NO. 18-1212

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

MARIE CURTO, DIANA LUSARDI, AND STEVE LUSARDI,
Plaintiffs-Appellants,

v.

A COUNTRY PLACE CONDOMINIUM ASSOCIATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey
Civil Action No. 16-CV-5928
(The Honorable Brian R. Martinotti)

BRIEF FOR APPELLANTS AND JOINT APPENDIX VOL. 1, P.P. JA001-014

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June 7, 2018

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JURISDICTION

The United States District Court for the District of New Jersey exercised jurisdiction over this federal-question action pursuant to 28 U.S.C. § 1331. This Court has jurisdiction to review the district court's entry of summary judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that a condominium association did not engage in sex discrimination in violation of the Fair Housing Act by imposing a policy that limits when residents may use a communal swimming pool based explicitly and exclusively on the residents' gender. *See* JA12.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. The January 31, 2018, Order and Opinion that are the subject of this appeal granted summary judgment on all federal claims, declined to exercise supplemental jurisdiction over the state law claims, and remanded the state law claims to the Superior Court of New Jersey, Ocean County. The proceedings in state court have been stayed pending this appeal. Plaintiffs are aware of no other case or proceeding that is related, completed, pending or about to be presented before this court or any other court or agency.

STATEMENT OF THE CASE

A. Proceedings Below

Plaintiffs initiated this action via an Order to Show Cause with Temporary Restraints and a Verified Complaint filed on August 29, 2016, in the Superior Court of New Jersey, Law Division, Ocean County. DDE #1-2 & 6. The matter was removed to the U.S. District Court for the District of New Jersey on September 26, 2016. DDE #1-2 & 6. The Verified Complaint was amended on April 19, 2017, by consent. JA22; DDE #24-25. Defendant filed an Answer to the Amended Complaint on April 20, 2017. JA37; DDE #26.

Plaintiffs Marie Curto, Diana Lusardi, and Steve Lusardi—residents of the community known as "A Country Place" in Lakewood, New Jersey—allege that the governing condominium association, Defendant A Country Place Condominium Association, Inc. (ACP), violated their rights by instituting a gender-segregated pool schedule at the community pool. JA22. Count I alleges violation of the Fair Housing Act (FHA), 42 U.S.C. § 3601 *et seq.*; Count II alleges violation of the New Jersey Law Against Discrimination; Count III alleges violation of the Horizontal Property Act, N.J.S.A. 46:8A-2. JA31-35 (Am. Compl. 10-14).

The parties agreed to engage in liability discovery and then file dispositive motions on threshold issues of law. DDE #14 & 23. Plaintiffs moved for partial summary judgment on Counts I and III of the Amended Complaint. Specifically,

Plaintiffs sought an order: (a) granting permanent injunctive relief prohibiting Defendant from directly or indirectly proposing, implementing, or enforcing common area gender segregation rules, regulations, by-laws, and/or changes to the master deed; (b) granting permanent injunctive relief prohibiting Defendant from issuing violation notices, fines, or sanctions—monetary or otherwise—when males use the community pool in the presence of females, or when females use the community pool in the presence of males; (c) voiding past and present pool schedules segregated by gender and any previous violation notices, fines, or sanctions—monetary or otherwise—issued to any person for violation of the pool schedules segregated by gender; and/or (d) voiding *ab initio* the violation notices and fines issued on June 28, 2016, to Plaintiff Marie Curto and Plaintiffs Steve and Diana Lusardi. DDE #27. ACP also moved for summary judgment, seeking dismissal of the Amended Complaint in its entirety. DDE #28.

By Order and Opinion dated January 31, 2018, the district court denied Plaintiffs' motion and granted ACP's motion in part as to Count I of the Amended Complaint, ruling that the gender segregated pool schedule is not discriminatory because "the gender-segregated schedule applies to men and women equally." JA2, 4, 12. The district court declined to exercise supplemental jurisdiction over the state law claims, denied the remainder of both motions as moot, and remanded the state law claims to the Superior Court of New Jersey, Ocean County. JA2, 4, 9-10.

Plaintiffs filed a Notice of Appeal of the January 31, 2018, Order on January 31, 2018. JA1.

B. The Parties and the Community

A Country Place is a "55 and over" age-restricted community comprising 376 condominium units. JA25 & JA39 (Am. Compl. & Ans. ¶27); JA75 (Engleman Dep. 10:15-17). The community was established and is operated under the Horizontal Property Act, N.J.S.A. 46:8A-1 *et seq*. JA53, 59 & 68 (Def.'s Resp. Interrog. Nos. 4, 5). The governing condominium association, ACP, is a non-profit corporation organized under the laws of the State of New Jersey. JA22 & 37 (Am. Compl. & Ans. ¶1). ACP is not organized as a religious society or congregation. JA55 & 66 (Def.'s Resp. Req. Admis. Nos. 4, 5). Rather, the ACP Board generally asserts that the majority of owners are Jewish Orthodox. *Id.*

Plaintiffs Steve Lusardi and Diana Lusardi (collectively "the Lusardis") own a unit in A Country Place and were 69 and 70 years old, respectively, when this case was initiated. JA23 & 37-38 (Am. Compl. & Ans. ¶¶7-9). One of the reasons they purchased their current residence was so they could use the pool together. JA24 (Am. Compl. ¶15). Diana Lusardi suffered two strokes in 2013 and has a physical disability as a result. JA24 (Am. Compl. ¶16). The Lusardis intended to conduct "pool therapy" to aid her rehabilitation. JA24 (Am. Compl. ¶17).

Plaintiff Marie Curto also owns a unit in A Country Place and was 60 years old at the time the complaint in this matter was filed. JA28 & 41 (Am. Compl. & Ans. ¶¶59, 60). Curto works Monday through Friday, 8:30 a.m. to 4:30 p.m. JA29-30 (Am. Comp. ¶¶68-70). On weekdays, she has very little opportunity to use the pool because women are largely prohibited from swimming in the evening. JA30 (Am. Compl. ¶¶71-72); JA156 & 158 (2016 pool schedules). In addition, Curto bought a unit in the community, in part, so that she could swim with her family, including her son, grandson, and other relatives. JA28 & 30 (Am. Compl. ¶¶61, 72); JA196 (Curto Dep. 106:10-22). The pool schedule, however, limits her ability to do so. *Id.*; JA156 & 158 (2016 pool schedules).

ACP's designated representative is Fayge Engleman, Board Trustee and Treasurer. JA53, 58 (Def.'s Resp. Interrog. No. 2); JA61 (Def.'s Resp. Interrog. At 10); JA75 (Engleman Dep. 9:3-14). ACP admits that the Federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, applies to condominium associations. JA66 (Def.'s Resp. Req. Admis. No. 3). ACP also admits that the subject swimming pool is a "general common element" as outlined in the controlling master deed and as defined in N.J.S.A. 46:8A-2. JA55 & 66 (Def.'s Resp. Req. Admis. Nos. 1, 2). The community houses three main common facilities: the swimming pool, an exercise room, and a clubhouse. JA75 (Engleman Dep. 12:5-14). The association/maintenance fee for the community is $215.00 per month. JA75 (Engleman Dep. 10:18-20).

As of the beginning of 2016, the relevant bylaws, as amended, governing the community were dated May 14, 2010. JA76 (Engleman Dep. 15:4-17); JA113. The by-laws state as follows:

> 16. **RULES OF CONDUCT**. Rules and regulations concerning the use and occupancy of the dwelling units and common areas and facilities may be promulgated and amended by the Board of Directors with the approval of a majority of votes cast by members. Copies of such rules and regulations shall be furnished by the Board of Directors to each member prior to the time when the same shall become effective.
>
> * * *
>
> 19. **ASSESSMENT OF FINES.** The Board of Directors shall have the authority to assess fines for the violation of any of the provisions of the Master Deed, By-Laws, or Rules & Regulations.

JA130. The by-laws, however, do not contain any specific provisions relating to the amount in fines that may issue for a particular violation, a system for the imposition of fines, or a dispute-resolution procedure for challenging fines. JA113-130.

The community rules and regulations entitled "General Information and Regulations of A Country Place Condominium Association," dated September 2008, also contain broad provisions governing pool usage. JA135; JA78 (Engleman Dep. 22:3-23:4). They do not mention gender segregation, but state simply that "[u]se of the pool is limited to residents and their guests. Badges may be obtained at the office. The pool rules are posted poolside." JA141. The pool schedule is also posted (a) on

the doors to the clubhouse and pool area, (b) on the community bulletin board, and (c) in the community's newsletter, "[The] Country Caller." JA80-81 (Engleman Dep. 32:16-33:05). The rules are updated yearly. JA78 (Engleman Dep. 23:11-23:22).

