IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
NORTHSIDE REALTY, *et al.*,	:	NO. 13932
Defendants.	:	

MOTION OF DEFENDANTS NORTHSIDE REALTY ASSOCIATES, INC., AND ED A. ISAKSON TO AMEND AND ALTER JUDGMENT AND BRIEF IN SUPPORT THEREOF

Defendants, NORTHSIDE REALTY ASSOCIATES, INC., and ED A. ISAKSON, hereby timely*/ submit pursuant to Rule 59(e), Federal Rules of Civil Procedure, this their motion to amend and alter judgment and brief in support thereof:

Motion

Pursuant to Rule 59(e), defendants submit that this Court has made clearly erroneous findings of fact and erred in its conclusions of law based thereon; defendants move that this Court amend its findings of fact and conclusions of law as suggested in the attached proposed amended order for the reasons set forth in defendants' brief in support thereof; and defendants urge that this Court, on the basis of the amended order, render judgment in defendants' favor.

Respectfully submitted,

Harold L. Russell

Lloyd Sutter
Counsel for Defendants

January 10, 1972

*/ Although this motion would otherwise be filed on Saturday, January 8, 1972 or "not later than 10 days after entry of the judgment" of December 29, 1971, Rule 59(e), by virtue of Rule 6(a), the filing date is carried forward to Monday, January 10.

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Brief in Support of Defendants' Motion to Amend and Alter Judgment As Reflected in Defendants' Proposed Amended Order

Defendants strongly believe that certain of this Court's findings of fact in its December 29, 1971 Order are "clearly erroneous." Fed. R. Civ. P. 52(a). In addition, this Court apparently overlooked or inadvertently omitted from its Order certain other relevant and material findings of fact required by the record which, defendants submit, are essential facts to any assessment of the "Northside Realty" activity in the totality of its context. The combined effect of the erroneously found and omitted facts is the ultimate conclusion of law by this Court (Order, p. 9) that "Mr. Isakson's own actions[1/] and statements that Congress has exceeded its constitutional limitations ... indicate his intention on behalf of himself

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1/ In fact, this Court criticized Mr. Isakson for only two "violations": the Detroit professor referral and the Dawson conversation. The Bowers incident was pre-Act, was not at the time an unlawful housing practice (and, defendants submit, should be considered by post-Act standards at worst as economic not racial discrimination) and its probative value defendants interpret from the Order to have been only a reference against which defendants' alleged open housing educational deficiencies were considered and from which an inference -- *contrary to the evidence* -- was drawn of no post-Act policy adjustment by defendants to comply with the Act. *See* proposed amended order and discussion of relevant portions thereof, *infra*.

and the company[2/] to resist compliance with the purposes of the Fair Housing Act ... [and that] black people as a group[3/] have thereby been denied the protection guaranteed by the Act."

This Court correctly placed (Order, p. 5) the burden of proof upon the Government by a preponderance of the evidence. However, by omitting findings with respect to compliance with the Act as to which issue was joined by defendants in Mr. Isakson's deposition testimony (incorporating by reference in Exhibit 1 thereto answers to interrogatories reflecting over a dozen instances of service to Negroes) and testimony at trial (indicating that defendants to that time had on at least 20 occasions served Negroes in varying capacities), this Court has absolved the Government of its burden of refuting defendants' evidence of compliance with the Act. Where a defendant has presented substantial evidence of nondiscriminatory policy and practice --as defendants herein have done -- then the burden of coming forward with evidence to rebut such policy and practice by a preponderance falls upon the Government. United States v. Jacksonville Terminal Co., et al., slip opinion,

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2/ Of the evidence with respect to actions of the sales persons associated with the corporate defendant, only the Gribble incident was reflected in the Order and it was correctly concluded to have been individual action (if it occurred at all and the Court did not so find) which was not imputable to either defendant. Otherwise, the Court omitted any findings with respect to the stipulated facts contained in Joint Exhibits 2 and 3 and the testimony of defendant Isakson at trial and on deposition (Government Exhibit 13) reflecting numerous specific instances in which Northside sales persons had served Negro customers.

3/ Considered in the quantitative totality of the evidence, Negroes as a group who have come into contact with defendants seeking a dwelling have been served in over 20 instances by Northside sales persons, including the sale to a Negro of an apartment listing in cooperation and on a shared commission basis with a Negro broker (Joint Ex. No. 2 ¶33) and presentation of a Negro's contract on a listing which was rejected by the seller. Against this "pattern and practice" of compliance with the Act, the pre-Act Bowers and post-Act Detroit professor and Dawson incidents, even if found to be incidents of unfair housing practices (and defendants do not believe they were for reasons fully set out in their Post-Trial Brief filed September 1, 1971), pale as an index of defendants' post-Act policy with respect to service to Negroes. See proposed amended order and discussion of relevant portions thereof, infra.

pp. 60, 64-65 (5th Cir. Aug. 31, 1971) (No. 30448). The Government, defendants suggest, did not attempt to refute defendants evidence of compliance because from its discovery and investigative efforts it knew it could not. See Defendants Answers 15 and 17 to Government Interrogatories incorporated by reference into Exhibit 1 to Mr. Isakson's deposition introduced into evidence as Government Exhibit 13; Joint Exhibit 2 ¶33; Joint Ex. 3; and Mr. Isakson's testimony (T. 204-06, 217-19, 224-28).

Defendants furthermore submit that, under the circumstances -- the Government having the burden of proof and the burden of coming forward with evidence to rebut defendants' evidence of compliance, - the Government's failure to call any of the more than 200 current and former sales persons or brokers of the defendant corporation 4/ raises an inference that the testimony of such individuals would have been adverse to the Government's case. United States v. Mintzes, 304 F.Supp. 1305, 1314-15 (D. Md. 1969) (a Title VIII case). See also Interstate Circuit v. United States, 306 U.S. 208, 225-26 (1939); Tropicana Shipping, S. A. v. Emersa Nacional, 366 F.2d 729, 733-34 (5th Cir. 1966); II Wigmore, Evidence § 285, p. 162 (3rd ed. 1940 and cases cited in annotations thereto and in 1970 supplement).

