aroostook Band of Micmacs v. Ryan*, 404 F.3d at 57 (citing *Verizon* and *Shaw* and holding that “[i]t is simply beyond dispute that a complaint which properly pleads a claim for relief against state officers under the *Ex Parte Young* implied right of action will satisfy the well-pleaded complaint rule.”).

“[T]here is an exception to the well-pleaded complaint rule, known as the ‘complete preemption doctrine’ which provides that, where Congress has completely preempted a given area of state law, a plaintiff’s state law claim will be ‘recharacterized’ as a federal claim so that removal becomes proper.” *Hart v. Wal-Mart Stores, Inc. Associates’ Health and Welfare Plan*, 360 F.3d 674, 678 (7<sup>th</sup> Cir. 2004). Here, however, the complete preemption doctrine had no application: this action was filed originally in federal court. Complete

preemption is relevant *only in the context of removal*. See *Verizon*, 535 U.S. at 643-44; *Hart, supra*; *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1071-72 (7<sup>th</sup> Cir. 2004); *Vorhees, supra*; *Speciale v. Seybold*, 147 F.3d 612, 614-15 (7<sup>th</sup> Cir. 1998); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1264 (10<sup>th</sup> Cir. 2004) (“Whether a federal statute completely preempts or only partially preempts local enactments can only affect the federal question analysis in a case involving removal jurisdiction.”).

The District Court’s reliance on complete preemption was misplaced in an analysis of whether the First Amended Complaint properly pled jurisdiction over New West’s Supremacy Clause claims. The District Court’s dismissal of the claims was error.

### **III. New West Properly Pled A Section 1983 Claim**

42 U.S.C. § 1983 provides that every person who, acting pursuant to public authority “subjects, or causes to be subjected, any citizen of the United States or other person ... 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 ...” The Supreme Court has argued consistently that Section 1983 should be read broadly to protect private persons, corporations and partnerships from the abusive acts of state or local officials in violation of the protections of the Constitution. *Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds by Monell v. Department of Social Services*, 436 U.S. 658 (1978), *supra*.

Count III of the First Amended Complaint pleads that the efforts of Defendants to do away with Evergreen Terrace and its African-American tenants violate the protections of the Fourteenth Amendment. New West pleaded that the “acts of discrimination on the basis of race of which Plaintiff complains violate the equal protection guarantee of the Fourteenth Amendment of the United States Constitution.” R. 18-2 at 16. “These were intentional acts designed to exclude persons on the basis of race from certain areas of the City of Joliet ...” R.18-2 at 16.

At the motion to dismiss stage, these characterizations are to be taken as true along with any reasonable inference from such facts. *Swierkiewicz v. Sorema N.A.*, 534 U.S. at 511-12. New West is entitled to proceed because it has been directly injured by Defendants’ conduct. New West need not be an African-American tenant to recover; it may seek to recover for its own injury as well as for that to its tenants arising out of the racially discriminatory conduct of Defendants. *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1408-09 (11<sup>th</sup> Cir. 1989) (non-minority developer had standing to bring civil rights claim resulting from city’s failure to grant application to amend zoning ordinance to build low income housing on racially discriminatory grounds); *Cutting v. Muzzey*, 724 F.2d 259, 260 (1<sup>st</sup> Cir. 1984)(non-minority developer had standing to bring civil rights action against town board challenging racially motivated restrictions on purchasers); *Scott v. Greenville County*, 716 F.2d 1409, 1415 (4<sup>th</sup> Cir. 1983) (non-minority developer seeking to

construct low income housing had standing to bring civil rights action challenging racially motivated withholding of building permit).

Nonetheless, the District Court dismissed Count III because “New West fails to establish that Joliet’s ‘campaign’ to discriminate against the African-American residents of Evergreen Terrace was an express policy or widespread practice within the City.” *See Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978). This conclusion is incorrect. It ignores the allegations of Count III and misstates the requirements for pleading a Section 1983 claim against a municipality.

First, Section 1983 claims against individual officers sued in their *individual* capacity may be prosecuted without any reference to municipal policies or procedures. The language of Section 1983 itself makes clear that “any person” who deprives another of Constitutional protections under color of law may be held responsible. A single act is sufficient. *See Monroe v. Pape, supra; Harris v. Harvey*, 605 F.2d 330, 337 (7<sup>th</sup> Cir. 1979); *Hampton v. Hanrahan*, 600 F.2d 600, 623-25, 630 (7<sup>th</sup> Cir. 1978), *rev’d in part on other grounds by Hanrahan v. Hampton*, 446 U.S. 754 (1980).

Count III of the First Amended Complaint names Arthur Schultz, the mayor of Joliet, Jim Shapard, the city manager of Joliet, and John Mezera, the deputy city manager of Joliet, in their individual as well as official capacities and describes the racially discriminatory conduct for which each of these individuals is liable. R. 18-2 at 2, 15, 16, ¶¶ 4-6, 61-64. In such circumstances, it is simply not necessary to plead a policy or practice. To do so

would be to eviscerate the remedial strength of Section 1983 which depends, in significant part, upon holding individual officers to Constitutional standards whether or not their conduct was authorized by their superiors or approved by the municipality. *See Monell*, 436 U.S. at 690-94. Remarkably, the District Court opinion does not discuss these claims against individual officers nor explain why the straightforward allegations in Count III against Mezera, Schultz and Shapard do not survive the motion to dismiss. At an absolute minimum, New West's claims against the individual Defendants survive.

Second, as Defendants themselves noted in their arguments to the District Court, R. 41-2 at 17, if a person with final or determinative policymaking authority causes the injury, the governmental entity itself may be named as a defendant without pleading a policy or practice. Indeed, a court may hold a municipality liable for a single act if such a policymaker engages in impermissible conduct. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1010-11 (7<sup>th</sup> Cir. 2000); *Kujawski v. Board of Commissioners*, 183 F.3d 734, 737 (7<sup>th</sup> Cir. 1999). *See also Waters v. City of Chicago*, 416 F. Supp. 2d 628, 630-31 (N.D. Ill. 2006); *Katris v. City of Waukegan*, 498 F. Supp. 48, 50-53 (N.D. Ill. 1980).

The First Amended Complaint alleges that the discriminatory conduct at issue here was caused by just such policymakers. Mezera, Shapard and Schultz were directly responsible for the campaign of harassment and intimidation. And, as the mayor, city manager and deputy city manager, these three were Joliet's final "policymakers" on matters relating to Evergreen Terrace. R. 18-2 at 5-6, 10-12, ¶¶ 17, 18, 20, 24, 25, 33-37, 40-42. When the

highest elected official (the mayor) and the two highest appointed positions (city manager and deputy city manager) operate in tandem, it is an eminently reasonable inference that they are, in fact, the City of Joliet. As a consequence, it is not necessary to plead a policy or practice. Joliet itself, as well as its senior officers, was properly named.

In sum, the District Court's dismissal of New West's claims under Section 1983 was error and should be reversed.

#### **IV. New West Properly Pled a Case Under §1982**

The First Amended Complaint asserts that Defendants violated 42 U.S.C. §1982 by denying African-American citizens the benefits of affordable housing in Joliet. R. 18-2 at 15, ¶¶ 58-60. Section 1982 grants to "all citizens of the United States" the same right to buy, lease and occupy real estate as is enjoyed by white citizens. The First Amended Complaint alleges that the actions of Defendants have prevented and will prevent tenants from entering into and enjoying subsidized leasing contracts with New West. R. 18-2 at 15, ¶ 60. This injured both the tenants and New West: the tenants have been injured by the direct denial of the right to lease and occupy affordable housing; New West has been injured by the loss of tenant income that results from Joliet's efforts at exclusion, tenant flight and, of course, by the potential destruction of Evergreen Terrace.

The District Court dismissed the Section 1982 claims because "New West is not a citizen ... instead, it is a private corporation ... [and] New West provides no evidence to suggest that Evergreen Terrace residents are unable to

prosecute this case themselves.” R. 85 at 7. The District Court’s conclusions are incorrect.

Section 1982 provides that “citizens” are the class whose right to enjoy, by lease or otherwise, real estate free from racial discrimination is protected by the Act. Who may sue to recover for the damages caused by such discrimination is a broader matter. Contrary to what the District Court believed, one need not be a member of the protected class to sue for injury sustained as a result of discrimination against the class. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235-37 (1969) (white plaintiff may bring an action pursuant to § 1982, where plaintiff was the direct target of discrimination based on his relationship to and advocacy on behalf of a minority). See also *Hudson Valley Freedom Theater v. Heimback*, 671 F. 2d 702, 705-707 (2d Cir. 1982). And if one need not be a member of the protected class to sue, there is no basis for distinguishing among plaintiffs by whether they are individuals or partnerships or corporations when they seek to redress injury caused by discrimination against the class. Thus, churches, corporations, voluntary associations and other “non-citizens” have been permitted to bring cases under Section 1982.

This Court has sustained the standing of both a municipality and a not-for-profit advocacy group to prosecute claims under both Section 1982 and the Fair Housing Act. In *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7<sup>th</sup> Cir. 1990), both organizational plaintiffs asserted their own injury and standing to sue as a result of discrimination against a protected class of “citizens” under

Section 1982. *See also Gordon v. City of Cartersville*, 522 F. Supp. 753, 757 (N.D. Ga. 1981) (denying motion to dismiss because partnership, which sought to construct and operate low-income housing, has standing to bring § 1982 action against city, mayor, and city officers who allegedly thwarted low-income housing for discriminatory reasons); *Sisters of Providence of St. Mary's of the Woods v. City of Evanston*, 335 F. Supp. 396, 400 (N.D. Ill. 1971) (not-for-profit corporation formed for purpose of organizing low-income housing had standing to maintain suit where it was alleged that city council's refusal to rezone property violated their civil rights under Federal Constitution and various federal statutes.)

In *Park View Heights Corporation v. City of Black Jack*, the corporate entity that owned affordable housing property was granted standing under Section 1982 (and other statutes as well) to challenge a discriminatory zoning ordinance to redress both its own injury as well as that of potential tenants because where the identity of interest between tenants and owners is “sufficiently close,” corporate plaintiffs may file suit to remedy the injury to both. *Id.*, 467 F.2d at 1213-1214. That is precisely the fact pattern before this Court. The tenants -- the “citizens” protected by Section 1982 -- are hurt by Defendants’ conduct. But their injury (the loss of affordable housing) is also New West’s injury (economic loss of leases and the destruction of its property). The injuries are intertwined; the interests of the tenants and their landlord New West are coterminous. Under these circumstances, New West may bring the action on behalf of its tenants as well as itself.

The District Court's conclusion that New West failed to provide evidence that the residents are unable to prosecute the case themselves is inappropriate on a motion to dismiss. New West had no burden to submit evidence to the District Court at this stage. Moreover, the allegations of the First Amended Complaint and the reasonable inferences therefrom demonstrate quite the opposite of what the District Court concluded. The tenants are predominantly young, African-American, and very poor. It is, in fact, unlikely that they would be able to challenge or withstand the all-out assault of a well-financed municipality.

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Supreme Court suggested that prudential limitations on standing were devised to assure "that the most effective advocate of the rights at issue is present to champion them." *Id.* at 80. Moreover, both Congress (through the legislative enactments) and HUD (through multiple agreements with New West) have obligated New West to protect affordable housing and its residents. New West is, in fact, the most effective advocate to redress Defendants' violations of the protections of Section 1982, and the injury to the residents of Evergreen Terrace and New West itself.

**Conclusion**

For the foregoing reasons, the District Court's final Order dismissing New West's First Amended Complaint and granting Defendants' motion should be reversed in its entirety and this case should be reinstated in the District Court.

Dated: December 15, 2006

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)**

Certificate of Compliance With Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP, in 12-point font for text, 11-point font for footnotes, and using Bookman Old Style font.

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Claudette P. Miller  
Attorney for Plaintiff-Appellant New West

Dated: December 15, 2006

**CIRCUIT RULE 31(e)(1) CERTIFICATION**

I, Claudette P. Miller, certify that the materials contained in the Appendixes are not available in searchable Portable Document Format as described in Circuit Rule 31(e)(3). Accordingly, Plaintiff-Appellant shall submit a digital version of only the brief to the Court, and shall submit a paper version of the Appendixes to the Court, as described in Circuit Rule 31(e)(1).

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Claudette P. Miller

Attorney for Plaintiff-Appellant New West

Dated: December 15, 2006

**PROOF OF SERVICE**

I, Claudette P. Miller, an attorney, hereby state that two (2) copies of Brief Of Plaintiff-Appellant New West, one (1) copy of Brief Of Plaintiff-Appellant New West on CD-ROM (virus free) in Portable Document Format as described in Circuit Rule 31 and one (1) copy of Plaintiff-Appellant's Appendix were served upon the Attached Service List via in-hand delivery where feasible, or by depositing same in a sealed box, postage prepaid, in the U.S. Mail at 3500 Three First National Plaza, Chicago, Illinois 60602, on December 15, 2006.

I, Claudette P. Miller, an attorney, hereby state that fifteen (15) copies of Brief Of Plaintiff-Appellant New West, and ten (10) copies of Plaintiff-Appellant's Appendix were delivered to the United States Court of Appeals for the Seventh Circuit via hand delivery on December 15, 2006. One (1) copy of Brief Of Defendant-Appellant New West was uploaded to the Seventh Circuit via the Internet as described in Circuit Rule 31(e)(2).

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**CIRCUIT RULE 30D STATEMENT OF COMPLIANCE**

I, Claudette P. Miller, certify that the Appendixes contain all materials required by Circuit Rule 30(a) and (b).

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Claudette P. Miller

Attorney for Plaintiff-Appellant New West

Dated: December 15, 2006

**PLAINTIFF-APPELLANT'S REQUIRED SHORT APPENDIX ATTACHED  
TO BRIEF PURSUANT TO CIRCUIT RULE 30(a),(b)**

APPENDIX PAGE	DATE	RECORD NUMBER	DESCRIPTION
<b>AttA1</b>	9/8/2006	84	MINUTE entry before Judge Charles R. Norgle Sr.: Defendants' Motion to dismiss is granted. Civil case terminated.
<b>AttA2 – AttA11</b>	9/8/2006	85	OPINION and Order Signed by Judge Charles R. Norgle Sr.
<b>AttA12</b>	7/31/2006	73	MINUTE entry before Judge Charles R. Norgle Sr.: Defendants' motion to dismiss. Standing has been raised but not fully developed. If defendant intends to challenge standing under the plaintiff's FHA claim, as it did under the Section 1983, leave is granted to do so. Defendant must file its opposition, or advise the court that it does not intend to challenge standing within 20 days. Plaintiff is granted 14 days thereafter to file its response.
<b>AttA13</b>	7/31/2006	74	MINUTE entry before Judge Charles R. Norgle Sr.: Defendants' motion to dismiss. If New West has not produced a copy of the contract it purportedly entered into in October 2005, it shall do so by August 11, 2006, and a courtesy copy shall be delivered to chambers. It is so ordered.

**PLAINTIFF-APPELLANT'S SEPARATE APPENDIX  
PURSUANT TO CIRCUIT RULE 30(b)**

<b>TAB</b>	<b>APPENDIX PAGE</b>	<b>DATE</b>	<b>RECORD NUMBER</b>	<b>DESCRIPTION</b>
<b>1</b>	<b>A1 – A3</b>	11/02/2006	35	MOTION by Plaintiff New West for partial summary judgment
<b>2</b>	<b>A4 – A100</b>	9/27/2005	18-2	FIRST AMENDED COMPLAINT
<b>3</b>	<b>A101- A203</b>	11/02/2005	37	RULE 56.1 Statement by New West regarding motion for partial summary judgment
<b>4</b>	<b>A204 – A207</b>	11/04/2005	40	MOTION by Defendants John M. Mezera, City of Joliet Arthur Schultz, Jim Shapard to dismiss first amended complaint
<b>5</b>	<b>A208</b>	3/6/2006	65	MINUTE entry before Judge Charles R. Norgle Sr.: New West's motion to supplement the record on pending matters is denied.
<b>6</b>	<b>A209-A240</b>	8/4/2006	75	RESPONSE TO COURT ORDER by Plaintiff New West to Court's July 31, 2006 Order
<b>7</b>	<b>A241-A243</b>	10/04/2006	86	NOTICE of appeal by New West
<b>8</b>	<b>A244-A246</b>	10/04/2006	87	DOCKETING STATEMENT by New West regarding notice of appeal