C. Gender-Segregated Pool Hours

In June of 2011, the ACP Board began implementing gender-segregated pool hours. JA78-79 (Engleman Dep. 24:18-26:4). According to Defendant, this change was made in response to the community's growing Orthodox Jewish population. Engleman testified that "[the Board] started instituting special hours. And as the years went along, as the orthodox population increased, we amended the hours." JA78-79 (Engleman Dep. 25:21-26:7); JA144-153 (2011, 2012-2015 pool schedules). Over the years, the segregated hours expanded while the integrated hours shrunk. JA144-153 (2011, 2013-2015 pool schedules).

In 2016, the pool was opened in late May or early June. JA75-76 (Engleman Dep. 12:21-13:4). The "Pool schedule and rules for Summer 2016" provided that the pool was open from 8:00 a.m. to 9:00 p.m. daily. JA154. The rules further stated that "[h]ours of use are posted" and instructed residents to "[p]lease comply to give everyone the opportunity to enjoy the pool." *Id.* From approximately June 2016 to the present, the pool schedule has mandated gender-segregated pool use at all times, with the exception of Saturdays and from 1:00 p.m. to 3:00 p.m. Sunday through

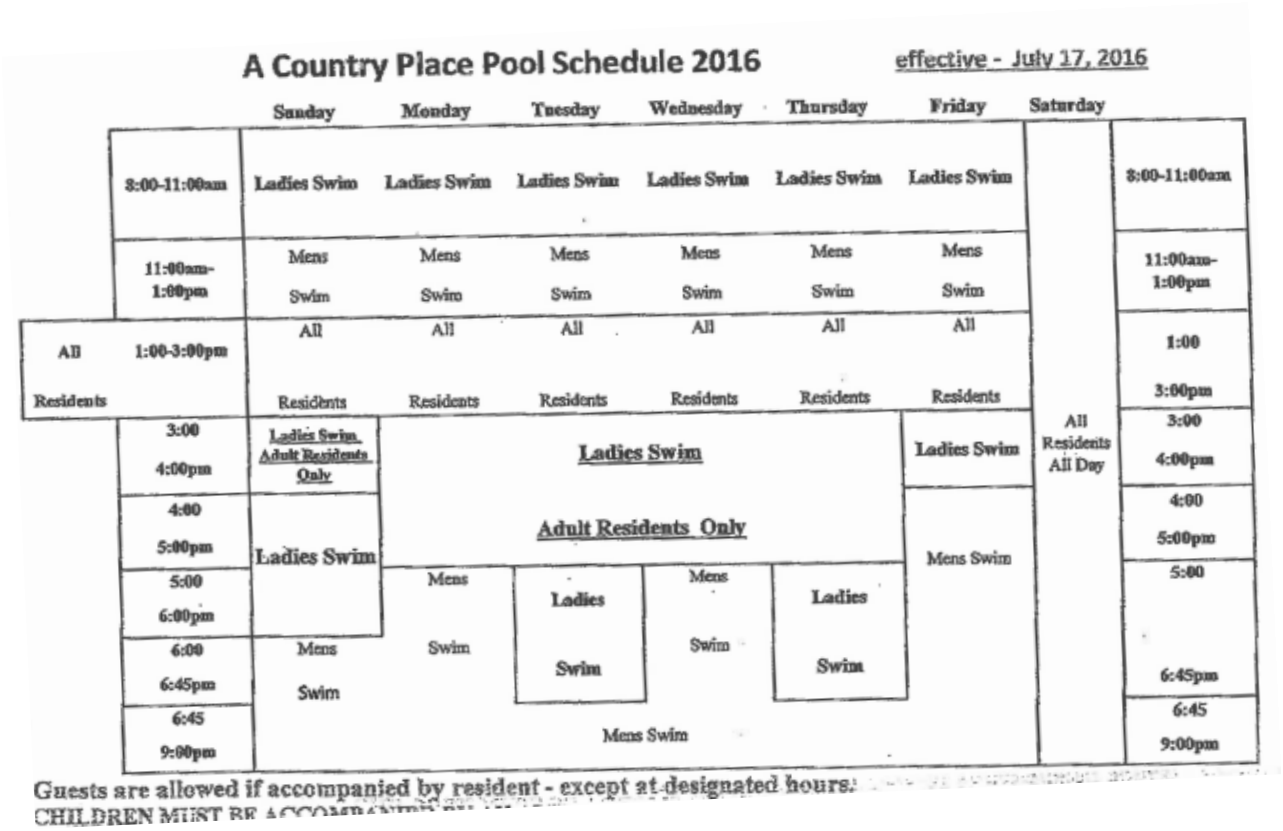
Friday. JA156 (2016 pool schedule). At a closed meeting after the start of the 2016 season, the Board modified the pool schedule, effective July 17, 2016, to provide more swim time for adult female residents. JA157-158; JA90-91 (Engleman Dep. 71:20-76:14). The overall number of segregated and integrated hours, however, remained unchanged. JA157-158. During "Ladies Swim" men are not permitted to use the pool or pool deck. JA98 (Engleman Dep. 104:2-8). During "Mens Swim" women are not permitted to use the pool or pool deck. JA98 (Engleman Dep. 104:9-12).

The initial 2016 Pool Schedule, JA156, is as follows:

A Country Place Pool Schedule 2016

		Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	
	8:00-11:00am	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	All Residents All Day	8:00-11:00am
	11:00am-1:00pm	Mens Swim	Mens Swim	Mens Swim	Mens Swim	Mens Swim	Mens Swim		11:00am-1:00pm
All Residents	1:00-3:00pm	All Residents	All Residents	All Residents	All Residents	All Residents	All Residents		1:00-3:00pm
Adults Only	3:00 4:00pm	Ladies Swim Adult Residents Only					Ladies Swim		3:00 4:00pm
	4:00 5:00pm	Ladies Swim					Mens Swim		4:00 5:00pm
	5:00 6:45pm	Ladies Swim	Mens Swim	Ladies Swim	Mens Swim	Ladies Swim			5:00 6:45pm
	6:45 9:00pm	Mens Swim							6:45 9:00pm

The modified 2016 Pool Schedule, effective July 17, 2016, JA158, is as follows:



A Country Place Pool Schedule 2016 effective - July 17, 2016

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	
8:00-11:00am	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	Ladies Swim	All Residents All Day	8:00-11:00am
11:00am-1:00pm	Mens Swim	Mens Swim	Mens Swim	Mens Swim	Mens Swim	Mens Swim		11:00am-1:00pm
All Residents 1:00-3:00pm	All Residents	All Residents	All Residents	All Residents	All Residents	All Residents		1:00 3:00pm
3:00 4:00pm	Ladies Swim Adult Residents Only	Ladies Swim Adult Residents Only				Ladies Swim		3:00 4:00pm
4:00 5:00pm	Ladies Swim					Mens Swim		4:00 5:00pm
5:00 6:00pm		Mens Swim	Ladies Swim	Mens Swim	Ladies Swim			5:00 6:45pm
6:00 6:45pm	Mens Swim							
6:45 9:00pm	Mens Swim							6:45 9:00pm

Guests are allowed if accompanied by resident - except at designated hours.
CHILDREN MUST BE ACCOMPANIED BY [illegible]

Under the initial 2016 Pool Schedule, women were prohibited from swimming during 31.75 "Mens Swim" hours per week; men were prohibited from swimming during 34.25 "Ladies Swim" hours per week. JA156. Under the modified 2016 Pool Schedule, women are prohibited from swimming during 32.5 "Mens Swim" hours per week and men are prohibited from swimming during 33.5 "Ladies Swim" hours per week. JA158. Under both 2016 Pool Schedules, from Sunday through Friday, just 15 percent of swim hours (12 of 78 hours) are open to all residents. *Id.* Of the total 91 swim hours throughout the week, 66 hours are segregated by gender.

Though residents complained of the limited "mixed gender/open swimming," the Board did not consider providing more integrated swim time. JA90-91 (Engleman Dep. 71:20-76:14); *see* JA157-158 (Board meeting minutes & revised 2016 schedule). The Board did not consider any faiths or religious beliefs other than the Orthodox Jewish faith when implementing the pool schedule. JA98 (Engleman Dep. 101:5-102:13). Engleman testified that she was aware that some married couples preferred to be together all the time; however, the Board did not consider such married couples when crafting the pool schedule. JA100 (Engleman Dep. 110:19-111:3). Engleman also could not state whether the Board considered people with disabilities or working women when implementing the pool schedule. JA98, 100 (Engleman Dep. 101:22-102:13, 111:7-10).