Finally, what this Court has done by its Order of December 29, 1971, is to try only defendant Isakson, omit evidence of compliance by the corporate defendant which should be imputed to Isakson's leadership of the corporate defendant, and then -- unfairest of all -- impute in reverse to the corporate defendant notwithstanding evidence to the contrary an inference of cor-

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4/ This Court, in considering this point, should also recall the contingency plans for bifurcating this trial as a result of last minute Government expansion of its discovery efforts and the size of the Government's final pre-trial witness list. Why did the Government back away from calling these "possible witnesses"? See Joint Ex. 3 for the answer.

porate noncompliance based upon the two isolated actions[5/] of defendant Isakson who the parties stipulated had not engaged in any activities reaching the public (white or Negro) and who the uncontroverted evidence shows would not have handled either the Detroit professor or Dawson incidents but for the fact these Negro inquirers called for Mr. Isakson personally.[6/]

Defendants submit that, if the totality of their conduct is considered in context and reflected as suggested in the proposed amended order attached hereto,[7/] the evidence shows by a preponderance:

(1) as the Court originally concluded, that the Government failed to prove a "pattern or practice" of discrimination by either defendant;

(2) that the post-Act actions of defendant Isakson -- who the parties stipulated does not "meet the purchasing public" in his capacity with Northside -- were isolated instances which do not reflect the practices or policies of Northside in the handling of more than 99.9 percent of its business by its ten other brokers and 167 associated agents;

5/ It is now well-recognized that a single pre-Act incident (such as occurred with the Bowers) will not itself support a finding of post-Act discrimination. United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971); United States v. Jacksonville Terminal Co., et al., supra at 53-54. Of course, the "violation" as to which the Court found the Bowers incident supposedly relevant and probative was defendants' purported failure to educate its sales force on responsibilities under the Act -- neither a requirement anywhere specified in the Act nor a supportable finding at all in light of the uncontroverted evidence of compliance with the Act.

6/ Dawson, it was clear, knew Mr. Isakson personally and professionally. See discussion in Defendants' Post-trial Brief, pp. 12-13. The Detroit professor, according to Mr. Isakson and Government witness McIntosh, called Isakson with respect to a listing Isakson purportedly had advertised. (T. 167-68; T. 209-10; Isakson deposition p. 61).

7/ Whenever an amendment or addition appears in the proposed amended order it is underlined and the record support therefor is found in the accompanying brief in support thereof. Those references are incorporated herein by reference rather than rediscussing them here.

(3) that defendants' uncontroverted evidence of service to Negroes, unrebutted by the Government, supports a holding that defendants 8/ have not engaged in actions manifesting an intent to deny Negroes as a group their rights guaranteed by the Act raising an issue of sufficient importance to authorize relief 9/ under Section 813 of the Act, 42 U.S.C. §3613; and

(4) that the suit against them accordingly should be dismissed.

Respectfully submitted,

GAMBRELL, RUSSELL, KILLORIN, WADE & FORBES

Harold L. Russell

Lloyd Sutter

Counsel for Defendants

January 10, 1972

8/ Defendants assert that it was erroneous for this Court, after omitting any consideration of defendants' conduct in serving Negroes in fact, to draw (Order, p. 9) an inference of intent to resist compliance with the Act apparently based substantially upon the fact that defendants in defending themselves against the Government's suit chose to challenge the constitutionality of certain of the provisions of the Act. That holding is analogous to saying that a criminal defendant who raised constitutional defenses to his arrest or denial of counsel would be presumed guilty until proven innocent -- an unsupportable legal precedent. Moreover, the record firmly establishes defendants' compliance to abide by the law (see T. 218-19). Defendants also note, and object to, the fact that this Court declined to rule on any of those constitutional defenses. On the other hand, if the Court adopts the proposed amended order and alters its judgment to defendants' favor, the constitutional issues can correctly be not reached.

9/ Speaking solely to the injunctive relief, defendants submit that, whether or not this Court amends its findings and conclusions and/or alters its judgment of December 29, the totality of the evidence in this case of defendants' compliance with the Act (assuming, arguendo, those findings should still stand) and the failure of the Government to carry its burden of proof would permit this Court, under its prior holding in United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487, 493 (N.D. Ga. 1971), and the precedent set under Title VII by the Eighth Circuit in Parham v. Southwestern Bell, 433 F.2d 421 (8th Cir. 1970), to decline to impose any injunctive relief and simply to retain jurisdiction for whatever period the Court considers appropriate (perhaps one year) to insure continued compliance with the Act.

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Proposed Amended Order

The following pages set out defendants' proposed amended order.

Respectfully submitted,

GAMBRELL, RUSSELL, KILLORIN, WADE & FORBES

Harold L. Russell

Lloyd Sutter

Counsel for Defendants

January 10, 1971

UNITED STATES DISTRICT COURT
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	:	
NORTHSIDE REALTY ASSOCIATES, INC., and ED A. ISAKSON	:	FILE NO. 13932
	:	

~~O R D E R~~

AMENDED ORDER[1/]

This action was brought by the United States pursuant to Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq. The case was heard by the Court sitting without a jury on July 7-9, 1971. Having considered the evidence as presented by both parties, the Court makes the following findings of fact:

Northside Realty Associates, Inc. is incorporated under the laws of the State of Georgia and is licensed to engage in the listing and selling of real estate. Its executive vice-president, Ed Isakson, is also the sales manager for one of the Company's seven residential sales offices. Mr. Isakson is a licensed broker, and his broker's license inures to the benefit of the Company (some nine other brokers also being associated with Northside). The parties have stipulated, however, that Mr. Isakson personally has neither advertised, shown, nor sold any residential property since March 23, 1960.