Engleman testified that the pool is open to everyone on Saturday because "orthodox don't go swimming on Saturday. From . . . Friday sundown to Saturday sundown we do not go swimming." JA85 (Engleman Dep. 49:12-16). Similarly, on Fridays, "Mens Swim" is 4:00 p.m. to 9:00 p.m. "because the ladies are ready -- are busy getting ready for the sabbath. . . . The house has to be prepared so that's the lady's job." JA85 (Engleman Dep. 49:22-50:7). In addition to restricting swimming, under ACP's rules, a man would not be permitted to play music with a woman's singing voice at the pool during "Mens Swim" because the modesty beliefs of some residents provide that "[a] lady never sings in the presence of a man, only her

husband. . . . A lady's voice should never be heard." JA99 (Engleman Dep. 107:17-108:11).

D. The Fines and the Association's Conduct

At the start of the 2016 season, the Regulations of the Association as well as the "Pool schedule and rules for Summer 2016" did not indicate anywhere that fines would be imposed for violating the posted pool rules or the gender-segregated schedule. JA135-143, 154-158.

On June 15, 2016, a resident identified as Rabbi Perr reported to the ACP Board that Curto was swimming at 12:00 p.m. during "men swim hours" and refused to leave. JA159 (ACP email documenting Curto's refusal to leave pool); JA83-84 (Engleman Dep. 41:7-46:13). The Board documented the incident. *Id.* The Lusardis, meanwhile, made various attempts to discuss the issue with the ACP Board. On June 16, 2016, the Lusardis attended a Board meeting and Mr. Lusardi read a statement. JA160-161; JA84-86 (Engleman Dep. 47:4-53:16). In the statement, Mr. Lusardi informed the Board that he had moved to A Country Place because the pool would be therapeutic for his wife, who has a disability. Mr. Lusardi asked the Board to explain its implementation of the schedule and specifically advised the Board that federal law prohibits discrimination based on gender. JA160-161.

In the weeks following the June 16, 2016, meeting, Mr. Lusardi and Curto used the pool during gender-segregated hours and were fined $50 per household by

the Board. JA162-166; JA86-89 (Engleman Dep. 55:16-58:18; 61:5-62:12; 64:10-16; 65:11-67:19). The violation notices merely stated that they were being fined for "Violation of Pool Policy" and for disregarding "specific regulations put in place to make our pool a place where people can enjoy." JA163 & 165. APC also sent both Curto and the Lusardi household invoices for the $50 fines, again indicating that they were being sanctioned for "disregarding specific regulations put in place to make our pool a place where people can enjoy." JA164 & 166.

In response to the fine, Mr. Lusardi advised the Board by letter dated July 1, 2016, that the by-laws contained no provisions regarding violations, the fining process, or fines for particular offenses. JA167-168; JA89-90 (Engleman Dep. 67:24-71:19). On July 27, 2016, he received a letter from the Board. JA176; JA93-94 (Engleman Dep. 84:6-88:14). The letter did not address under whose authority the fines were devised or issued, other than stating that "ACP is a private Association and as per counsel we are well within our rights to serve the vast majority of the community (even though we also provide and are considerate for the minority)." JA176. The letter accused Mr. Lusardi of being "inconsiderate of the majority and wish[ing] for minority rule," and proclaimed, "[t]hat is not our community." *Id.*

Similarly, after Curto received a fine, she made three written requests between June 28, 2016, and July 21, 2016, for a meeting with the Board to dispute the fine and discuss the pool hours. JA169-175; JA91-93 (Engleman Dep. 76:18-83:16). On

July 21, 2016, the Board replied to her e-mail, stating that: (1) the Board was unable to meet with her; (2) the "pool [hours] meet the requirements of current residents"; and (3) the fine was issued on Friday, June 24, 2016, because she had refused to leave the pool during men's swimming hours. JA171. On July 27, 2016, the Board further responded to Curto's concerns regarding the pool hours as follows:

> It is you that is unfair to the vast majority of our residents. The vast majority of people would not want any mixed gender swim hours at all. That is the community you live in.
>
> . . .
>
> The vast majority of people would abolish any mixed swimming, because that is the will of the majority. As an accommodation to the minority, you have almost 30 percent of the hours as well as women can always come during women's hours and men during men's hours. To give you more on Sunday would be to take away from the majority (much more than 70% of people).

JA174.

In August 2016, a notice was published to all members of the community in The Country Caller. JA177; JA95 (Engleman Dep. 91:15-92:9). The notice appeared to be directed in large part toward Curto and the Lusardis. *Id.* The notice sets out a series of escalating fines in the amounts of $50, $100, and $250 for violations of pool rules, stating:

> Another fee which we impose which has been oft discussed is a sliding scale fee where you restrict the rights of other Homeowners. This violates the basic acceptance

> of the rights of others, which you feel your rights have priority to others. The vast majority of Homeowners have asked for separate swimming hours. They have also asked for separate hours for only adult resident swimming. We have provided that as well as provided All resident mixed swim for those few who want it. We have done that in an equitable and fair manner.
>
> When there is a blatant violation we have imposed a sliding scale. $50 the first offense, $100 the second offense and $250 the third offense. People have paid the fees and have agreed to live in according to the will of the vast majority. We ask that you respect people's religious and cultural preferences so that an issue of a fine never comes up. Our pool, for example, cannot support or be pleasurable when grandparents bring more than 3-4 grandchildren or when during separate hours you decide to intrude and cause people to have to leave because you violate their religious beliefs. During Adult Resident swim time, please don't come with your daughters or granddaughters or friends. Please have respect and courtesy. This is a private association of senior Homeowners, not a public action park.

JA177. Before August 2016, there was no schedule of fines. JA77 (Engleman Dep. 20:2-13). To date, the pool hours and fine schedule remain essentially unchanged.

SUMMARY OF ARGUMENT

Discrimination is often couched in neutral language or belied by benign explanation. Here it is not. This case concerns a condominium association's explicit policy of conditioning use of the association's communal pool on a swimmer's gender. The policy bans women from using the pool during certain hours and men from using the pool during others. Its exclusive purpose and uncontroverted

consequence is to classify and separate the residents of ACP along gender lines. The policy discriminates on its face, without apology or pretext, in glaring violation of the FHA.

More than a half-century after the Supreme Court consigned "separate but equal" to the disgraced anti-canon of our nation's jurisprudence, the district court approved ACP's gender-segregation policy, reasoning that the "gender-segregated schedule applies to men and women equally." JA12. Factually and legally, the district court was mistaken. The schedule does not, in fact, burden the men and women of ACP in equal measure. For example, women may not use the pool during weekday evenings from roughly 6:00 pm to 9:00 pm—when a person with a traditional work schedule might be free to swim. Moreover, a regime of overt, dual discrimination is not saved by its perceived symmetry. Confronted with a facially discriminatory policy such as the swimming schedule in this case, a court need not search for a differential effect on a particular group. Uneven impact can indicate that a neutral policy discriminates. But a policy that dictates gender-based treatment by its express terms is immediately and inherently discriminatory.

By letter and design, ACP's pool-use rules treat men and women differently. ACP issued fines to the Plaintiffs for no reason but that they swam at times not designated for their gender. The policy violates the FHA and undermines the law's promise that discrimination finds no harbor in the places we call home.

STANDARD OF REVIEW

In the district court, both parties moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs appeal the district court's grant of summary judgment in the Defendant's favor, and this Court's review is *de novo*. *Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013). Courts "exercise plenary review over an order resolving cross-motions for summary judgment," *Tristani ex rel. Karnes v. Richman*, 652 F.3d 360, 366 (3d Cir. 2011), and use "the same standard that the lower court was obligated to apply under Rule 56," *Auto–Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 402 (3d Cir. 2016). As such, the grant of summary judgment may only be affirmed if "no genuine dispute exists as to any material fact, and [the defendant is] entitled to judgment as a matter of law." *Montone*, 709 F.3d at 189 (citing Fed. R. Civ. P. 56(a)). This Court must draw "all reasonable inferences in favor of [the plaintiffs]" and "disregard evidence [favorable to the defendant that] the jury is not required to believe." *Hill v. City of Scranton*, 411 F.3d 118, 129 n.16 (3d Cir. 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

ARGUMENT

I. IMPOSING A GENDER-SEGREGATED POOL-USE POLICY ON MEMBERS OF A CONDOMINIUM ASSOCIATION VIOLATES THE FAIR HOUSING ACT'S PROHIBITION ON SEX-BASED DISPARATE TREATMENT.

ACP devised a pool schedule that purposefully and plainly applies different rules to men and women. In other words, the policy discriminates on its face. But for Plaintiff Marie Curto's gender, she would be permitted to swim on weekday evenings after she gets home from work—hours ACP reserves for men only. JA 30 (Am. Compl. ¶¶71-72); JA156 & 158 (2016 pool schedules). She would not have been fined $50 for using the pool during "Mens Swim." JA162-163, 166; JA86-87 (Engleman Dep. 55:16-58:18). But for Plaintiff Steve Lusardi's gender, he would be permitted to conduct swim therapy with his wife, Diane Lusardi, who has a physical disability, regularly—not just during the windows marked for gender-integrated swimming. JA24 (Am. Compl. ¶17). He would not have been fined $50 for using the pool during "Ladies Swim." JA164-165; JA88-89 (Engleman Dep. 61:5-62:12; 64:10-16; 65:11-67:19).

Instead of applying the simple facial-discrimination test these facts cry out for—which asks whether the policy explicitly treats men and women differently—the district court relied on a single, inapposite case involving a facially neutral zoning ordinance, *Doe v. City of Butler*, 892 F.2d 315 (3d Cir. 1989), and applied its

equally inapposite disparate-impact analysis. JA11-12. The disparate-impact analysis probes whether a facially neutral policy falls more harshly on members of a protected class. *Id.* at 323. Even if this were the correct question, the district court's answer was wrong. ACP's pool policy does not "appl[y] to men and women equally." JA12. ACP's gender-segregated pool schedule is inconsistent with the values of a free and equal society and unlawful under the FHA.

A. Classifying and Separating Individuals According to Gender Is Paradigmatic Disparate Treatment.

Congress enacted the FHA fifty years ago to effectuate "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (noting the FHA's purpose to promote "truly integrated and balanced living patterns") (citation omitted). In its original form, the FHA prohibited discrimination on the basis of race, color, religion, and national origin. Pub. L. No. 90–284, § 804, 82 Stat. 83 (1968). Congress passed an amendment adding "sex" as a protected class in 1974. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b), 88 Stat. 729. Commensurate with its sweeping mission to eradicate discrimination in housing, courts afford the FHA "a generous construction." *Trafficante*, 409 U.S. at 212; *see also Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977).

To the same end, the FHA takes aim at discrimination in many shapes. At least two are relevant to this case. First, section 3604(b) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). As the U.S. Department of Housing and Urban Development's (HUD) implementing regulations clarify, "[l]imiting the use of privileges, services or facilities associated with a dwelling" on the basis of a protected characteristic is prohibited within the scope of section 3604(b). 24 C.F.R. § 100.65(b)(4).

Second, under section 3604(c), it is unlawful to "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . . ." 42 U.S.C. § 3604(c). Violations of section 3604(c) frequently concern efforts to "steer" prospective buyers or renters away from housing opportunities; challenges based on post-acquisition communications, however, also fall within the section's coverage. *See, e.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (landlord's agent's racist statement to white tenant, overheard by black tenant, was covered by section 3604(c)). Although section 3604(c) creates an independent cause of action, discriminatory messages of the type it prohibits also constitute compelling evidence

that the defendant violated the FHA's broader anti-discrimination provisions, including section 3604(b). *See* Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 230 (2001).

Plaintiffs can establish a violation of section 3604(b) by showing that a challenged policy reflects disparate treatment (also known as intentional discrimination) or results in a disparate impact (also known as a discriminatory effect) on a protected class. *See Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005); *City of Butler*, 892 F.2d at 323. Disparate-impact analysis "examines a facially-neutral policy or practice" for its lopsided effect on a particular group. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988). The analysis in a disparate-treatment case, by contrast, centers on the policy's purpose and not its downstream repercussions. *Wind Gap*, 421 F.3d at 177. A plaintiff can support a disparate-treatment claim through direct or circumstantial evidence of discriminatory motive or by showing that a rule draws impermissible distinctions on its face. *Id.*

Where, as here, a plaintiff demonstrates that a challenged policy "involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, 'a plaintiff need not prove the malice or discriminatory animus of a defendant.'" *Id.* (quoting *Bangerter v. Orem City Corp.*, 46 F.3d 1491,

1501 (10th Cir. 1995)). "The motives of drafters of a facially discriminatory [policy], whether benign or evil, is irrelevant to a determination of the unlawfulness of the [policy]." *Horizon House Developmental Servs., Inc. v. Twp. of Upper Southampton*, 804 F. Supp. 683, 694 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993). Instead, the policy constitutes *per se* discrimination because "the protected trait by definition plays a role in the decision-making process, inasmuch as the policy explicitly classifies people on that basis." *Wind Gap*, 421 F.3d at 177 (quoting *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 726 (3d Cir.1995)) (internal quotation marks omitted). Such a policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *United Auto. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (quoting *L.A. Dep't. of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978)). In short, a plaintiff establishes a facial-discrimination claim by pointing to a policy that relies on express reference to a protected class or characteristic.

So long as a plaintiff puts forward facial (or otherwise "direct") evidence of discriminatory treatment, a defendant may not rebut the evidence of discrimination by proffering a justification or explanation. Only in the absence of direct evidence will courts apply a burden-shifting analysis based on the standards set forth in

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).[1] *See United States v. Branella*, 972 F. Supp. 294, 298–99 (D.N.J. 1997). "The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979)). Where a policy is discriminatory on its face, or is otherwise supported by direct evidence, the test is "inapplicable." *Id.*

For example, claims under section 3604(c)—which targets the particular variety of facial discrimination involving notices, statements, and advertisements, and therefore depends on direct evidence by definition—cannot be overcome by any kind or quantity of rebuttal proof. *See Pack v. Fort Washington II*, 689 F. Supp. 2d 1237, 1245 (E.D. Cal. 2009). A plaintiff establishes an irrebuttable section 3604(c) violation by demonstrating that a given notice, statement, or advertisement would indicate a preference or limitation based on protected status to an "ordinary reader or listener." *Id*. (quoting *Fair Housing Congress v. Weber*, 993 F. Supp. 1286, 1290 (C.D. Cal. 1997)); *see also United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.

[1] In a Title VII disparate-treatment case without direct evidence, after a plaintiff establishes a *prima facie* case by alleging facts adequate to support a legal claim, the burden of production shifts to the employer to rebut the case by articulating a legitimate, nondiscriminatory reason for its actions. If the employer meets its burden, the presumption of discrimination falls away but a plaintiff may still prevail by showing the reason to be pretextual.

1972); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999–1000 (2d Cir. 1991); Schwemm, 29 Fordham Urb. L.J. at 215-16. The existence of this standalone provision barring discriminatory notices and statements underscores that facial discrimination is considered particularly egregious and inexcusable under the FHA.[2]

This Circuit has not squarely addressed whether or how a defendant may justify facial discrimination outside of a burden-shifting framework. However, if such a justification is cognizable at all, it must clear a high bar. In the Sixth, Ninth, and Tenth Circuits, accepted justifications include that the challenged facially discriminatory policy is (1) narrowly tailored to benefit the protected class by promoting integration and equal housing opportunity without reference to stereotypes; or (2) based on a public-safety need that is "tailored to particularized concerns about individual residents" the policy targets. *Bangerter*, 46 F.3d at 1503-05; *see also Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007). The Eighth Circuit analyzes a defendant's rationale by engaging the standard of scrutiny applicable to claims affecting the class under the Equal Protection Clause. *See Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991). Thus, in the context of sex discrimination, a challenged classification would need to be

[2] In contrast, analogous provisions in Title VII and the Age Discrimination in Employment Act are much more limited in scope. *See* Schwemm, 29 Fordham Urb. L.J. at 207-12.

supported by "an exceedingly persuasive justification" and serve important governmental objectives by means substantially related to the achievement of those objectives. *See United States v. Virginia*, 518 U.S. 515, 532 (1996).