In the Atlanta area, Northside maintains nine offices, each under the supervision of a sales manager-associate broker (except for the Buckhead office which is directly supervised by the defendant, Ed Isakson). Seven of these offices are

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1/ The original Order is reflected as written with those portions proposed to be deleted appearing as lined through, with proposed amendment or additions following immediately thereafter and underlined.

engaged in the sale of residential property. All of the offices are located in the northeastern and northwestern areas of the suburban metropolitan Atlanta area. Approximately 165 sales-women are associated with and licensed under Northside Realty.

Northside, through its salespeople and brokers, acts as agent for listing sellers by presenting offers on behalf of potential buyers. Commissions are paid by the sellers when sales are consummated. The majority of such sales involve single family dwellings while a smaller proportion involve lots and multiple dwellings or commercial property.

~~In the three years since the effective date of the Fair Housing Act, not a single one of the more than 3,000 homes sold by Northside has been sold to a Negro.~~

In the three years between the effective date of the Fair Housing Act and the close of the evidence in this case, none of the 3,000 single family dwellings sold by Northside was sold to a Negro; but Northside did sell on May 29, 1970 (over a month before the Attorney General brought this action) to a Negro in cooperation with a Negro broker and on a shared comis-sion basis an exclusive Northside apartment listing.

Sometime between February and May, 1968, a black couple named Bowers visited Northside's Buckhead office and talked with defendant Ed Isakson. Mr. Bowers' purpose in going to the Northside office was to investigate an advertised listing for an \$18,000 to \$18,500 home. ~~After learning the amount of Mr. Bowers' salary, Mr. Isakson told the Bowers that they could not afford an \$18,000 house and referred them to a Negro-owned southwest Atlanta real estate firm. Mr. Isakson made no attempt to inquire of his agents whether Northside had any available listing within Mr. Bowers' price range, nor did he make the usual inquiries into Mr. Bowers' financing capabilities.~~ Mr. Isakson was alone in his office on the February 1968 date of the Bowers' visit with the exception of one other person, a sales lady who was throughout the Bowers' transaction working with another client. Mr. Isakson did not attempt to inquire of that sales lady whether Northside had any $18,000 listing available in the Sandy Springs area (the Bowers' area and price preference). Mr. Isakson qualified the Bowers as to their financial capacity by personally determining from them their income and by applying thereto the standard "rule of thumb" applied to all prospective purchasers, white or black alike, that they could purchase a house at a price no greater than 2 1/2 times their annual income, limiting the Bowers according to the $6,500 income they admitted to a house at a price of between $15,000 and $16,250. Mr. Isakson testified, however that he personally had found it difficult to get his own Buckhead office sales personnel to handle any client - white or black and even including in the past a relative of his - who does not want to spend more than $25,000. This reluctance is understandable when the average Northside sales prices for single family dwellings is considered: during the period when the Bowers visited Northside the average sale by Mr. Isakson's sales persons exceeded $37,600.00 and the average Northside sales price for residential real estate for the period since the effective date of the Act exceeded $45,300.00.

In the spring of 1970, defendant Isakson received a telephone call from a man recently transferred to Atlanta from Detroit. ~~The caller stated that he was a black professor at one of the black colleges, and that he wanted to buy a house advertised by Northside. Mr. Isakson responded by saying that he had no houses advertised and that the caller's "interest would be best served" if he contacted another real estate company that sold primarily in the southwest Atlanta area.~~ The caller stated that he was a black professor at one of the black colleges and that he wanted to buy a house that Isakson had advertised in Area 1 in the preceding day's paper. Mr. Isakson responded by saying that "he did not sell real estate and that he hadn't sold real estate"; and the parties stipulated that Mr. Isakson, in fact, "has not personally listed, shown or sold anyone, Negro or white, any real estate after March 23, 1960." Mr. Isakson indicated that he thought the caller's "interest would be best served" if he contacted one of two Southwest Atlanta real estate agencies (one black-owned, the other white-owned) "because he [the professor] ... taught school in the southwest area of Atlanta, of which we [Northside] do not sell any real estate." Mr. Isakson related this incident to a meeting of the DeKalb Women's Real Estate Council held later in the spring of 1970. ~~At that meeting, Mr. Isakson told the audience that while talking to this black caller, he told the caller that "he did not sell real estate, and that he had not sold real estate since March 23, 1960." He held this method out as a model for white real estate salespeople who did not wish to deal with blacks.~~

The Reverend Sam Williams telephoned Mr. Isakson concerning Mr. Isakson's conversation with the unnamed black professor from Detroit. When confronted with allegations of discrimination, Mr. Isakson, according to Government witness McIntosh, who attended the Women's Council meeting, said to Reverend Williams, "No, I did not refuse to sell him a home because he was black." ~~When confronted with allegations of discrimination, Mr. Isakson failed to deny them.~~

The pre-Act Bower's incident and post-Act Detroit Professor incident are the only two incidents where Mr. Isakson, who generally does not "meet the public" whether white or Negro, made general referrals of Negroes to real estate firms selling in Southwest Atlanta, an area where Northside has no listings; and Mr. Isakson testified that on at least one occasion he had made a general referral of a white person to a Negro broker selling in the Southwest Atlanta area.

Mr. Harold Dawson, a black real estate broker, who is a member of the City Planning Commission and a former president of the Empire Real Estate Board, made a telephone call to defendant Isakson in the course of business in 1970. During their conversation, Mr. Dawson asked if Mr. Isakson could help him with a client. Mr. Isakson reminded Mr. Dawson of his involvement in this lawsuit, and indicated that he "would be in a better position" to assist Mr. Dawson at some later date. The conversation ended at that point.

Mr. Dawson testified that he never indicated to Mr. Isakson the name or race of his client and he did not ask Mr. Isakson to "co-op" on any particular type of transaction. Mr. Dawson further testified that "I felt that I could have pursued the conversation but I decided not to," that he did not take Mr. Isakson's response as negative, that Mr. Isakson always acts fairly and in accordance with law irrespective of race, and that he had no complaint about his call to Mr. Isakson.