The circuit courts deploy these approaches in service of the common goal of adapting the Supreme Court's Title VII jurisprudence to the FHA context. *See Wind Gap*, 421 F.3d at 176 (courts evaluating housing discrimination claims "have typically adopted the analytical framework of their analogues in employment law"); *Huntington Branch*, 844 F.2d at 935 (Title VII and the FHA, as "part of a coordinated scheme of federal civil rights laws enacted to end discrimination . . . require similar proof to establish a violation."). Notably, the text of the FHA contains no explicit carve-out permitting sex discrimination. Title VII, in contrast, permits employers to discriminate based on sex when the sex of an employee is a bona fide occupational qualification. *See Johnson Controls*, 499 U.S. at 190, 200. This exception is "written narrowly, and [the Supreme Court] has read it narrowly." *Id.* at 201. For example, whether a sex-based policy has a beneficent purpose is irrelevant, *id.* at 200, and does not broaden the "restrictive scope" of the bona fide occupational qualification defense, *id.* at 201. In enacting the FHA, Congress did not fashion even a narrow exception to the prohibition on sex discrimination in housing opportunities or articulate any circumstance in which sex could or should be considered a decisive factor in a person's access to housing and related facilities. If

such circumstances exist at all, Title VII jurisprudence counsels that they must meet an exceptionally demanding standard.

B. The Gender-Segregated Pool-Use Policy Is Facially Discriminatory and Constitutes Direct Evidence of Disparate Treatment Based on Sex.

ACP's discrimination in this case is brazen. A moment's glance at the ACP pool schedule—divided into blocks prominently labeled "Ladies Swim" and "Mens Swim"—confirms the dispositive fact: If you are a resident of ACP, whether and when you may use the pool depends on your gender. In irreducible terms, the schedule does that which the FHA prohibits. It "limit[s] the use of privileges, services or facilities . . . because of . . . sex . . . ." 24 C.F.R. § 100.65(b)(4). A clearer example of direct, facial discrimination could not be found.

Courts have recognized that restrictions on pool access violate sections 3604(b) and (c) of the FHA under circumstances significantly more ambiguous than those present here. In *Llanos v. Estate of Coehlo*, for instance, an apartment complex imposed a rule designating separate swimming facilities for adults and children. 24 F. Supp. 2d 1052, 1060 (E.D. Cal. 1998). It provided: "Children will swim in family pools only. Adult pools are for ADULTS ONLY." *Id.* The court found that the rule facially discriminated on the basis of familial status in violation of section 3604(b). *Id.* In a similar case, a policy "restricting children ages 12 through 17 in having guests at [a] swimming pool and . . . restricting the hours that children could use the

swimming pool" involved familial status discrimination contrary to sections 3604(b) and (c). *Sec'y v. Beacon Square Pool Ass'n*, No. 04-91-1026-1, 1993 WL 668297, at *1 (HUDALJ July 12, 1993). Likewise, in *Pack*, a rule prohibiting children under fourteen from swimming without the supervision of a parent or guardian violated section 3604(c). 689 F. Supp. 2d at 1246; *see also Iniestra v. Cliff Warren Invs., Inc.*, 886 F. Supp. 2d 1161, 1168-69 (C.D. Cal. 2012) (rule preventing children under eighteen from entering pool without an adult violated sections 3604(b) and (c)).

ACP's pool policy is distinguishable only in its severity. Like the pool rules in the familial-status cases, ACP's policy makes impermissible classifications on its face and, in so doing, discriminates. But it goes further: For most open pool hours, ACP's policy enacts an outright gender-based ban on swimming. The policy prohibits women from swimming during 32.5 "Mens Swim" hours per week and men from swimming during 33.5 "Ladies Swim" hours per week.[3] JA156 & 158 (2016 pool schedules). From Sunday through Friday, just 15 percent of swim hours are open to all residents. *Id.* But for Marie Curto's gender—and no other variable—she would not have been fined for swimming during hours designated for men. But for Steve Lusardi's gender—and no other variable—he would not have been fined for swimming during hours designated for women.

[3] The version of the 2016 schedule in effect prior to July 17, 2016, prohibited women from swimming during 31.75 "Mens Swim" hours and 34.25 "Ladies Swim" hours.

ACP effectuated this extreme policy in the manner that the FHA and attendant case law has marked as uniquely indefensible—through facially discriminatory notices and statements. ACP posted its gender-segregated pool schedule and accompanying rules on doors to the pool and on a community bulletin board. ACP also published the rules in "The Country Caller," the community's newsletter. JA80-81 (Engleman Dep. 32:16-33:05). In addition, ACP published in "The Country Caller" a notice of escalating fees ($50, $100, $250) for first and subsequent violations of "separate swimming hours." JA177; JA95 (Engleman Dep. 91:15-92:9). Finally, ACP made statements directly to the Plaintiffs by mail and email, reinforcing the gender-segregation policy and scolding the Plaintiffs for transgressing it. JA89-90 & 91-94 (Engleman Dep. 67:24-71:19; 76:18-88:14). To Plaintiff Marie Curto, for example, the ACP Board of Directors wrote, "[Y]ou refused to leave the pool area during men swim hours @ 430pm" JA171 (Email from Board to Curto, July 21, 2016) and later, "It is you that is unfair to the vast majority of our residents . . . [who] would not want any mixed gender swim hours at all." JA174 (Email from Board to Curto, July 27, 2016). ACP sent both Curto and Mr. Lusardi invoices for $50 fines for "disregarding specific regulations put in place to make our pool a place where people can enjoy." JA164 & 166.

The patently discriminatory pool schedule—and associated notices and statements—directly evidence violations of the FHA. ACP's policy facially

classifies residents according to gender for the purpose of restricting their pool use and no reasonable person—viewing the schedule's mosaic of gender-blocked hours or reading ACP's unequivocal statements endorsing and enforcing gender segregation—could disagree. As such, this discriminatory treatment is not subject to a burden-shifting analysis. All that this Court need evaluate are the frank words of the policy's proponents and the plain letter of the pool rules, which unmistakably discriminate against ACP residents on the basis of gender. [4]

II. EVEN IF THE GENDER-SEGREGATED POOL-USE POLICY BURDENED MEN AND WOMEN EQUALLY, AS THE DISTRICT COURT INCORRECTLY CONCLUDED, IT WOULD STILL VIOLATE THE FAIR HOUSING ACT.

As discussed *supra*, the district court failed to recognize that longstanding precedent requires the rejection of the Defendant's sex-segregated swimming policy under the FHA as a facially discriminatory policy. The district court made three additional, significant errors. First, it held that the policy "applies to men and women

[4] While the district court did not address ACP's reason for its discriminatory policy, ACP has not put forward any acceptable justification. ACP may wish to argue that its policy of gender-based discrimination is permitted in order to cater to the religious beliefs and practices of a subset of the ACP community. It is not. The FHA contains a religious exemption that authorizes "a religious organization, association, or society, or any non-profit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society" to give preference to persons of the same religion. 42 U.S.C. § 3607. But ACP is not, and does not purport to be, a religious organization, association, or society. JA55 & 66 (Def.'s Resp. Req. Admis. Nos. 4, 5).

equally," when in fact, the allocation of hours to men and women deprive working women of access and are rooted in gender stereotypes. Second, it wrongly distinguished a line of cases that found facial discrimination based on familial status in swimming pool access. And third, it inappropriately relied on a FHA disparate-impact case, despite the distinct analytical framework applicable to disparate-treatment claims such as the one brought here.

The district court dismissed the case on the assumption that the sex-segregated schedule applies to men and women equally. It does not. For example, the pool schedule largely prevents women who work a typical schedule from swimming during the workweek, thus arising from and reinforcing the gender stereotype that men work while women stay home. Weekday evenings (5:00 pm – 9:00 pm on Mondays and Wednesdays, 6:45 pm – 9:00 pm on Tuesdays and Thursdays, and 4:00 – 9:00 pm on Fridays) are designated "Mens Swim." Curto, who works Monday through Friday, 8:30 am – 4:30 pm, JA29-30 (Am. Comp. ¶¶68-70), and other women in comparable positions, have very little opportunity to use the pool during the workweek as a result. What is more, Curto was fined for swimming at 4:30 pm on a Friday, JA171 (Email from Board to Curto, July 21, 2016), a time reserved for men expressly because "[t]he ladies don't go swimming in the afternoon. . . .The house has to be prepared so that's the lady's job." JA85 (Engleman Dep. 49:22-50:7). ACP chose to set aside a longer period of time for men's swimming on Friday

afternoons and evenings based on the generalization that many women would be within their units, and without consideration of the women residents, like Curto, who would desire to swim. The pool schedule was fashioned to accommodate—and thus perpetuates—stereotypes about the role of women as domestic caretakers.

Anti-discrimination law repeatedly has condemned policies and practices that discriminate or segregate based on sex, particularly when the policies are based on "generalizations about 'the way women are.'" *Virginia*, 518 U.S. at 550. *See also Manhart*, 435 U.S. at 707 n.13 ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.") (citations omitted); *Sec'y ex rel. Holley v. Baumgardner*, No. 02-89-0306-1, 1990 WL 456960, at *4 (HUDALJ Nov. 15, 1990), *aff'd in part and rev'd on other grounds*, 960 F.2d 572 (6th Cir. 1992) ("The intent of the 1974 amendment [to the FHA] is to end housing practices based on sexual stereotyping[.]"). Because gender stereotypes are so often at the heart of policies that facially discriminate based on sex, case law "reveal[s] a strong presumption that gender classifications are invalid." *Virginia*, 518 U.S. at 532 (citing *J.E.B. v. Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment)).

The district court's reasoning was flawed because it did not heed this presumption. The court turned a blind eye to how the swim schedule deprives

working women of access to the pool and ignored the gender assumptions ingrained in how the hours were allocated—all evidence of sex discrimination.

The district court also dismissed a highly relevant body of cases: FHA disparate-treatment claims challenging pool policies that explicitly limited access for families with children. Courts repeatedly have concluded that pool restrictions for children facially discriminate based on familial status in violation of the Fair Housing Act. *Iniestra*, 886 F. Supp. 2d at 1167-69; *Landesman v. Keys Condo. Owners Ass'n*, No. C 04-2685PJH, 2004 WL 2370638, at *4 (N.D. Cal. Oct. 19, 2004); *United States v. Plaza Mobile Estates*, 273 F. Supp. 2d 1084, 1092 (C.D. Cal. 2003); *Llanos*, 24 F. Supp. 2d at 1060. HUD similarly has determined that policies that, on their face, prevent protected groups like families with children from accessing a pool violate the FHA. *Beacon Square Pool Ass'n*, 1993 WL 668297 at *1; *Dep't. of Hous. & Urban Dev. v. Paradise Gardens*, No. 04-90-0321-1, 1992 WL 406531, at *10 (HUDALJ Oct. 15, 1992), *aff'd*, 8 F.3d 36 (11th Cir. 1993). As the federal agency charged by Congress with interpreting and enforcing the FHA, its decisions are entitled to great weight. *Trafficante*, 409 U.S. at 210.

The district court found that the cases striking down pool limitations for children were inapposite. According to the district court, the "cases did not involve a schedule in which only children could use facilities at certain times while only adults could use them at other times, which would be analogous to the circumstances

in this case. ACP's policy does not exclude men or women from using the pool, as the defendants in Plaintiffs' cited cases excluded children." JA11.

The relevant analysis for familial-status discrimination, however, is whether a defendant is discriminating against families with children compared to families without children. *See* 42 U.S.C. § 3602(k) (defining "familial status" as meaning "one or more individuals (who have not attained the age of 18 years) being domiciled with – (1) a parent or another person having legal custody of such individual or individuals"). In some of the cases cited above, the defendants did, in fact, adopt pool policies that restricted access for families with children in the same manner as ACP – by limiting the times people could swim based on their membership in a protected class. *Paradise Gardens*, at *2, 11 (disapproving a schedule that effectively prevented children from using the pool during the workweek as well as families, where the parents work, from enjoying the pool together during the workweek); *Beacon Square Pool Ass'n*, at *1; *Landesman*, at *3-4; *Plaza Mobile Est.*, 273 F. Supp. 2d at 1093. Moreover, defendants in some of the familial-status cases pointed to by Plaintiffs were still found to violate the FHA even where families with children *were* given access to one pool but excluded from another. *Llanos*, 24 F. Supp. 2d at 1060-61; *Landesman*, at *3-4. In striking down a pool schedule that offered fewer hours to children in the main pool while providing access to two other pools, the court in *Landesman* noted: "The statute does not distinguish among any

of the protected characteristics, in the sense of indicating that some are more worthy of protection than others. Thus, there is no exception to the scope of protection, such that discriminatory treatment based on familial status would be acceptable under the FHA if there is a showing that adult residents of a housing complex do not like sharing a swimming pool with children." 2004 WL 2370638 at *4.

Finally, rather than analyzing the relevant disparate-treatment precedent, the district court cited the Third Circuit's decision in *Doe v. City of Butler*, 892 F.2d 315 (3d Cir. 1989). While acknowledging that *City of Butler* dealt with discriminatory *effects*, not intent, the district court nonetheless found it relevant, leading to an erroneous ruling. JA11-12. *City of Butler* involved a disparate-impact challenge to a zoning ordinance that limited the number of residents that could occupy a transitional shelter. 892 F.2d at 316-17. The ordinance did not make any distinction based on gender or any other protected class. *Id.* at 317-18. Women in need of temporary shelter challenged this facially neutral ordinance, arguing that it would disproportionately harm women because they are more likely to reside with children and thus trigger the numerical limit. The Third Circuit upheld the lower court's ruling that the ordinance was not discriminatory on the basis of sex, determining the ordinance was facially neutral because it applied to all transitional dwellings, regardless of gender. *City of Butler*, 892 F.2d at 323. There also was no evidence that application of the ordinance was harsher on women than men. *Id.* For example,

the Third Circuit noted that the ordinance would apply equally to a transitional dwelling for "recovering male alcoholics." *Id.*

The district court here inappropriately relied on the *City of Butler* disparate-impact analysis and ruled that the sex-segregated swimming policy should be upheld because men and women were affected similarly. JA11-12. In other words, the district court found that it is permissible to craft a pool schedule that discriminates on the basis of sex, so long as the discrimination is evenhanded. Disparate-impact claims, by definition, challenge facially neutral policies or practices that disproportionately harm members of a protected class. *See supra* at p. 20. Examining the relative effect of a neutral policy on men and women is appropriate to discern whether the policy does, in fact, discriminate. But assessing whether women and men are deprived comparably misses the point entirely when a policy *explicitly* discriminates based on sex, a protected status. Otherwise, it would be permissible for condominium associations to create racially segregated access to common rooms, child play areas, and swimming pools—so long as people who are black and white had roughly equal amounts of access time.

This reasoning runs directly counter to the purpose of the FHA, which was intended to integrate communities with respect to all of the protected classes. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515-16, 2525-26 (2015); Robert G. Schwemm, Housing Discrimination Law

and Litigation § 11C:1 (July 2017 Update) (observing that "the prohibition against sex discrimination should be understood to ban the same types of practices that would be illegal if undertaken on the basis of race or any other prohibited ground"). In the seminal case of *Loving v. Virginia*, the Commonwealth of Virginia argued that anti-miscegenation statutes did not violate the Equal Protection Clause because they applied equally to white and black people. 388 U.S. 1, 7–8 (1967). The Supreme Court rejected the Commonwealth's argument, holding that "equal application" could not save a statute based "upon distinctions drawn according to race." *Id.* at 10–11. "*Loving*'s insight—that policies that distinguish according to protected characteristics cannot be saved by equal application—extends to association based on sex." *Zarda v. Altitude Express*, 883 F.3d 100, 126 (2d Cir. 2018) (finding that Title VII prohibits sexual orientation discrimination), *petition for cert. filed*, No. 17-1623 (U.S. May 29, 2018). This reasoning is directly applicable here, where the pool schedule prohibits people from accessing the pool based on their sex. The district court's ruling in this case was incorrect as a matter of law and dangerous as a matter of policy and precedent.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the decision below and direct the district court to enter summary judgment in favor

of Plaintiffs with respect to their Fair Housing Act claim. Further, in the interest of judicial economy, convenience, and fairness to parties, Plaintiffs request that the Court also vacate the district court's remand order as it pertains to Appellants' state law claims.

Dated: June 7, 2018

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am counsel of record and I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

June 7, 2018 /s/José D. Román
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word 2016, Version 16.0.4591.1000) contains 8,334 words, exclusive of the portions excluded by Rule 32(f). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

June 7, 2018 /s/José D. Román
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I hereby certify that the text of the electronic and hard copies of this brief are identical.

June 7, 2018 /s/José D. Román
José D. Román

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I certify that the electronic file of this brief was scanned with Sophos AntiVirus software.

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José D. Román

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing Brief of Appellants and accompanying Joint Appendix were filed electronically and served on all counsel of record via the ECF system of the United States Court of Appeals for the Third Circuit. In addition, seven (7) paper copies of the brief and four (4) paper copies of the appendix were sent via New Jersey Lawyers Service to the clerk of this Court.