Mrs. Patricia D. Randolph, a licensed real estate agent in Atlanta, testified that in June of 1970 she contacted Mrs. Katherine Gribble, a Northside agent, to "cooperate" in showing one of her listings to a white client of Mrs. Randolph's. Mrs. Randolph claims that during their conversation, Mrs. Gribble asked if Mrs. Randolph's client was black, and after being told that he was not, Mrs. Gribble volunteered that if she knew a potential client was black, she would fail to show up for any appointment with him. Mrs. Randolph further stated that Mrs. Gribble later showed Mrs. Randolph and her client the house inquired about and at that time gave Mrs. Randolph her business card. Mrs. Randolph produced this card during the trial. When placed on the witness stand, Mrs. Gribble testified that she had no knowledge of ever having talked with Mrs. Randolph. She also contended that she had never made an appointment with a black person that she did not keep, and that she had served to the best of her ability the only black person who had ever contacted her. From the testimony given by these two women, the Court finds that even if this incident occurred as Mrs. Randolph described, it represented only the spontaneous statement of an agent describing her own conduct and not describing the policy of the company or defendant Isakson.

Mrs. Amaryliss Hawk, an assistant professor of speech at a local black college, testified that she called Northside Realty on June 2, 1970, and after asking for the sales manager, was connected with Mr. Isakson. She was quite certain of the date of the call as she had gone to the hospital later that same evening and delivered her third child. Mrs. Hawk claims she told Mr. Isakson that she was interested in a four bedroom house in Area 1 (an area in which Northside sells property) in the $35,000 price range. After a brief, cordial conversation, Mrs. Hawk allegedly told Mr. Isakson that she was black. At this point, Mr. Isakson purportedly said he could not help a black family, but that he could recommend the names of two other real estate companies which would help her. Mr. Isakson denied ever having talked with Mrs. Hawk and further proved that he was not in Atlanta on June 2, 1970. From the evidence presented, Mr. Isakson proved to the satisfaction of the Court that on June 2, 1970, he was in Valdosta, Georgia, on business, and that he was not in his Atlanta office at any time that day. The Court finds that since Mr. Isakson was in Valdosta, Georgia, with Mr. John McTier, a Valdosta attorney, on June 2, 1970, Mrs. Hawk could not have had any conversations with him on that date. Therefore, the Court finds that if such a conversation did in fact take place, it must have occurred on some date other than June 2, 1970. The Court, however, is unable to assume that Mrs. Hawk had this conversation with Mr. Isakson on some date other than June 2, 1970, because of Mrs. Hawk's definite testimony as to the date on which she made the call. From the evidence presented, the plaintiff did not prove to the Court that Mrs. Hawk's alleged talk with Mr. Isakson did in fact take place.

<u>The uncontroverted evidence showed that although Northside had not actually consummated a single family dwelling sale to a Negro, either individually or on a "co-op" or "commission-</u>

sharing" basis, Northside had made available to Negroes its full range of services on at least 20 different occasions, including at least one Negro contract submission to a white seller who listed with Northside, occurring both before and after commencement of this action; and Northside had a policy of compliance with rather than resistance to the Act. Finally, defendants provided the Government during discovery with the name, address, telephone number, and sales office of each sales person and broker associated with defendant Northside and a list of more than a dozen instances when sales persons associated with defendant Northside had provided to various blacks before and after the institution of this litigation the full range of their services. Mr. Isakson, in his testimony and on deposition, referred to or incorporated by reference to defendants' interrogatory answers at least 20 instances of sales persons associated with Northside serving blacks. His testimony was uncontroverted. The Government deposed, in addition to Mr. Isakson, one broker and two sales persons associated with defendant Northside and had F.B.I. agents interview over 40 sales persons formerly associated with Defendant Northside. The interview summaries submitted to Government counsel by the F.B.I. and supplied by the Government to defense counsel were admitted into evidence as a Joint Exhibit; and they provided evidence of compliance, not violation, of the Act before and after its effective date. Notwithstanding its discovery and intensive investigation, which would have permitted the Government to call to the stand more than 200 present or former Northside sales persons or brokers, the Government called none; and this Court finds that, had such persons been called to testify, the evidence as it existed in documentary form shows that defendants' present and former sales persons had complied with the law and repeatedly served Negro clients so that this Court can presume from the Government's decision not to call any of them that their testimony would have been adverse to the Government's case.

CONCLUSIONS OF LAW

Section 810(e), 42 U.S.C.A. § 3610(e) of the Fair Housing Act places the burden of proof upon the Attorney General to show by a preponderance of the evidence that the defendant has engaged in a "pattern or practice of resistance" toward rights granted under the Act or a pattern or practice which constitutes a general public importance denial of such rights to any group of persons protected by the Act. United States v. West Peachtree-Tenth Corp., 437 F.2d 221 (5th Cir. 1971); United States v. Mitchell, 327 F.Supp. 476, 481-484 (N.D., Ga., 1971); United States v. Bob Lawrence Realty, Inc., 327 F.Supp. 487, 492-493 (N.D., Ga., 1971). The question before this Court is whether the plaintiff has met that burden by proving that Northside Realty and Ed Isakson have engaged in a discriminatory "pattern or practice" of selling real estate.

THE BOWERS INCIDENT

~~It appears to the Court that Mr. Isakson treated the Bowers in a discriminatory manner. It was admittedly abnormal for Mr. Isakson to deal directly with "walk-in" customers, since Isakson himself stated that he never handles would-be purchasers unless there is no other sales person in the office. Further, it would seem abnormal for a veteran real estate salesman: (1) to fail to discover the buyer's total financial potential before determining what priced house the buyer could afford; (2) to deny that the company had any houses listed within the price range of the potential buyer without consulting the listing book or the agents in the office; and (3) to refer a potential buyer to another real estate company without "co-operating" or receiving a referral fee. Furthermore, Mr. Isakson stated in his deposition that he had never referred a white buyer to a black real estate broker as he did Mr. Bowers. In short, Mr. Isakson treated the Bowers in a different manner than he would have treated white customers.~~

Although the Bowers' incident occurred prior to the effective date of the Act, it is relevant to this case in that it shows a past practice of discrimination which this Court feels has been carried forward to the defendant's present operation. Defendant Isakson, himself, stated that at no time after the Act was passed, did he attempt to explain its significance to his salespeople nor did he attempt to change his or Northside's policy or method of operation with respect to blacks. When there is a finding of a pattern or practice of discrimination before the effective date of the Act, and little or no evidence indicates a post-Act change in such pattern or practice up to the time suit is filed, a strong inference arises that the pre-Act pattern or practice continued after the effective date of the Act, and such evidence is of significant probative value. U.S. v. West Peachtree Tenth Corp., supra.

THE DETROIT PROFESSOR INCIDENT

Although the events surrounding the phone call from the Detroit professor are vague due to the anonimity of the caller, Mr. Isakson's own testimony is sufficient to show the Court that he treated this caller in a different manner than he would have treated a white caller. The defendant Isakson went through none of the usual procedures for qualifying this customer in terms of income or geographical area desired, but rather referred him immediately to two other real estate companies which sold primarily to blacks. Mr. Isakson stated that he made this referral because he felt that this client's interest would "best be served" by going elsewhere. Such subjective standards which result in blacks not being served or admitted are inherently suspect. U.S. v. West Peachtree Tenth Corporation, supra; U.S. v. Sheet Metal Works, 416 F.2d 123 (8th Cir., 1969). Once again, Mr. Isakson referred a black to another company without "cooperating" or claiming a referral fee. This fact alone is unusual for one engaged in a commercial venture to make a profit.

~~It is undisputed that Mr. Isakson told the black professor that he, himself, "did not sell houses" and further, that he had not advertised any houses in the previous day's newspaper. It appears that Mr. Isakson made these statements without making it clear that although Mr. Isakson, himself, did not sell or advertise houses, Northside Realty did both. One may not be allowed to use such half truths to avoid the purposes of the Fair Housing Act. Failure to give a Negro adequate information or aid is ordinarily given to whites has been held to be discriminatory conduct. *U.S. v. West Peachtree Tenth Corp.*~~, ~~*supra.*~~

~~CONVERSATION WITH MR. DAWSON~~

~~In his conversation with Mr. Dawson, Mr. Isaksen showed that he did not treat a Negro broker's offer to "co-op" in the same manner he would have treated such an offer from a white broker. The manner in which Mr. Isakson made reference to the pendency of this suit discouraged and, in fact, ended their conversation. Furthermore, this reference could have had little other meaning than to suggest that Mr. Isaksen would not "co-operate" with any black realtor unless ordered to do so by this Court. This Act of discrimination constitutes a violation of § 804(a) of the Fair Housing Act, 42 U.S.C. §3604(a) since Section 804(a) makes it unlawful to make a dwelling unavailable to any person on account of race.~~

The Fair Housing Act should be given a liberal construction to accomplish the purpose of eliminating racial discrimination. In this regard, the Act prohibits subtle, as well as, more obvious forms of discrimination, and courts should look to each transaction in its entirety to prevent indirect, as well as, direct methods of discrimination. *But only when there is a finding of a pattern or practice of discrimination before the effective date of the Act and little or no evidence indicates a post-Act change in such pattern or practice up to the time suit is filed, does a strong inference arise that the pre-Act* pattern or practice continued after the effective date of the Act, and such evidence is only then of significant probative value; however, a single pre-Act act (which, even if actually committed has not been carried forward or perpetrated post-Act) will not support a finding of violation of the Act, particularly where there exists post-Act evidence of compliance with the Act. Furthermore, this Court has previously stated that "[c]oncerning an isolated violation by a single person acting independently, Congress intended enforcement only by private parties. Should Congress decide that the public interest requires increased enforcement powers for the Attorney General, it may provide them. This court should not." U.S. v. Bob Lawrence Realty, Inc., 327 F.Supp. 487, 493 (N.D. Ga. 1971). ~~Therefore, this Court will not allow Mr. Isakson and Northside Realty to circumvent the purposes of the Act by the methods used in Mr. Isakson's dealings with the Bowers, Mr. Dawson, and the Detroit professor.~~

The Court takes note that the government filed this case and presented it with little evidence to support its position that the defendants were engaged in a pattern or practice of discrimination. At the time suit was filed, the government's case consisted of one pre-Act incident and one post-Act incident (which later failed of proof.) ~~Mr. Isakson's own actions and statements that Congress has exceeded its constitutional limitations, however, indicate his intention on behalf of himself and the company to resist compliance with the purposes of the Fair Housing Act. The Court finds that Mr. Isakson's intentions have manifested themselves in his actions and that black people as a group have thereby been denied the protection guaranteed by the Act. This denial of protection is of sufficient public importance to authorize the relief herein granted.~~

From the testimony of Mr. Isakson and from the testimony of Mr. Dawson, as well as from Government summaries of FBI interviews with former saleswomen and the presumption drawn from the Government's failure to call such sales persons and brokers that their testimony would be adverse,[2/] defendants' policy and practice must be concluded to have been to comply with the law and to serve all customers regardless of race, color, religion or national origin and this policy was complied with as evidenced by at least 20 instances before and after commencement of this litigation when sales persons associated with Northside had served black customers.

The Government in this "pattern and practice" action made sweeping allegations that defendants had violated all but the "anti-blockbusting" provision of the Act. On the basis of all of the evidence, including the Court's observation of the appearance and demeanor of the witnesses, this Court finds that the Government has failed to meet its burden of proof.

The record refutes the Government's allegations: the Bowers could not be served for economic reasons (and that incident transpired entirely prior to the effective date of the Act);[3/] the Detroit professor incident involved no more than an evaluation that a real estate firm listing in the area where he would teach could better serve his interest;[4/] and the Dawson-Isakson conversation proves nothing racially discriminatory (and Dawson's testimony taken as a whole actually

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2/ From the Government's failure to call any of the 200 or more possible witnesses available to tell the real "Northside story", an inference arises that their testimony would have been adverse to the Government's case. United States v. Mintzes, 304 F. Supp. 1305, 1314-1315 (D. Md. 1969). Accord: Interstate Circuit v. United States, 306 U.S. 208, 225-226, 59 S.Ct. 467, 474 (1939); Tropicana Shipping, S.A. v. Emersa Nacional, 366 F.2d 729, 733-734 (5th Cir. 1966); II Wigmore, Evidence, §285, p. 162 (3rd ed. 1940 and cases cited in annotations thereto and in 1970 supplement).

3/ While this Court should and did consider the pre-Act Bowers incident, not as proof itself of a post-Act violation of the Act, but as probative evidence which might explain post-Act conduct, United States v. West Peachtree Tenth Corp., supra, defendants' post-Act conduct considered in its entirety establishes a pattern and practice of compliance, not violation, of the Act.

4/ While this Court is not prepared in this case to suggest that any referral of Negro inquirers to a real estate agency serving a predominantly Negro or transitional area might violate the Act, it should be noted that an avoidance of such referrals would be the wiser course of action.

corroborates Isakson's that he has always complied with the law).

The Government's evidence of alleged violations of Title VIII are to be weighed against the evidence of the record as a whole in determining whether the Government has established its allegations of "pattern or practice of resistance" or a "general public importance denial" of Title VIII rights to a "group of persons protected by the Act". On the one side are two post-Act incidents, which involved Mr. Isakson and no one else. Although the testimony of record supports the conclusion the treatment of the Detroit professor did not reflect racial discrimination and a finding that the response to Mr. Dawson arose from the exigencies of this litigation and was not, according to Mr. Dawson, to be treated as a refusal to do business for racial reasons, even if those situations were found to reflect racially-discriminatory refusals to do business, the preponderance of the evidence would establish that Northside has not violated Title VIII for, on the other side of the scales, are these facts: None of the ten brokers associated with Northside (other than Mr. Isakson) and none of the 167 agents associated with Northside, who do 99.9 percent of the business of Northside, has ever been found to have been engaged in any pattern or practice nor any public interest denial prescribed by Title VIII; every black would-be client of Northside has, since the effective date of the Act, been properly served; and at least 20 blacks have been provided fully all services offered by Northside.

The foregoing facts and all other facts of record do not support a finding of resistance by defendants (or their associates) to the rights of blacks to equality of service, do not establish a single violation of Section 804 of the Act, and do not reflect a policy and practice of discrimination pursuant to defendants' "regular procedures" which would amount to a "pattern or practice of resistance" to black rights or which would show that any group of persons, _i.e._, blacks, had been denied rights guaranteed by the Act to such an extent as to raise "an issue of general public importance."

Judgment is therefore entered in favor of defendants and the action is hereby dismissed.[5/]

This ________ day of ________________, 1972.

U.S. District Judge

5/ Judgment for defendants precludes imposition of injunctive relief and defendants therefore have not reproduced in this proposed amended order that portion of the original order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 13932
NORTHSIDE REALTY, *et al.*,	:	
Defendants.	:	

BRIEF IN SUPPORT OF
PROPOSED AMENDED ORDER

The proposed change 1/ in paragraph 2 at page 1 of the Court's order simply reflects the fact that, while there is no question that Mr. Isakson's license does inure to the benefit of the Company, it is not *his* license alone which is important. Each one of the seven residential sales offices of Northside is in charge of a broker and, all together, there are ten brokers whose licenses inure to the benefit of Northside.

Defendants believe that the proposed amendment of paragraph 2 at page 2 of this Court's Order 2/ is justified by recognition of paragraphs 33 and 36 (considered together as they should be) of the July 7, 1971 stipulations of fact introduced into evidence in Joint Exhibit No. 2. 3/

1/ All references to proposed changes are to the materials in the proposed amended order, attached hereto.

2/ All references to the "Court's Order" are to the order and injunction of December 29, 1971.

3/ The Court's decision as it now stands would imply to the casual reader that Northside has not to date sold to a Negro any single family or other dwelling at any time up to the present. Subsequent to the cutoff date for the close of evidence established by this Court's pretrial order, Northside has sold such a single family dwelling to a Negro.

Defendants submit that the last sentence of paragraph 3 on page 2 of this Court's Order should be amended as proposed in light of Transcript (hereinafter "T") 20-21, 38-39, 43, 59, 206. <u>See also</u> Defendants' post-trial brief, page 6, with respect to the Bowers' area and price preferences. Furthermore, this Court's decision at paragraph 3 on page 2 should be amended to add the following:

> Mr. Isakson testified, however, that he personally had found it difficult to get his own Buckhead office sales personnel to handle any client - white or black and even including in the past a relative of his - who does not want to spend more than $25,000.

<u>See</u> T. 207-08 and page 8 of Defendants' post-trial brief. Mr. Isakson's statement was supported by Defendants' Exhibit No. 9 reflecting that the average sales price for residential real estate transactions made by his Buckhead office was over $44,000 during the years 1969, 1970, and 1971. See also page 7 of Defendants' post-trial brief. Similarly, Defendants' Exhibits 10A, 10B and 10C reflected that the average residential property sales price during the month of February 1968, when the Bowers visited Northside, was $40,460. Both newspaper listings and completed sales transactions during February-April 1968 reflected that, at the time of the Bowers' visit, the $18,000 house they thought they saw advertised byNorthside was neither listed nor sold by Northside. <u>See</u> Defendants' post-trial brief, pages 7-8 and Proposed Findings of Fact No. 6 and 7 submitted therewith. Finally, paragraph 3 at page 2 should be further amended to reflect:

> Mr. Isakson qualified the Bowers as to their financial capacity by personally determining from them their income and by applying thereto the standard "rule of thumb" applied to all prospective purchasers, white or black alike, that they could purchase a house at a price no greater than 2-1/2 times their annual income, limiting the Bowers according to the $6,500 income they admitted to a house at a price of between $15,000 and $16,250.

<u>See</u> Defendants' post-trial brief, pages 6 and 7 and record references contained therein.

The second sentence contained in the paragraph at the bottom of page 2 and continuing to the top of page 3 of this Court's decision should be amended to state: "The caller stated that he was a black professor at one of the black colleges and that he wanted to buy a house that Isakson 'had advertised in Area I in yesterday's paper'". See T. 209-10 and Isakson deposition at 61. The third sentence in the same paragraph should be amended to state:

> Mr. Isakson responded by saying that "he did not sell real estate and that he hadn't sold real estate"; and the parties stipulated that Mr. Isakson, in fact, "has not personally listed, shown or sold anyone, Negro or white, any real estate after March 23, 1960." Mr. Isakson indicated that he thought the caller's "interest would be best served" if he contacted one of two Southwest Atlanta real estate agencies (one black-owned, the other white-owned) "because he [the Professor] ... taught school in the southwest area of Atlanta, of which we [Northside] do not sell any real estate."

The fourth sentence in that same paragraph should be the last. The fifth sentence merely reiterates the uncontroverted facts stipulated by the parties and the sixth sentence constitutes an inference not supported by either the testimony of Government witness McIntosh or the statements of Mr. Isakson. See generally Defendants' post-trial brief, pages 9 to 11.

The sentence in the first full paragraph contained on page 3 of the decision should be replaced to read as follows: "When confronted with allegations of discrimination, Mr. Isakson, according to Government witness McIntosh, who attended the Women's Council meeting, said to Reverend Williams, 'No, I did not refuse to sell him a home because he was black'" (T. 167-68, emphasis added). The second sentence in the Order as it now stands is a "clearly erroneous" finding of fact.

Immediately following the findings of fact with respect to the so-called "Detroit professor" incident and immediately prior to the findings of fact with respect to the "conversation with Mr. Dawson," the following additional finding of fact should be made:

The pre-Act Bowers' incident and post-Act Detroit professor incident are the only two incidents where Mr. Isakson, who generally does not "meet the public" whether white or Negro, made general referrals of Negroes to real estate firms selling in Southwest Atlanta, an area where Northside has no listings; and Mr. Isakson testified that on at least one occasion he had made a general referral of a white person to a Negro broker selling in the Southwest Atlanta area.

With respect to Mr. Isakson's contact with the public, see Defendants' post-trial brief, pages 18 and 19; and with respect to the white referral, see Isakson's deposition, pages 22-23. The white referral occurrence makes clearly erroneous this Court's conclusions of law at pages 6 and 7 with respect to general referrals 4/ and the Bowers' and Detroit professor incidents.

To the second full paragraph on page 3, this Court, in order to reflect the material testimony of Mr. Dawson, should add the following two sentences:

> Mr. Dawson testified that he never indicated to Mr. Isakson the name or race of his client and he did not ask Mr. Isakson to "co-op" on any particular type of transaction. Mr. Dawson further testified that "I felt that I could have pursued the conversation but I decided not to," that he did not take Mr. Isakson's response as negative, that Mr. Isakson always acts fairly and in accordance with law irrespective of race, and that he had no complaint about his call to Mr. Isakson.

See Defendants' post-trial brief, pages 12 and 13 and record references contained therein. 5/

4/ The Court has critized defendant Isakson's failure to "cooperate" with certain real estate agencies or receive from them a referral fee. The conclusions of law drawn from this conduct, as reflected in pages 6-8 of the Court's decision, are clearly erroneous and plainly in conflict with Stipulations 30, 31 and 32 contained in Joint Exhibit No. 2, which reflect that, in the industry, if a referral is made to another agency with respect to a particular dwelling listed by the other agency and the sale is consummated, the referring broker/salesman might expect to share in the commission; but when a general referral is made, not with respect to a specific property, the referring broker/salesman may not expect to share in the subsequent sales commission. See also Joint Exhibit No. 2, Stipulation 33, reflecting an instance wherein defendants did in fact both cooperate and share a commission with a Negro broker with respect to a particular listing.

5/ Only by assuming facts not known to Isakson at the time of the call can this Court find that Dawson had in mind cooperation

At the conclusion of the Court's findings of fact and immediately before its conclusions of law on page 5, another finding of fact should be added:

> The uncontroverted evidence showed that although Northside had not actually consummated a single family dwelling sale to a Negro, either individually or on a "co-op" or "commission-sharing" basis, Northside had made available to Negroes its full range of services on at least 20 different occasions, including at least one Negro contract submission to a white seller who listed with Northside, occurring both before and after commencement of this action.

The absence of the foregoing finding of fact prejudicially deprives defendants of uncontroverted facts critical to a proper weighing in the <u>totality of defendants' conduct</u> of their compliance with the Act. Overwhelming support, never challenged by the Government, exists in the testimony of Mr. Isakson (T. 204-206, 217-219, 224-228), the defendants' answers to Government Interrogatories No. 15 and 17, incorporated by reference as Exhibit 1 to defendant Isakson's deposition which itself was introduced into evidence as Government Exhibit 13, the testimony of Mrs. Gribble (T. 298-299) and Joint Exhibit 3 containing the F.B.I. interview summaries of more than 40 sales persons formerly associated with defendants as to the handling of and policy with respect to Negroes, plainly showing compliance with the Act and rebutting Government allegations to the contrary. See generally Defendants' post-trial brief, pages 21-24.

Turning to this Court's conclusions of law, defendants believe certain amendments to be in order.

In light of the proposed amended findings and the record references listed in support thereof, defendants believe that Subdivisions 1 and 3 of sentence 3 of the first full paragraph

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Continuation of footnote 5/ ...

with Northside, that his client was Negro, or that the property sought was a single family dwelling and not some other type of real estate transaction. Such an assumption is unsupported by the record and unfair to defendants.

on page 6 under the caption of "THE BOWERS' INCIDENT" are clearly erroneous. Furthermore, based on a general knowledge of his company's average listings and sales prices and a personal familiarity with his sales persons' reluctance to handle would-be purchasers wishing to spend less than $25,000 (including a relative of his own), Mr. Isakson's failure to consult Northside's listing books or the sole agent present in his office and occupied with another customer during the Bowers' visit is understandable rather than "abnormal for a veteran real estate salesman." Sentences 4 and 5 of the first paragraph under the "BOWERS' INCIDENT" are contrary to the record in light of Mr. Isakson's testimony on deposition, pages 22-23, concerning the "Mills Incident".

Finally, with respect to "THE BOWERS' INCIDENT", defendants contend that this Court's conclusion that an inference of post-Act unfair housing practices can be supported by Mr. Isakson's handling of the Bowers and his deposition statement, taken out of context and made without reference or relation to the Bowers' transaction, that Northside's policy with respect to Negroes remained unchanged after the Act, represents a strained misapplication of the Fifth Circuit's decision in United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971). The defendants had complied with the Act after its effective date in at least 20 or more situations prior to the time of the trial. Any objective weighing of the preponderance of the evidence should support a finding of a post-Act compliance even if the pre-Act Bowers' incident might arguably have been considered discrimination by post-Act standards. And it is well-recognized now that a finding of pre-Act conduct which post-Act might have been an unfair housing practice will not support a finding of a violation of the Act but is only relevant to explain post-Act motivation. United States v. West Peachtree Tenth Corp., supra; see United States v. Jacksonville Terminal Co., Slip Opinion, pps. 53-54 (5th Cir. 1971) and Dobbins v. Local 212 IBEW, 292 F.Supp. 413, 444 (S. D. Ohio 1968).

The only two post-Act acts of defendants which this Court found to be racially discriminatory -- the "DETROIT PROFESSOR INCIDENT" and " CONVERSATION WITH MR. DAWSON" -- constitute two isolated instances and not any intentional discrimination when they are considered in the totality of the context of the uncontroverted evidence showing repeated provision of full services to Negroes by numerous Northside sales persons. Not only would the evidence presented by the Government not support a finding of a "pattern or practice", but it would also not support a holding that black people as a group have been denied the protection guaranteed by the Act. More erroneous, however, than the holding on the basis of but the two post-Act actions of Mr. Isakson (and ignoring the totality of defendants' conduct in compliance with the Act) is the unfair and unsupported conclusion of law that defendants' assertion of constitutional defenses "indicate his [defendant Isakson's] intention on behalf of himself and the company to resist compliance for the purposes of the Fair Housing Act", as this Court held at page 9. As a matter of fact, the testimony fully supports and requires a finding of good faith intention to comply with the law (<u>see</u>, <u>e.g.</u>, T. 217-19). Moreover, it would be grossly unfair to impute to any defendant an intention to violate a law because of doubts as to its constitutionality.[8/]

Defendants submit that, if the totality of defendants' conduct is considered, the evidence showed by a preponderance that defendants have, in fact, complied with the Act since its effective date. The proposed penultimate paragraph of the proposed amended order supports that conclusion. What?

On the basis of the foregoing proposed substitutions and amendments to this Court's findings of fact and conclusions of law (as set out in their entirety in defendants' proposed amended

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<u>8/</u> See following page for footnote 8

Footnote 8 for page 7.

8/ The Court may have had reference to a statement of Mr. Isakson, attached to his deposition and made a part thereof as Deposition Exhibit 1, in which Mr. Isakson said:

> I am familiar with the Fair Housing or Civil Rights Act of 1968; and I know that the Act makes certain actions illegal, so far as Congress has authority within the limitations of the U. S. Constitution to make such actions illegal. Although I believe that my firm and I have complied with the Act, I personally believe that Congress may have exceeded its authority under the Constitution in enacting the Act and I intend to challenge Congress' action in this litigation in hopes that this Court will interpret the law and decide the case in my favor.

Mr. Isakson went on, in that statement, to chronicle Northside's complete compliance with the Act. He then referred to Northside's Interrogatory Answer 16, filed April 16, 1971, for Northside's statement of position in which Northside's policy of adherence to the law was affirmed. In the answer to Interrogatory 16, defendants had noted their dissemination of the Atlanta Real Estate Board's January 9, 1969, fair housing circular; that sales managers and agents had been notified of defendants intention specifically to comply with the then newly-enacted Fair Housing Act; that they were instructed "to treat the Negro customer exactly as you would a white customer"; and, after the litigation was begun, all brokers and agents were reminded, in writing (March 24, 1971), of Northside's policy "to comply with the law ... under Title VIII." Mr. Isakson concluded:

> As far as I know, Northside's sales managers and agents are complying with the law as I have instructed them to do. I do not believe that Northside has violated the law and I do not believe that I have either.

Certainly, Northside's assertion of constitutional doubts with respect to Title VIII (not ruled upon by the Court), considered in the full context of Northside's compliance with the law, do not support the inference of any intention to disobey the law. Moreover, this evidence which the Court overlooked, fully establishes that defendants made all associated personnel fully aware of the significance of the Fair Housing Act (cf. Order, pp. 6-7).

order attached hereto), judgment should have been entered by this Court holding that a preponderance of the evidence showed that defendants had complied with the Act and dismissing this action.

Respectfully submitted,

GAMBRELL, RUSSELL, KILLORIN, WADE & FORBES

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January 10, 1972

CERTIFICATE OF SERVICE

I hereby certify that I am of counsel for defendants Northside Realty Associates, Inc. and Ed A. Isakson and that I have this day served the within and foregoing Motion, Brief in Support thereof, Amended Order and Brief in Support thereof upon the plaintiff by mailing, postage prepaid, true copies thereof to its attorney of record:

Miriam R. Eisenstein
Attorney
Fair Housing Section
Civil Rights Division
U. S. Department of Justice
Constitution Avenue
Washington, D. C. 20530

This 10th day of January, 1972.

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Of Counsel for Defendants