June 7, 2018 /s/José D. Román
José D. Román

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARIE CURTO, DIANA LUSARDI AND STEVE LUSARDI, v. A COUNTRY PLACE CONDOMINIUM ASSOCIATION, INC.	CIVIL ACTION Docket No.: 3:16-CV-5928 **Judge: Hon. Brian R. Martinotti** **Notice of Appeal to the U.S. Court of Appeals for the Third Circuit**

Notice is hereby given that Plaintiffs Marie Curto, Diana Lusardi and Steve Lusardi appeal to the United States Court of Appeals for the Third Circuit the Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting in Part Defendant's Motion for Summary Judgment (ECF No. 34) of the United States District Court, District of New Jersey, entered in this action on January 31, 2018

Dated: January 31, 2018

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIE CURTO, et al., Plaintiffs, v. A COUNTRY PLACE CONDOMINIUM ASSOCIATION, INC., et al., Defendants.	Civ. Action No.: 16-5928-BRM-LHG **ORDER**

THIS MATTER is opened to the Court by Plaintiffs Marie Curto, Diana Lusardi, and Steve Lusardi's (collectively, "Plaintiffs") Motion for Partial Summary Judgment (ECF No. 27) and Defendant A Country Place Condominium Association, Inc.'s ("CPCA") Motion for Summary Judgment (ECF No. 28). The Court having reviewed the parties' submissions pursuant to Federal Rule of Civil Procedure 78(b), for the reasons set forth in the accompanying Opinion, and for good cause shown,

IT IS on this 31st day of January 2018,

ORDERED that Plaintiffs' Motion for Partial Summary Judgment (ECF No. 27) is **DENIED**, and it is further

ORDERED that CPCA's Motion for Summary Judgment (ECF No. 28) is **GRANTED IN PART** and **DENIED IN PART AS MOOT**, and it is further

ORDERED that the Court remands the matter to the Superior Court of New Jersey, Ocean County; and it is finally

ORDERED that the Clerk is directed to **CLOSE** this case.

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARIE CURTO, et al., Plaintiffs, v. A COUNTRY PLACE CONDOMINIUM ASSOCIATION, INC., et al., Defendants.	Civ. Action No.: 16-5928-BRM-LHG **OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court are: (1) Plaintiffs Marie Curto, Diana Lusardi, and Steve Lusardi's (collectively, "Plaintiffs") Motion for Partial Summary Judgment (ECF No. 27) and (2) Defendant A Country Place Condominium Association, Inc.'s ("CPCA") Motion for Summary Judgment (ECF No. 28). Pursuant to Federal Rule of Civil Procedure 78(b), the Court did not hear oral argument. For the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment is **DENIED** and Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART AS MOOT**, and the Court **REMANDS** the matter to the Superior Court of New Jersey, Ocean County.

I. BACKGROUND

Plaintiffs assert claims for sex discrimination pursuant to the Federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("FHA"), the New Jersey Law Against Discrimination N.J.S.A. 10:5-1, *et seq*. ("NJLAD"), the New Jersey Horizontal Property Act of 1963, N.J.S.A. 46:8A-1, *et seq.*, and the New Jersey Condominium Act, N.J.S.A. 46:8B-1, *et seq.* arising from gender segregation at

the community pool in the condominium complex where they reside. (*See* Am. Compl. (ECF No. 25).)

A. The Parties

Plaintiffs are residents and unit owners of the A Country Place Community (the "Community"), which is a 376-unit condominium community in Lakewood, New Jersey. (Pls.' Statement of Undisputed Material Facts (ECF No. 27-2) ¶¶ 5, 14, 20, 25; Def.'s Resp. to Pls.' Statement of Undisputed Material Facts (ECF No. 29) ¶¶ 5, 14, 20, 25; Def.'s Statement of Undisputed Material Facts (ECF No. 28) ¶¶ 1, 7; Pls.' Resp. to Def.'s Statement of Undisputed Material Facts (ECF No. 30-1) ¶¶ 1, 7.) CPCA is a non-profit organization organized under New Jersey law. (ECF No. 27-2 ¶ 6; ECF No. 29 ¶ 6.)

B. Community Pool Policy

CPCA claims eighty percent of the units in the Community are owned by members of the Jewish Orthodox who "are strictly separated by gender." (ECF No. 28 ¶¶ 9, 10.) In 2011, CPCA implemented a gender-segregated schedule at the pool. (Dep. of Fagye Engelman ("Engelman Dep.") (ECF No. 27-6) at 28:21-29:5; ECF No. 27-2 ¶ 52; ECF No 28 ¶ 19.) In 2016, when this lawsuit was filed, the pool operated under two slightly different schedules, but generally allotted time as follows:

1. Women-Only Swimming – 8:00 to 11:00 a.m. Sunday to Friday; 3:00 to 5:00 p.m. Sunday to Thursday; and 3:00 to 4:00 p.m. Friday.

2. Men-Only Swimming – 11:00 a.m. to 1 p.m. Sunday to Friday; 6:45 to 9:00 p.m. Sunday to Thursday; and 4:00 to 9:00 p.m. Friday.

3. All Residents Swimming – 1:00 to 3:00 p.m. Sunday to Friday and 8:00 a.m. to 9:00 p.m. Saturday.

(Certif. of Angela Maione Costigan, Esq. ("Costigan Cert.") Ex. E (ECF No. 28-14) at 2, Ex. F (ECF No. 28-15) at 2.) During the swimming hours for women, men are not permitted to use the

pool or pool deck. (ECF No. 27-2 ¶ 65; ECF No. 29 ¶ 65.) Similarly, during swimming hours for men, women are prohibited from using the pool or the pool deck. (ECF No. 27-2 ¶ 66; ECF No. 29 ¶ 66.) The association/maintenance fee for the Community is $215.00 per month. (ECF No. 27-2 ¶ 35; ECF No. 29 ¶ 35.) A portion of this fee covers common areas, including the pool, but also covers maintenance of the grounds, snow removal, trash removal, among other services. (ECF No. 27-2 ¶ 36; ECF No. 29 ¶ 36; ECF No. 28 ¶ 36; ECF No. 30-1 ¶ 36.)

The parties dispute the details concerning how and when CPCA implemented a system of fines related to use of the pool (*see* ECF No. 27-2 ¶¶ 41-42; ECF No. 29 ¶¶ 41-42) but agree Steve and Diana Lusardi and Marie Curto were fined $50.00 per household for using the pool during gender-segregated hours. (ECF No. 27-2 ¶¶ 78-79; ECF No. 29 ¶¶ 78-79.) Plaintiffs claim they sought hearings with CPCA to address the fines, but CPCA denied this request. (ECF No. 27-2 ¶¶ 80-84.) CPCA denies these claims and states it responded to Plaintiff's questions and concerns about the fines. (ECF No. 29 ¶¶ 80-84.) The system of fines provided for fines of $50.00, $100.00, and $250.00 for first, second, and third violations of the pool policy, respectively. (ECF No. 27-2 ¶ 92; ECF No. 29 ¶ 92.)

C. Procedural Background

On August 29, 2016, Plaintiffs initiated this lawsuit via an order to show cause with temporary restraints and a verified complaint filed in the Superior Court of New Jersey, Law Division: Ocean County. (ECF No. 1.) On the same day, the Honorable Craig L. Wellerson, P.J.Cv., entered an order to show cause with temporary restraints (the "TRO"), which temporarily enjoined CPCA from, among other things, enforcing gender segregation at the pool and collecting fines related to the gender-segregation policy. (ECF No. 2.) On September 26, 2016, CPCA removed the matter to this Court. (ECF No. 1.) Judge Wellerson's order expired by operation of law on October 10, 2016. (ECF Nos. 12 & 13.) The parties then agreed to engage in liability

discovery and file dispositive motions on threshold issues of law. (ECF Nos. 14 & 23.) The parties consented to amend the pleadings (ECF No. 24), and on April 19, 2017, Plaintiffs filed the Amended Complaint asserting claims for: (1) sex discrimination in violation of Sections 3604(b) and 3617 of the FHA (Count I), (2) violations of NJLAD (Count II), and (3) violations of the Horizontal Property Act and the Condominium Act (Count III). Plaintiffs now move for partial summary judgment on Counts I and III (ECF No. 27), and CPCA moves for summary judgment (ECF No. 28).

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is genuine only if there is "a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party," and it is material only if it has the ability to "affect the outcome of the suit under governing law." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Anderson*, 477 U.S. at 248. "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255)); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986); *Curley v. Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002).

The party moving for summary judgment has the initial burden of showing the basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If the moving party will bear the burden of persuasion at trial, that party must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Id.* at 331. On the other hand, if the burden of persuasion at trial would be on the nonmoving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either (1) "submit[ting] affirmative evidence that negates an essential element of the nonmoving party's claim" or (2) demonstrating "that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.* Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324; *see also Matsushita*, 475 U.S. at 586; *Ridgewood Bd. of Ed. v. Stokley*, 172 F.3d 238, 252 (3d Cir. 1999). In deciding the merits of a party's motion for summary judgment, the court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

There can be "no genuine issue as to any material fact," however, if a party fails "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322-23. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323; *Katz v. Aetna Cas. & Sur. Co.*, 972 F.2d 53, 55 (3d Cir. 1992).

III. DECISION

A. Plaintiffs' Standing to Assert Their Claims

As a preliminary matter, CPCA argues Plaintiffs lack standing to assert their claims, because Plaintiffs have not sustained an injury. (ECF No. 28-5 at 10-12.) CPCA contends Plaintiffs testified they were able to use the pool and that they did not pay the fines they were assessed. (*Id.* at 12-14.)

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2016) "That case-or controversy requirement is satisfied only where a plaintiff has standing." *Id.* (citation omitted). Article III "standing consists of three elements." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "Absent Article III standing, a federal court does not have subject matter jurisdiction to address a plaintiff's claims, and they must be dismissed." *Common Cause of Pennsylvania v. Pennsylvania*, 558 F.3d 249, 257 (3d Cir. 2009) (quoting *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006)).

The Court finds Plaintiffs have standing. CPCA mischaracterizes Plaintiffs' claims. Their claims do not arise from an allegation that they were prohibited from using the pool altogether. Rather, they allege CPCA's gender-segregation policy discriminated against them based on gender because they could not access the pool as they would have but for their gender. Furthermore, the FHA allows an "aggrieved person" to commence a civil action to obtain relief from an alleged discriminatory housing practice. 42 U.S.C. § 3613(a). The FHA defines an "aggrieved person" to

include any person who "(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i). Plaintiffs have clearly alleged the gender-segregation of the pool constitutes "(1) [] an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct at 1547. Therefore, Plaintiffs have Article III standing.

B. CPCA's Motion for Summary Judgment as to Plaintiffs' FHA Claim[1]

The FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 48 U.S.C. § 3604(b). It is also "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted by [the FHA]." *Id.* § 3617. "A plaintiff can establish a *prima facie* claim of housing discrimination under the [FHA] by showing that the challenged actions were motivated by intentional discrimination or that the actions had a discriminatory effect on a protected class." *Mitchell v. Walters*, No. 10-1061, 2010 WL 3614210, at *6 (D.N.J. Sept. 8, 2010) (citing *Cmty Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005)). Here, Plaintiffs argue CPCA has engaged in intentional discrimination, because the pool schedule facially discriminates and segregates residents by gender.

CPCA argues its gender-segregated schedule for the pool does not discriminate, because the policy applies to both men and women equally. (ECF No. 28-5 at 15.) It argues the policy

[1] Because Plaintiffs' FHA claims are the only basis for this Court's original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1332, the Court first considers CPCA's Motion for Summary judgment on that claim. By considering CPCA's motion first, the Court "view[s] the facts and draw[s] all reasonable inferences in the light most favorable" to Plaintiffs. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

comports with United States Supreme Court precedent that provides a policy is not discriminatory unless "the evidence shows treatment of a person in the manner which, but for that person's sex, would be different." (ECF No 28-5 at 4 (citing *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978). Plaintiffs argue CPCA advocates "separate but equal" treatment of men and women in violation of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

The Court finds the gender-segregated scheduling does not violate the FHA. Plaintiffs rely on a series of cases in which there was an express intent to discriminate, *i.e.* to place a group at a disadvantage relative to another group. Specifically, Plaintiffs rely on three cases that concern pool restrictions: *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1061-62 (E.D. Cal. 1998); *HUD v. Paradise Gardens*, HUDALJ 04-90-0321-1, 1992 WL 406531, at (HUDALJ Oct. 15, 1992); and *Dept. of Hous. & Urban Dev. v. Beacon Square Pool Ass'n*, 1993 WL 668297 at *1 (H.U.D. 1993). However, each of those cases involved prohibitions on children from using pools and related facilities and are therefore inapposite. The cases did not involve a schedule in which only children could use facilities at certain times while only adults could use them at other times, which would be analogous to the circumstances in this case. CPCA's policy does not exclude men or women from using the pool, as the defendants in Plaintiffs' cited cases excluded children.

The Court is guided by the Third Circuit's decision in *Doe v. City of Butler, Pa.*, 892 F.2d 315 (3d Cir. 1989). *City of Butler* involved a claim of discriminatory effect rather than discriminatory intent, but nonetheless has relevance to this case. In *City of Butler*, the defendant municipality enacted a zoning ordinance that limited the number of residents that could occupy a transitional dwelling. *Id.* at 323. A women's group home challenged the ordinance on the basis it discriminated against women, who would be more likely to trigger the resident limit because they

are more likely to reside with children. The Third Circuit, despite agreeing plaintiffs would be affected, found the ordinance was not discriminatory "because the resident limitation would have a comparable effect on males." *Id.* Here, the gender-segregated schedule applies to men and women equally. Therefore, the Court finds the policy does not violate the FHA and CPCA is entitled to summary judgment as a matter of law.

C. CPCA's Motion for Summary Judgement as to Plaintiffs' State Law Claims

As to Plaintiffs' claims for violations of NJLAD (Count II) and violations of the Horizontal Property Act and the Condominium Act (Count III), this Court declines to exercise supplemental jurisdiction over these state law claims. Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction over a claim if the court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In exercising its discretion, "the district court should take into account generally accepted principles of 'judicial economy, convenience, and fairness to the litigants.'" *Growth Horizons, Inc. v. Del. County, Pa.*, 983 F.2d 1277, 1284 (3d Cir. 1993) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)).

On September 29, 2017, the Court granted a motion to remand in *Richman v. A Country Place Condominium Assoc.*, Case No. 16-9453. That case is pending in the Superior Court and involves NJLAD and New Jersey Condominium Act claims against CPCA regarding the same pool policy. The Court finds the "principles of 'judicial economy, convenience, and fairness to the litigants" would be best served if this case was remanded to the Superior Court. *See Growth Horizons, Inc.*, 983 F.2d at 1284.

Therefore, CPCA's Motion for Summary Judgment is **GRANTED IN PART** as to

Plaintiffs' FHA claims and **DENIED IN PART AS MOOT** as to Plaintiffs' state law claims.

D. Plaintiff's Motion for Partial Summary Judgment

Plaintiffs argue they are entitled to summary judgment on their FHA claims, because CPCA's gender-segregated pool schedule is facially discriminatory. (Pls.' Br. in Supp. of Summ. J. (ECF No. 27-3) at 10.) They point out a plaintiff does not have to prove a defendant's malice or discriminatory animus to establish intentional discrimination where the defendant expressly treats someone protected by the FHA differently from others. *Id.* (citing *Potomac Group Home v. Montgomery Cty., Md.*, 823 F. Supp. 1285, 1295 (D. Md. 1993).) However, this Court has found CPCA's policy does not treat men or women differently based on gender and therefore is not discriminatory. The schedule applies to both men and women and is not a restriction on one group. The policy is different from the discriminatory policies in the cases cited by Plaintiffs. Indeed, these pool cases involved blanket prohibitions on use by minors. Similarly, Plaintiffs cite several cases in which group homes for the elderly and disabled were required to comply with zoning requirements that did not apply to those outside those protected classes. *See Bangester v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (finding a zoning requirement that residents of a group home for the handicapped had to be supervised for twenty-four hours was discriminatory.); *Fair Housing Ctr. V. Sonoma Bay Comm. Homeowners*, 136 F. Supp. 3d 1364 (S.D. Fla. 2015) (finding a rule prohibiting minors from congregating in property common areas after sundown was discriminatory); *Potomac Group Home*, 823 F. Supp. at 1295 (finding a zoning rule requiring applicants for approval to build a group home for the disabled to notify neighbors was discriminatory).

Because the court has granted CPCA's motion for summary judgment, Plaintiffs' Motion for Partial Summary Judgment as to their FHA claims is **DENIED**. The Court need not reach Plaintiff's arguments regarding their motion for summary judgment as to the Horizontal Property

Act. The Court has declined to exercise supplemental jurisdiction over that claim pursuant to 28 U.S.C. § 1367(c), because the Court "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3).

III. CONCLUSION

For the foregoing reasons, CPCA's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART AS MOOT**. Plaintiffs' Motion for Partial Summary Judgment is **DENIED**. An appropriate Order will follow.

Date: January 31, 2018

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE