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December 16, 1970

Richard Green, Esq.
Housing Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Re: Trafficante, et al v. Metropolitan Life Insurance Company
Racial Discrimination Suit

Dear Mr. Green:

Enclosed please find a copy of the brief filed by the undersigned on December 14, 1970. The brief is in response to the motion to dismiss of Metropolitan Life Insurance Company, and Exhibit E is in support of plaintiffs' motion to join the purchaser of Parkmerced as an additional defendant. The hearing on these matters will be at 1:30 p.m. on Friday, December 18, 1970, before Judge Burke in the Federal Building, 17th floor.

We greatly appreciate the assistance which you have given us, and we hope that we can count on your continuing cooperation until the racial imbalance at Parkmerced has been corrected.

Very truly yours,

GEORGE H. CLYDE, JR.
STEPHEN V. BOMSE

By: George H. Clyde

George H. Clyde, Jr.

Volunteer Attorneys
San Francisco Lawyers Committee
for Urban Affairs

Enclosure

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[illegible]neys for Plaintiffs and
[illegible]ntiffs in Intervention.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL J. TRAFFICANTE and DOROTHY M. CARR,

Plaintiffs,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,

Defendant,

COMMITTEE OF PARKMERCED RESIDENTS COMMITTED TO OPEN OCCUPANCY, an unincorporated association; THE REVEREND ARTHUR H. NEWBERG; JAMES EMBREE; ALBERT JAMES HEICK; JACQUELINE TCHAKALIAN,

Plaintiffs in Intervention.

NO. C-70 1754 (LHB)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS

"Negroes and whites don't mix. Perhaps they will in a hundred years, but not now. If we brought them into this development [Stuyvesant Town], it would be to the detriment of the city, too, because it would depress all the surrounding property." Frederick H. Ecker, Chairman of the Board, Metropolitan Life Insurance Company, quoted in the New York Post, May 20, 1943.

"...[T]he duly authorized officers and directors of the defendants have determined, in the exercise of their sound discretion and best judgment, that the successful operation of the project [Stuyvesant Town] and the safety of the investment of the funds held for the benefit of the policyholders of the defendant, Metropolitan Life Insurance Company, require that Negroes

should not, at the present time, be accepted as tenants in this project." Brief of Metropolitan Life Insurance Company, submitted in Polier v. O'Dwyer, 85 N.Y.2d 313, aff'd sub nom., Dorsey v. Stuyvesant Town, 299 N.Y. 512.

INTRODUCTION

Plaintiffs[1/] and plaintiffs in intervention[2/] seek in these proceedings[3/] to end the notorious racial discrimination

---

1/ Paul J. Trafficante and Dorothy M. Carr.

2/ Committee of Parkmerced Residents Committed to Open Occupancy; The Reverend Arthur H. Newberg; James Embree; Albert James Heick and Jacqueline Tchakalian. Except where otherwise noted, plaintiffs and plaintiffs in intervention above-named are collectively referred to in this Memorandum as "plaintiffs".

3/ Allegations of racial discrimination with respect to Metropolitan's housing practices are in no way new. Indeed, more than twenty years ago racial exclusion at Metropolitan developments in New York (similar to Parkmerced and erected at approximately the same time) was the subject of a landmark 4-3 decision of the New York Court of Appeals upholding the right of a private landlord to discriminate in tenant selection. Dorsey v. Stuyvesant Town, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950). In those proceedings, which obviously antedated passage of the 1968 Civil Rights Act (42 U.S.C. §3601) and the decision of the United States Supreme Court in Jones v. Mayer, 392 U.S. 409 (1968) interpreting 42 U.S.C. §1982, Metropolitan freely admitted its policy of exclusion. See quotation from Metropolitan's brief in those proceedings supra at 1-2.

Metropolitan's policies of racial discrimination have not only been the subject of judicial and administrative proceedings, but have been the subject of various books, articles and scholarly studies, including, most recently, Simon, STUYVESANT TOWN, U.S.A.: PATTERN FOR TWO AMERICAS (New York University Press, 1970), from which the above quotations were taken. See also, e.g., Abrams, FORBIDDEN NEIGHBORS (New York: Harper & Brothers, 1955) at pages 244-59, and Weaver, THE NEGRO GHETTO (New York: Harcourt Brace & Company, 1948) at pages 320-21, as well as the numerous articles cited in Simon, supra.

Metropolitan's tenant selection practices at Parkmerced itself are equally well-known. In fact, in 1963, when Parkmerced entered into a joint agreement with the NAACP to admit Negroes to Metropolitan's various residential projects, the news rated a banner headline in the San Francisco Examiner and a front page article in the Chronicle ("Parkmerced, the community of tower and garden apartments near the shores of Lake Merced, will be opened to Negroes, the Metropolitan Life Insurance Company said yesterday." [San Francisco Chronicle 8/12/63]).

which has existed at Parkmerced for many years. More, plaintiffs seek to remedy the effects of these past years of discrimination. Expectably, defendant Metropolitan Life Insurance Company ("Metropolitan") has moved to dismiss on a variety of procedural grounds. However, as we demonstrate hereafter, defendant's claims are without merit and should be rejected so that this litigation can move forward expeditiously on its merits as required by law.[4/]

Plaintiffs here are four White tenants, two Negro tenants, and an unincorporated association of Parkmerced residents which has endeavored for more than a year to end the discriminatory practices at Parkmerced. They bring the instant action because Metropolitan's policies of racial exclusion at Parkmerced have created an artificial, unhealthy and injurious "White ghetto". The individual plaintiffs act in their self-interest to end the harm which the imbalanced community is doing to them and

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3/ (continued)

Despite the fanfare which greeted Metropolitan's announcement, however, the intervening seven years have failed to bring about the heralded change, for Parkmerced remains over 99% Caucasian and of the few minority applicants who have been admitted, several obtained apartments only after filing or threatening to file legal or administrative actions. This continuing exclusion of minority persons from Parkmerced has recently prompted the Chairman of California Fair Employment Practices Commission to note: "...[A]s I think is quite obvious for one reason or another, there has been almost a total exclusion of minorities from Parkmerced." Letter from Pier A. Gherini, Chairman, California Fair Employment Practices Commission to Raymond V. Ringler, Vice President-Housing, Metropolitan Life Insurance Company, August 14, 1970.

4/ "Any court in which a proceeding is instituted under section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited."
(42 U.S.C. §3614).

to their families. The Committee proceeds on behalf of a group of citizens committed to the elimination of racial discrimination at Parkmerced because of the injurious effect such discrimination inevitably has on tenants, minority applicants and the thousands of potential minority applicants who are dissuaded ever from making application at Parkmerced because of its notorious discrimination. In short, plaintiffs assert their right to "an integrated environment" (SASSO v. Union City, ___ F.2d ___ [9th Cir. 1970]; compare Shannon v. HUD, 305 F.Supp. 205 [E.D. Pa. 1969]) which is denied to them so long as defendant continues to practice racial discrimination, and until the effects of past discrimination are remedied.

Metropolitan's response to this most recent challenge to its tenant selection practices is the instant Motion to Dismiss which broadly asserts (a) that this Court lacks subject matter jurisdiction of the proceedings, (b) that plaintiffs, both individuals and the Committee, lack standing to raise the claims of discrimination asserted and (by way of supplement) (c) that Metropolitan is relieved of obligation with respect to its tenant selection policies at Parkmerced as a result of its pending sale of the development. We consider each of such claims hereafter.

I

THIS COURT HAS JURISDICTION OF CLAIMS RAISED UNDER SECTION 810 SINCE PLAINTIFFS HAVE NO JUDICIAL REMEDY UNDER ANY STATE OR LOCAL FAIR HOUSING LAW PROVIDING RIGHTS AND REMEDIES SUBSTANTIALLY EQUIVALENT TO RIGHTS AND REMEDIES AFFORDED BY THE CIVIL RIGHTS ACT OF 1968

Metropolitan has initially moved to dismiss the First Cause of Action of the Complaint of plaintiffs Carr and Trafficante[5/] on the asserted ground that a proviso to §810(d) (42 U.S.C. §3610[d]) deprives this Court of jurisdiction since such plaintiffs assertedly "[have] a judicial remedy under a state or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this sub-chapter...." Such language, Metropolitan asserts, ousts this Court of subject matter jurisdiction.

In brief, Metropolitan asserts that the provisions of the California Rumford Act (California Health & Safety Code §§35700-35744) afford plaintiffs Trafficante and Carr judicial remedies which are substantially equivalent to those available under Title VIII of the 1968 Civil Rights Act. However, the most cursory review of the California statute cited reflects that the judicial rights and remedies available to plaintiffs in the California courts are in no

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5/ By a curious theory of statutory incorporation, Metropolitan has sought to read the proviso of §810(d) into the wholly independent provisions of §812 (42 U.S.C. §3612), which is the basis for the Second Cause of Action of the Carr and Trafficante Complaint and for the First Cause of Action to the Complaint in Intervention. Compare Brief of Defendant in Support of Motion to Dismiss at 5-7 and see also Response to Complaint in Intervention filed December 8, 1970, which incorporates such portion of the prior Memorandum of Defendant. These contentions, which are utterly without merit, are considered in detail hereafter at pp. 14-21.

sense equivalent to the relief available here.[6/]

A. The Rumford Fair Housing Act.

The Rumford Fair Housing Act undeniably provides rights to certain persons to obtain relief from a limited range of discriminatory housing practices. Yet such rights are, in no sense, "substantially equivalent" to those provided for by Title VIII.

Perhaps the most persuasive proof of such "non-equivalence" is the unquestioned fact that in these proceedings the California Fair Employment Practices Commission ("FEPC"), which is the California agency charged with administration of the Rumford Act, has explicitly refused to take any action whatever on the administrative complaints filed by plaintiffs Trafficante and Carr, under §810.

Upon the filing of such complaints with HUD, and pursuant to subsection (c) of §810, representatives of the Department of Housing and Urban Development ("HUD") immediately referred the complaints to the California FEPC. Plaintiffs' complaints were, however, promptly referred back to HUD without any action being taken thereon for the reason that its staff lacked the resources to deal adequately with the matters asserted therein. See Exhibit A attached hereto, and see also Exhibit 1 to Metropolitan's Brief in Support of Motion to

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6/ As an initial matter it should be noted that §810(d) refers to the "rights and remedies provided in this sub-chapter", which includes not only the relief provided by §810 itself, but also the rights and remedies of §§812 and 814. Thus, the federal rights and remedies to be compared include the right to enjoin a defendant from engaging in discriminatory practices, to order affirmative action as may be appropriate, to appoint attorneys and authorize commencement of proceedings without payment of fees, costs or security, to grant a permanent or temporary injunction and to award damages, punitive damages, court costs and reasonable attorneys fees.

Dismiss. Thus, by its explicit refusal to act, the state here has provided a pragmatic, but unimpeachable, refutation to Metropolitan's claimed equivalence.

But even apart from the failure of the California FEPC to act in this case, the pertinent statutes on their face reveal vast differences. For example, under §810 of the federal statute an aggrieved party may file a complaint with HUD respecting discriminatory housing practices occurring within the past 180 days (and compare also §812). By contrast, the Rumford Act's limitations period is but a third of that. Health & Safety Code §35731. It should be noted, moreover, that in the single case relief upon by Metropolitan in its instant Memorandum (Colon v. Tompkins Square Neighbors, Inc., 289 F.Supp. 104 [S.D.N.Y. 1969]) the comparison of the respective limitations periods was considered significant to the court's assessment of remedial equivalence. See also discussion infra at 10-13.

Nor are the available remedies substantially comparable. As we have noted above, and in our companion Memorandum in Support of Plaintiffs' Rule 25 Motion (at pp.3-10), Title VIII of the 1968 Civil Rights Act explicitly provides for broad programs of affirmative relief in addition to the available injunctive and monetary damage rights. See, e.g., §810(d) and §812(c). Indeed, in the instant litigation, the claim for affirmative relief is at the very heart of the proceedings. Yet under the California Rumford Act, only limited relief is provided. The FEPC may simply issue a cease and desist order and take one of the following actions:

> "(1) The sale or rental of the housing accommodation to the aggrieved person, if it is still available.
>
> "(2) The sale or rental of a like

accommodation, if one is available, or the next vacancy in a like accommodation.

"(3) The payment of damages to the aggrieved person in an amount not to exceed Five Hundred Dollars ($500.00), if the Commission determines that neither of the remedies under (1) or (2) is available."
Health & Safety Code §35737.

Equally significant, §810(d) provides for deferral to a local forum only where the person aggrieved "has a judicial remedy under a state or local fair housing law...." (emphasis added). While counsel for defendant has made an attenuated argument for the existence of such judicial remedies under California law, it is clear that the Rumford Act was intended to provide only an administrative forum[7/].

Throughout the entire FEPC process, no action is filed in any court, and no judge participates in any manner in the action taken by the FEPC. It is true that actions by the FEPC, as by virtually all state agencies, may be reviewed in accordance with the California Administrative Procedure Act, Government Code §11500, et seq., and that after exhaustion of the lengthy administrative process an aggrieved

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7/ As Exhibit 1 to its Brief, Metropolitan has appended a letter from HUD which states, in part, "...we have found that the State law provided rights and remedies substantially equivalent to those provided by the Federal law." This determination by HUD for purposes of the administrative provision of subsection (c) (§810[c]) is in no wise pertinent to the very different determinations required to be made under subsection (d) (§810[d]) relative to the availability of a substantially equivalent judicial remedy. We may presume that Congress, by its explicit reference to "judicial remedies" in §810(d), intended that a comparison be made with relief available in state courts, not administrative agencies. Such conclusion is clearly reasonable since the decision to defer to state administrative action is essentially an administrative allocation of resources, while under subsection (d) the fundamental right of access to the federal courts is at issue.

party may seek review of the agency decision through administrative mandamus under California Government Code §11523 or California Labor Code §1428 (compare Op. Leg. Counsel, 1959 S.J. 1272). However, such limited review of administrative action (which simply assesses whether the agency has abused its broad discretion), by means of the extraordinary writ procedure, can hardly be deemed a judicial remedy for discriminatory housing practices, much less a judicial remedy substantially equivalent to that provided for in Title VIII. Again, compare the New York statute at issue in Colon, supra, which provides for direct judicial remedies in addition to the available review of administrative action. N.Y. Civil Rights Law §18-d(1) and N.Y. Executive Law §§297(4) and 297(9).

Finally, as we have noted above, the rights and remedies included under sub-chapter 1 to federal Title VIII permit a court to authorize commencement of an action without payment of fees, costs or security, to appoint an attorney for plaintiffs, to award attorneys' fees to a prevailing plaintiff and to award actual and punitive damages. Such provisions are reflective of the strong public policy favoring civil rights plaintiffs seeking to end racial or related discriminations. See, e.g., Hutchings v. United States Industries, Inc., 428 F.2d 303, 311 (5th Cir. 1970); Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970). Moreover, the importance of these federal provisions cannot be gainsaid, especially considering that "civil rights" plaintiffs may often be without substantial resources. Again, however, none of such rights is available under the California statute, with the single exception that actual damages, in an amount not exceeding $500.00, may be awarded.

In short, the Rumford Act, salutory though it may be in those cases to which it is applicable (and in those cases where the FEPC is willing to act), simply does not provide rights or remedies remotely resembling the broad, affirmative provisions of Title VIII. Accordingly, jurisdiction is properly invoked, and should be retained, in this Court.8/

The sole judicial authority relied upon by Metropolitan in support of its jurisdictional claim is the decision of Judge Tenney in Colon v. Tompkins Square Neighbors, Inc., supra, in which the District Court refused to take jurisdiction over a New York civil rights claim. While plaintiffs in no way controvert the reasoning of the court in Colon,

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8/ While Metropolitan's Brief apparently concedes that there are no other state or local statutes assertedly providing plaintiffs with "substantially equivalent" rights and remedies, it should be noted that California has, in addition to the Rumford Act (considered in text, supra), the Unruh Civil Rights Act (California Civil Code §§51-52) which may be interpreted to cover certain discriminations in housing. Again, however (as Metropolitan evidently concedes), such Act does not provide these plaintiffs with remedies or rights in any way equivalent to those available under Title VIII. This is true for the following reasons, among others:

First, plaintiffs have waived any rights they might otherwise have under the Unruh Act simply by virtue of the HUD referral of Trafficante and Carr's administrative complaints to the FEPC, since the Rumford Act explicitly provides that a complainant thereunder waives all rights under the Unruh Act. Cal. Health & Safety Code §35731.

Moreover, unlike the federal law which provides for suits by "persons aggrieved" by acts of housing discrimination, the Unruh Act provides a right of action only for persons actively discriminated against. Crowell v. Isaacs, 235 C.A.2d 755, 757 (1965); compare §810(a) to Title VIII and see also discussion infra at 28-36.

Finally, as is true of the Rumford Act we well, the Unruh Act does not provide for broad affirmative relief nor does it grant a right to attorneys' fees or any of the other special rights specified in §812.

its decision is simply inapposite here. In fact, fairly considered in light of the facts then before the court, Colon supports by implication the position of plaintiffs and plaintiffs in intervention, rather than the defense of Metropolitan.

The fundamental distinction between Colon and the instant proceedings is the difference between California's Rumford Act and the New York Civil Rights statutes there at issue. See N.Y. Civil Rights Law §18; N.Y. Executive Law §§290-301. By contrast to the narrow administrative provisions of the Rumford Act, considered in detail above, the New York law at issue in Colon provided judicial rights and remedies which were truly equivalent to the federal rights and remedies under Title VIII.

We previously noted that the court in Colon placed special emphasis upon the available statutes of limitations. While the Rumford Act's limitation period is but a third of the 180 days provided under Title VIII, the New York law granted a reference period of a full year, or more than twice that of the comparable federal statute. See 289 F.Supp. at 110. In noting the existence of this extensive limitations period, moreover, the court pointed out that in the event the federal proceedings were dismissed, time still remained for filing a complaint under New York law. By contrast, under the California statute, plaintiffs run the risk that by the time their right to proceed in the federal forum is adjudicated, any rights they might otherwise have had under state law would be forfeited by the simple passage of time. In dicta, the Colon court specifically noted that such a situation should not be permitted to obtain:

"This court would clearly be in error

> if, in its determination to abstain from exercising its jurisdiction over the race claim, it would be committing plaintiffs to an exercise in futility by ordering the pursuit of an empty remedy or a remedy not available to them by virtue of the relevant statute of limitations." 289 F.Supp. at 110.

Similarly, the broad remedies available under the New York law, as detailed and relied upon by Judge Tenney in Colon, compare poorly, if at all, with the Rumford Act rights above-detailed. In language similar to that found under the federal Title VIII, N.Y. Civil Rights Law §18-d(1) authorizes "equitable remedies including such affirmative relief as may be necessary to undo the effects of [the] violation...." Similarly, the N.Y. Executive Law expressly provides for "affirmative action, including (but not limited to) ... the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons...." (N.Y. Exec. Law §297[4] [c]) and "such other remedies as may be appropriate...." (N.Y. Exec. Law §297[9]).9/

9/ At page 12 of its Brief, Metropolitan asserts, without amplification, that the Trafficante and Carr Complaint has not been timely filed under §810. Such objections appear utterly without substance. First, plaintiffs have alleged discrimination by Metropolitan "...as of the date of the filing of this complaint and for many years prior thereto..." (Complaint at ¶5) and, further, that said discrimination is and will continue unless corrected by this court. To thus suggest that there has been no actionable discrimination within the preceding 180 days as alleged by such complaint as untenable.

It is, of course, true that discrimination at Parkmerced commenced many years ago, but such discrimination, and its effects have continued unabated through and including the 180 days prior to filing the administrative and judicial complaints herein. It is simply no defense to an action to correct unlawful racial exclusions that the practice is a continuing one of ancient, rather than recent, vintage. See, e.g., Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969).[cont'd]

9/ (continued)

Even more curious is Metropolitan's statement that "...it does not appear that this action was commenced within the time prescribed by §810(d)..." (Brief, page 12). As shown by Exhibit B, the complaints here were returned by FEPC to HUD on May 21, 1970. Under §810(d) the resumption of the investigation by HUD commenced the running of a thirty-day period which, in this case, would expire on June 20, 1970. On said date, and for an additional thirty days, plaintiffs had a right to bring suit under §810(d). During the course of that period, at the instance of counsel for plaintiffs, arrangements were made for a meeting between representatives of Metropolitan and plaintiffs. In order that plaintiffs' position before this Court not be prejudiced, Metropolitan agreed to extend for thirty days the time for filing suit by plaintiffs (see Exhibit C), thus extending the July 20, 1970, deadline to August 19, 1970. Plaintiffs filed the instant suit on August 18, 1970.

We submit that the only reason Metropolitan has suggested that the Complaint was not timely filed is to raise a defense directly contrary to the plain language of their stipulation set forth in Exhibit C hereto. Stipulations extending time are binding on the parties, Randon v. Toby, 52 U.S. 493, 13 L.Ed. 784 (1850). The Court should hold Metropolitan to its stipulation here.

II

PLAINTIFFS AND PLAINTIFFS IN INTERVENTION ARE ENTITLED TO MAINTAIN AN ACTION DIRECTLY UNDER §812 OF THE 1968 CIVIL RIGHTS ACT.

In addition to its claim that this court lacks jurisdiction over the claims raised by plaintiffs Trafficante and Carr under §810, Metropolitan has moved on the same grounds to dismiss the Second Cause of Action by plaintiffs and the initial Cause of plaintiffs in intervention, both of which are maintained under the alternative provisions of §812. Such claim is asserted by Metropolitan notwithstanding the fact that §812 does not contain any language analogous to the proviso of §810 upon which Metropolitan has based its defense to Trafficante's and Carr's First Cause. As we have noted above, however (see Section I, supra), such claim is simply untenable in view of the unambiguous statutory language, the relevant legislative history and the decided cases, and is at best wishful thinking by defendant.

Metropolitan attempts to engraft the language of §810 onto the independent provisions of the succeeding §812 by means of the provision of the latter statute permitting the rights granted under Title VIII to "be enforced in appropriate United States district courts." This meager adjective, however, is simply incapable of bearing the burden assigned to it by defendant.

As appears on its face, §812 was drafted to provide a wholly-independent means of direct access to the federal courts in cases of unlawful discrimination. Under this section, there is no requirement of administrative action, nor is there any language compelling deference to state procedures or incorporating the reference provision of §810(d). In fact, subsection (a) to §812 explicitly grants to aggrieved parties the

choice of proceeding initially in federal or "State or local courts of general jurisidction."

Finding no support for their position in either legislative or jurisdictional interpretations of §812, Metropolitan attempts to make a virtue of such silence. See Brief of Defendant in Support of Motion to Dismiss at 5-7. Thus, Metropolitan's brief notes that the Senate "discussion [of §812]...related only to that part of Section 812(a) which provides protection for a bona fide purchaser, encumbrancer or tenant and did not relate to the court in which an action under Section 812 could be filed...." From this, Metropolitan infers that it was the "apparent intent of Congress" to incorporate by silence the referral provisions of §810.

Such claim is not only unreasonable on its face but ignores specific Congressional comment to the contrary. As Representative Emanuel Celler, Chairman of the House Judiciary Committee, stated both in Committee and on the floor of the House:

> "In addition to administrative remedies, the bill authorizes immediate civil suits by private person...in any appropriate United States district court or appropriate state or local court of general jurisdiction." Hearings on H.R. Res. 1100 Before House Rule Comm. 90th Cong., 2d Sess. pt. 1, at 6-7 (1968); and 114 Cong. Rec. 9558 (April 10, 1968) [emphasis added]. 10/

10/ Defendant's own memorandum further quotes the remarks of Representative Gerald Ford, himself quoting from a study memorandum on the then-proposed 1968 Act, as follows:

The reported cases are equally unhelpful to defendant. Again attempting to make a virtue of omission, Metropolitan suggests that since the district court in Colon failed to "[suggest] that Section 812 did permit the filing of the action in a United States District Court", it must have interpreted §812 in accord with the claim of defendant here. Such argument, however, is hard to credit, and such task is made even more difficult by defendant's failure to discuss or even cite this Court to the decision of Brown v. Lo Duca, 307 F.Supp. 102 (E.D. Wis. 1969) where the very issue at bar was presented. There, in the course of its opinion, the court explicitly considered whether §810 and §812 provided independent remedies for discrimination. It concluded as follows:

> "When one compares §§ 3610 and 3612 [§§ 810 and 812 of the Civil Rights Act of 1968], it is noted that both sections have provisions dealing with time, venue, amount of controversy, and the type of relief available. If § 3612 had been intended simply as an adjunct to § 3610, such repetition would have been unnecessary. Further, § 3610 requires a complaint to be filed with the Secretary within 180 days after the alleged violation occurred. Section 3612 requires a civil action be brought within the same time limit--180 days. The civil action in § 3612 could not refer to an action brought only after

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10/ (continued)

> "Section 812 states what is apparently an alternative to the conciliation-then-litigation approach above stated: an aggrieved person within 180 days after the alleged discriminatory practice occurred, may, without complaining to HUD, file an action in the appropriate U. S. district court."

Far from being helpful to Metropolitan, however, such remarks affirmatively support the position of plaintiffs and plaintiffs in intervention here.

> pursuing an administrative remedy of § 3610 because no time has been provided for the agency to act. A further example of alternative remedies being provided by the two sections is that § 3610(f) refers to actions 'pursuant to this section or section 3612' (emphasis added). And again, § 3612(a) refers to actions 'brought pursuant to this section or section 3610(d)' (emphasis added). The use of the disjunctive clearly indicates an alternative. These indications within the statute compel a conclusion that § 3612 provides an alternative remedy." Id at 103, 104.

In Brown, the court not only rejected the defense raised by Metropolitan here but did so after an exhaustive analysis of the legislative history surrounding the Act. See 307 F.Supp. at 104-5. The court noted that when the measure was before Congress, both its supporters and opponents interpreted §812 as providing an independent and alternative remedy for housing discrimination.

What is more, the existence of an independent right of action under §812 was explicitly recognized in dicta by Mr. Justice Harlan dissenting in Sullivan v. Little Hunting Park, 396 U.S. 229, 249 (1969) where he observed that "as an alternative to going first to HUD, it appears that a person may go directly to court [under §812] to enforce his rights under the Fair Housing Law....". See also Note, "Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968", 82 HARV L REV 834, 839, 855-59, 862-63 (1969), and Davidson and Turner, "Fair Housing and Federal Law: Where Are We?", ABA (Civil Rights Section) 1 HUMAN RIGHTS 36, 41-43 (1970).

In short, there is no basis whatever for the suggested notion that the jurisdictional limits of §810 limit §812 by

osmosis. Likewise, the further suggestion that the administrative remedies of §810 must first be pursued is mere chimera and is, in fact, inconsistent with defendant's own contention that §810 and §812 provide mutually exclusive remedies.

Thus, both plaintiffs and plaintiffs in intervention properly maintain actions before this court under §812:

A. Plaintiffs Trafficante and Carr.

Unlike the intervenors, individual plaintiffs Trafficante and Carr, have brought claims under both §§810 and 812 of the Act. Metropolitan asserts, however, that since plaintiffs have proceeded under §810 "they are bound by the provisions of §810" and may not proceed under §812. Yet, as we have above demonstrated, it is in no wise consistent with the statutory scheme of Title VIII to impose such an awkward interpretation upon its language. Moreover, there are numerous reasons which favor not only the existence of alternative remedies under §§810 and 812 but which argue for the right of plaintiffs to maintain proceedings under both sections.

In the first instance, it is clear that action taken under §812 can in no way undermine or disrupt the administrative procedures of §810, since §812 contains an explicit proviso to the effect that "the court shall continue [any] civil case brought pursuant to this section or Section 3610(d)...before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practices complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court...." (42 U.S.C. §3612[a]).

Moreover, in view of the statute's express concern for expedition under §814, it is hardly conceivable that mutual exclusion could have been intended. A person filing a complaint under §810 will desire that the appropriate administrative agency act promptly to resolve his complaint. However, such is not always the case, as the history of the Trafficante and Carr administrative claims in these proceedings desmonstrates. Initially, when reference of such claims was made to the California FEPC (as above discussed), the State agency refused to act because of "overload of work and staff shortages." See Exhibit 1 to Metropolitan's Brief in Support of Motion to Dismiss. Moreover, as of November 5, the federal investigation by HUD had not been completed due to "the acute manpower shortage and the overwhelming case load" at HUD's local office. (Compare Exhibit D hereto) In such circumstances (which would appear to represent the rule rather than the exception in such cases), it would be a harsh remedy indeed which would bind such plaintiffs irrevocably to their initial selection of §810. 11/

11/ It should also be pointed out that the interpretation of the Act asserted by plaintiffs is apparently concurred in by the relevant administrative agency, HUD. As frequently noted, moreover, such interpretations are entitled to great weight by the courts. Cf. United States v. Trucking Associations, Inc., 310 U.S. 534 (1940); Skidmore v. Swift, 323 U.S. 134, 137 (1944). International Chemical Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366-7 (N.D. Miss. 1966).

In a letter from HUD dated May 22, 1970, a copy of which is attached hereto as Exhibit A, plaintiffs were advised as follows:

> "You should know that if your case is recalled [from the state agency] and we do not take action as a result of the investigation or satisfactorily achieve a resolution of the complaint within thirty days after the date of recall, you will have the right under Section 810 of the law, to take your case to court at any time within thirty days thereafter. If you feel that your situation demands immediate court relief, you

Finally, §812 grants plaintiffs rights which have no correlative under the language of §810. Under the former provision, attorneys may be appointed for plaintiffs and the court may authorize commencement of proceedings without payment of fees, cost or security. The relief available under §812(c) includes injunctions plus special and punitive damages and an award of costs and a reasonable attorneys fee. Contrast §810(d). To hold that a party waives these rights by seeking administrative relief would conflict with the policy favoring the use of administrative procedures.

B. Plaintiffs in Intervention.

Plaintiffs firmly assert that this Court has undeniable jurisdiction of the claims of all parties under §812. However, and in any event, the plaintiffs in intervention, who did not proceed initially through the administrative route of §810, are properly before this Court under §812. Metropolitan does not even apparently urge the contrary.

In its brief supporting the instant Motion to Dismiss, which was filed initially in opposition to the claims of Trafficante and Carr alone, Metropolitan argued as follows: "Notwithstanding the interpretation to be given Section 812, the plaintiffs elected to seek the assistance of the Secretary of the Department of Housing and Urban Development and having

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11/ (continued)

> may wish to consult an attorney to determine whether you should seek such relief under Section 812 of the law or under the Civil Rights Act of 1866 as interpreted by the Supreme Court in the case of Jones v. Mayer." (emphasis added)

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done so they are bound by the provisions of Section 810. (Brief of defendant at 7: 11-15; emphasis added). Or, as noted subsequently: "The plaintiffs having availed themselves of the remedy set forth in Section 810 must follow the mandates of that section." (Brief of Defendant at 7: 23-24). Such allegations, however, can have no conceivable force as to the plaintiffs in intervention who admittedly have not "elected to seek" or "availed themselves of" the administrative remedies of §810, but have proceeded directly under the alternative remedy of §812. Compare remarks of Representative Gerald Ford quoted by defendant's brief at page 7, and also set forth above in footnote 10.

Defendant's sole response to the complaint in intervention is a partial incorporation of its earlier Memorandum (see Brief of Defendant in Support of Motion to Dismiss Complaint in Intervention at 1: 25-30.), and we can only assume that even defendant concedes the anachronism of its assertions when applied to the Committee and other plaintiffs in intervention. These parties, having elected to follow the direct access provisions of §812 are clearly within the proper jurisdiction of this Court and are entitled to go forward with their action notwithstanding the disposition made of the analogous claims of plaintiffs, Trafficante and Carr.

III.

PLAINTIFFS' ACTION UNDER THE 1866 CIVIL RIGHTS ACT (42 U.S.C. §1982) IS IN NO WAY BARRED OR LIMITED BY ENACTMENT OF TITLE VIII OF THE CIVIL RIGHTS ACT OF 1968 OR BY ANY ACTS OF PLAINTIFFS UNDER SAID ACT.

In addition to their claims under Title VIII of the 1968 Civil Rights Act, both plaintiffs and plaintiffs in intervention have filed independent causes under 42 U.S.C. §1982,[12/] the 1866 Civil Rights Act "revitalized" by the Supreme Court in Jones v. Alfred H. Mayer Co., supra. In view of the recent clear pronouncements by the Supreme Court concerning the availability and scope of relief permitted under the 1866 statute, we would have thought the right of plaintiffs to so proceed well settled. Metropolitan apparently disagrees. Its disagreement, however (which is set forth at pages 8-9 of its Brief in Support of Motion to Dismiss) is based upon a significant misinterpretation of the pertinent authorities and is without substantial merit.

In Jones v. Mayer, supra, which is the leading case under §1982, the Court had specific occasion to consider the relationship between §1982 and the then-recent passage of Title VIII. After considering at length the statutory history of both §1982 and the 1968 Civil Rights

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12/ 42 U.S.C. §1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Act, the Supreme Court held categorically that enactment of the fair housing provisions in 1968 "had no effect upon §1982." (392 U.S. at 416-17). More, the Court further noted that "at oral argument, the Attorney General [who appeared as amicus curiae at the special request of the Court] expressed the view that, if Congress should enact the pending bill [the 1968 Fair Housing Act], §1982 would not be affected in any way but 'would stand independently.' That is, of course, correct." (392 U.S. at 417, Fn. 20; emphasis added). Thus -- though it in no wise appears from defendant's memorandum -- the exact contention raised by Metropolitan here was considered and rejected in Jones.

Rather, Metropolitan lifts from context Mr. Justice Stewart's appropriate comment that "it would be a serious mistake to suppose that §1982 in any way diminishes the significance of the [Fair Housing Act of 1968] recently enacted by Congress." (392 U.S. at 415, quoted in defendant's memorandum at page 8). Plaintiffs emphatically concur in Mr. Justice Stewart's statement, and with the holding of the Court in Jones. Section 1982 does not diminish the force and scope of the 1968 Civil Rights Act and, as the Jones Court held, the existence of the 1968 Civil Rights Act does not affect §1982.

The conclusions reached in Jones have been subsequently affirmed both by the Supreme Court and by lower federal courts. Indeed, we are aware of no authority to the contrary and none is cited by defendant.

In the year following its decision in Jones, the Supreme Court again considered both the applicability of §1982 to asserted housing discrimination, and

its relationship to recent Civil Rights legislation. Such decision reaffirmed the availability of §1982 as an alternative remedy to those granted by such Civil Rights statutes. See Sullivan v. Little Hunting Park, 396 U.S. 230 (1969) and compare Hunter v. Erickson, 393 U.S. 385 (1969).[13/]

To similar effect, in Sanders v. Dobbs House, Inc., 431 F.2d 1097 . 2 F.E.P. Cases 942 (5th Cir. [August 28] 1970), the Fifth Circuit held that §1982 was not inconsistent with the provisions of Title VII to the 1964 Civil Rights Act, and, thus the fact that plaintiff had previously filed an administrative complaint with the EEOC did not oust the court of jurisdiction under §1982. Moreover, in Bush v. Kaim, 297 F.Supp. 151 (N.D. Ohio 1969), a housing discrimination suit under §1982, the district court again considered the point raised here by Metropolitan in light of the Supreme Court's earlier

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13/ Metropolitan's brief again attempts to find support for its position in dicta from the Court's opinion in Hunter. See Brief of Defendant in Support of Motion to Dismiss at 8-9. Such support, however, is not fairly inferable. At issue in Hunter was the validity of a city charter amendment which effectively repealed a local fair housing ordinance of Akron, Ohio. When plaintiff brought mandamus in the state courts to compel the City to administer the local fair housing ordinance, the defendant (City of Akron) claimed that the case was rendered moot by passage of the 1968 Civil Rights Act and the decision in Jones v. Mayer interpreting §1982, since the federal laws allegedly preempted local legislation. In response to such contention, the Court, speaking through Mr. Justice White, noted that the federal legislation was not intended to preempt local housing ordinances and should not be so construed. It in no way suggested that actions under 1982 should be deferred in favor of local law or the 1968 Civil Rights Act (see Jones v. Mayer, supra), a point which is further underscored by its subsequent holding in Sullivan v. Little Hunting Park, supra, permitting direct action under §1982 notwithstanding the existence of the Public Accommodations provisions of the 1964 Civil Rights Act.

decision in Jones. It noted:

> "As the Supreme Court determined, however, these acts [§1982 and Title VIII of the 1968 Civil Rights Act] have independent significance and the exemptions in the 1968 act are not applicable to litigation under the 1866 act." (297 F.Supp. at 151).

As the foregoing authorities make clear, the co-existence of the alternative procedures invoked by plaintiffs and plaintiffs in intervention here is well established. Thus, apart from any limitations attaching to the proceedings brought under Title VIII, the parties plaintiff are fully entitled to seek relief under the guaranties of equal opportunity clearly established by §1982.

IV.

PLAINTIFFS ARE PROPER PARTIES IN THESE PROCEEDINGS AND HAVE STANDING TO CHALLENGE METROPOLITAN'S DISCRIMINATORY HOUSING PRACTICES

Defendant asserts that these plaintiffs and intervening plaintiffs -- both individuals and the Committee -- have no right to challenge Metropolitan's discriminatory housing practices.[14/] Yet, again, defendant's argument -- which literally cites no authority beyond counsel's interpretation of the law -- is fatally at odds with the numerous decisions which have broadly construed the rights of private parties to seek redress of unlawful activities bringing injury to themselves and to others similarly situated. Defendant's contentions should, accordingly, be rejected.

A. The Concept of Standing.

The concept of standing in American jurisprudence reflects the fact that our judicial system is limited to "cases and controversies" of an existing nature. As a complementary notion, "standing" requires that parties to any such case or controversy have a connection, or nexus, with the subject thereof sufficient to assure vigorous advocacy. This latter notion is particularly significant since it is fundamental that decided

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14/ Metropolitan's Memorandum alternately styles plaintiffs as "well intentioned," "misinformed" or simply "volunteers" (Brief of Defendants in Support of Motion to Dismiss at 11-12). Such characterizations are strangely reminiscent of the words of Metropolitan's former Board Chairman and President Frederick H. Ecker some years earlier:

> "A conflict has now arisen which has seriously retarded further slum clearance. The conflict arises out of the belief of certain well-meaning organizations and individuals that social objectives can be obtained by writing those objectives into law, rather than awaiting the slower processes of education..." Affidavit of Frederick H. Ecker, submitted in Dorsey v. Stuyvesant Town, supra, as reported in Simon, Ibid, at pages 60-61.

cases take on significance, as precedent, far beyond the immediate interests of the parties then before the Court.

What the recent cases make clear, however, is that while standing constitutes a valid "entrance requirement" it was not intended as a barricade against maintenance of important litigation by persons vitally interested therein. Thus, far from being decisive, Metropolitan's treatment of this issue is, we respectfully submit, both doctrinaire and completely inconsistent with prevailing judicial authority.

Any current discussion of standing under federal law must commence with the Supreme Court's recent decision in Flast v. Cohen, 392 U.S. 83 (1968). There, the Court took the opportunity of a taxpayer's suit challenging the constitutionality of federal aid to parochial schools to reconsider the concept of standing on a broad scale. After pointing out that the issue of standing was entirely independent of the problem of "justiciability" on the merits, the Court stated that the gist of the inquiry into standing was simply a determination of "a nexus between the status asserted by the litigant and the claim he presents." (392 U.S. at 102). Such inquiry, the Court further made clear, is a narrow one, since "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." 392 U.S. at 101 [emphasis added]. Compare also, e.g., Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970).

Tested by Flast's standard of adversity, there can be no question of the standing of these plaintiffs. Indeed, counsel for Metropolitan does not suggest any lack of adversity. The

present plaintiffs -- both black and white -- encounter daily the effects of Metropolitan's discriminatory housing practices. In terms of the matters here at issue, plaintiffs are, and will remain, firmly adverse to Metropolitan until the racial discrimination (and the effects thereof) now existing at Parkmerced are remedied by affirmative action. Metropolitan's characterizations to the contrary notwithstanding, plaintiffs are not "unrelated to the landlord." They are his tenants and are subjected day by day to the effects of landlord's unlawful practices. See also discussion infra at 44-48.

But plaintiffs need not rely upon general references to "adversity" or "nexus," for decisions both preceding and following Flast have established beyond dispute that these plaintiffs are properly before the court in a suit challenging Metropolitan's rental practices at Parkmerced. We turn to a consideration of such decisions, first in the context of plaintiffs as "persons aggrieved" and, thereafter, with relation to notions of standing in the context of alleged racial discrimination. Following such discussion, we take up the precise injuries asserted by plaintiffs here.

B. "Persons Aggrieved."

Although citing no authority, Metropolitan's opposition to the standing of plaintiffs is essentially a claim that -- as tenants at Parkmerced -- they have not been aggrieved by any discrimination practiced by Metropolitan. In the words of defendant's Memorandum: "It is obvious that [no] plaintiff is a 'person aggrieved' within the contemplation of Section 810(a) of the Act." (Brief at 10). This is true, it is further alleged, because no "plaintiff has been the victim

of any discriminatory housing practice..."[15]

Although defendant has failed to discuss, or even cite, any of the pertinent authority, the question of who are "persons aggrieved" in the standing context has received considerable judicial attention in recent years. Taken as a whole, such cases not only support the right of the present plaintiffs to maintain the instant suit, but make clear that they are the very parties encouraged to vindicate the expressed public policy[16] favoring elimination of racial discrimination.

Whether one is a "person aggrieved" in any litigation, of course, demands a determination that such person have an "interest" in the litigation, and its outcome. Compare discussion of

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15/ Metropolitan's claim that plaintiffs lack standing is brought under Federal Rule 12(b) (6) on the ground that "the complaint fails to state a claim upon which relief can be granted." As such, it is well established that the motion admits (for present purposes) the truth of all facts well pleaded by plaintiffs. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Brown v. Brown, 368 F.2d 992 (9th Cir. 1966) and compare 2A Moore, FEDERAL PRACTICE 2266-67. These admissions include the allegations of injury, both economic and non-economic, which plaintiffs claim to have suffered as a result of Metropolitan's discriminatory practices at Parkmerced. See Complaint and Complaint in Intervention at paragraph 8 and see also subsection "D," post.

Although defendant's Memorandum does not deal directly with any of these asserted injuries, it attempts to dismiss them generally with the statement (again citing no authority) that "the injuries allegedly suffered by plaintiffs ... are not injuries cognizable by the Act." This peremptory dismissal is discussed in light of the decided cases hereafter (see infra at pages 30-36).

16/ The initial section of the 1968 Fair Housing Act declares:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." (42 U.S.C. §3601).

Flast v. Cohen, supra. This does not mean, however, that a plaintiff must be prepared to assert "a personal economic interest." Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 615 (1965). Thus, in Scenic Hudson, supra, the Second Circuit unanimously held that plaintiff, "an unincorporated association consisting of a number of non-profit conservationist organizations," was a "person aggrieved" by the decision of the Federal Power Commission to permit construction of a hydro-electric facility in New York State. There, the F.P.C. had argued that plaintiff lacked standing since it "[made] no claim of any personal economic injury resulting from the Commission's action." (354 F.2d at 615; compare Metropolitan's Brief in Support of Motion to Dismiss at page 11.) However, such contention was explicitly rejected, the court noting that not only had prior cases gone far beyond the narrow concept of economic detriment, but that the statute in question (the Federal Power Act) was concerned with interests "non-economic as well as economic." Refusing to apply a wooden formula to the question of standing, the Second Circuit ruled that the interest required was simply a matter of demonstrated concern: "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under §313(b)."[17/]

17/ It is significant to note, moreover, that in so holding, the court placed particular reliance upon the earlier decision of the Ninth Circuit in State of Washington Department of Game v. F.P.C., 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954) in which a non-profit organization of Washington residents was held to have standing to oppose construction of a dam which threatened to destroy local fishing. The Ninth Circuit there held

In a case decided three months later, the Court of Appeals for the District of Columbia applied similar reasoning to a "listener's" challenge to proposed F.C.C. renewal of a radio broadcast license. Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966). This decision (which, along with Scenic Hudson has been cited favorably by the Supreme Court in several recent cases including Data Processing Service v. Camp, supra) again rejected "rigid adherence to a requirement of direct economic injury...." in assessing standing. (359 F.2d at 1002).

Anticipating the reasoning of the Supreme Court in Flast v. Cohen, the court, in an opinion by Judge (now Chief Justice) Burger, noted that "the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate." Thus, it held that "listeners" to a radio station which assertedly broadcast racially-biased matter were "persons aggrieved" by a proposed F.C.C. renewal of the station's broadcast license and, therefore, had standing to complain of such action.

Cases decided subsequently have reaffirmed and, indeed, strengthened the rationale and application of Scenic Hudson and Office of Communication. As well summarized by the District Court for the Eastern District of Pennsylvania in Powelton Civic Homeowners' Association v. Department of Housing & Urban Development, 284 F.Supp. 809 (E.D. Pa. 1968), "neither economic injury nor a specific, individual legal right are necessary adjuncts to standing

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17/ (continued) that these organizations, along with various governmental agencies, were "'parties aggrieved' since they [claimed] that the Cowlitz Project will destroy fish which they, among others, are interested in protecting." Cf. Sierra Club v. Hickel, ___F.2d ____(9th Cir. 1970).

A plaintiff need only demonstrate that he is an appropriate person to question [an] alleged failure to protect the value specifically recognized as 'in the public interest'." In that case, residents of a proposed urban renewal area were held to have standing to challenge determinations by the Department of Housing and Urban Development as "appropriate representatives of legal rights conferred by the Housing Act on the general public." See also, e.g., Shannon v. Department of Housing & Urban Development, 305 F.Supp. 205 (E.D. Pa. 1969) (white and black residents of urban renewal area who were not required to move held to have standing to challenge renewal plan as "persons aggrieved" in light of their demonstrated interest "in the national goal of 'well-planned integrated residential neighborhoods'."); Road Review League v. Boyd, 270 F.Supp. 650 (S.D. N.Y.1967); Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2nd Cir. 1970); Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179 (6th Cir. 1967) (negro and white businessmen had standing to challenge proposed route of interstate highway on the ground that "the highway segment and plan will cause substantial damage to the North Nashville community, by erecting a physical barrier between this predominantly Negro area and other parts of Nashville." [387 F.2d at 181])[18]

Closely related to the above cases are those decisions which -- although not focusing precisely on who are "persons aggrieved" -- have considered in detail the interests and injuries sufficient to confer standing. Particularly pertinent is the decision of the Eastern District of Pennsylvania in Shannon v. HUD,

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18/ That plaintiffs are "persons aggrieved" under the Fair Housing Act of 1968 is further emphasized by a letter of November 5, 1970, from Clifton R. Jeffers, Assistant Regional Administrator of HUD (a copy of which is attached hereto as Exhibit "D"). In such letter, Mr. Jeffers noted as follows:

supra. There, "white and black residents, businessmen and representatives of private civic organizations" in the Philadelphia urban renewal area challenged continuation of a federal urban renewal plan although their property was not directly to be taken. Defendants -- like Metropolitan here -- urged that, having suffered no direct injury as a result of the renewal project, plaintiffs were without standing to challenge its continuation. The court, however, disagreed, noting that although "the impact of the renewal project is less direct upon the present plaintiffs who are not required to move, than upon those displaced, it cannot be gainsaid that the future impact of this plan more directly affects them." (305 F.Supp. at 209; emphasis added). More, the court pointed out that plaintiffs, as continuing residents of the redevelopment area, would be those persons whose "living environment" would be most directly affected by the plan or any changes in it.[19]

19/ (continued) "As previously discussed with you it is the determination of this office that the complainants [i.e., Trafficante and Carr] are aggrieved persons and as such are within the jurisdiction of Title VIII of the 1968 Civil Rights Act."

As we have previously noted, moreover, such administrative interpretations are entitled to great weight by the courts in construing the provisions of a federal statute. See cases cited at Footnote 11, supra.

19/ As further support for its holding, the court in Shannon considered whether, apart from the persons then before the court, it was likely that anyone would come forward to assert the claims raised by the plaintiff: "in determining whether these plaintiffs have the requisite directness of injury, the likelihood that plaintiffs would be adequately protected by the persons more directly affected is a relevant consideration."

This notion is a recurring one in the area of standing, particularly with respect to claims involving minority persons. See, e.g., Office of Communication of the United Church of Christ v. F.C.C., supra at 1004; Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2nd Cir. 1968); N.A.A.C.P. v. Alabama Ex Rel Patterson, 357 U.S. 449, 458-460 (1958). Compare also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154 (1951) and Barrows v. Jackson, 346 U.S. 249 (1953)(discussed infra)

The pertinence of Shannon's analysis cannot be disputed. The court's recognition that persons may be "more directly" affected by being forced to remain in an area from which others have been wrongfully excluded is directly pertinent, if not controlling, here, as is the court's explicit focus upon the plaintiffs' vital interest in the nature of their "living environment." In short, Shannon emphasizes that standing is a concept broad enough to encompass a great variety of concerns and to permit domonstrably interested persons and groups access to the courts.[29] See also, e.g., Norwalk Core v. Norwalk Redevelopment Agency, supra; Powelton Civic Homeowners' Association v. HUD, supra; Nashville I-40 Steering Committee v. Ellington, supra; Western Addition Community Organization v. Weaver, 294 F.Supp. 433 (N.D. Cal. 1968); Arrington v. City of Fairfield, Alabama, 314 F.2d 687 (5th Cir. 1969); Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970); Roe v. Wade,

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19/ (continued) Cases such as these, which explicitly uphold the role of such "indirectly" injured persons as plaintiff-litigants, contradict Metropolitan's comment upon the supposed "irony" of tenants at Parkmerced being responsible for institution of the instant proceedings. See defendant's Brief at 13. In view of the size of Metropolitan and its sophisticated methods of discrimination, it is not surprising that minority applicants have never challenged Metropolitan's policies at Parkmerced except on an individual basis, nor is it likely that such a suit will be brought in the future. In fact, the thousands of potential applicants who choose never to apply because of the notoriety of Metropolitan's practices would never bring suit to change those practices. Only residents, who daily witness both the effects of and the procedures utilized by Metropolitan in its discrimination, are likely to bring an action effectively challenging its discriminatory practices.

20/ Even beyond Shannon's recognition of plaintiffs' proper concern for the quality of their "living environment," the Ninth Circuit has recently recognized an apparent right to an "integrated environment" (SASSO v. Union City, __F.2d ___ (9th Cir. 1970). To the extent that such right is appropriately recognized, there can, of course, be no dispute over the right of the instant plaintiffs to complain of the vast racial imbalance at Parkmerced. Indeed, it is hard to conceive of any persons more directly affected by the lack of an "integrated environment" in that community.

314 F.Supp. 1217 (N.D. Tex. 1970).[21/]

Before turning to a consideration of "standing" in the context of civil rights litigation and racial discrimination, two final points should be made. First, even apart from the considerations discussed above, numerous cases have ruled that organizations or associations analogous to the plaintiff "Committee" in these proceedings are to be accorded especially favorable status in assessing standing. To this point, as we have noted above, it has been held that "those who by their activities and conduct have exhibited a special interest" in the problem then before the court are entitled to special consideration. Scenic Hudson, supra at 616. Powelton Civic Homeowners' Association, supra at 826; Citizens Committee for the Hudson Valley v. Volpe, supra; Road Review League v. Boyd, supra at 660. And, as the District of Columbia Circuit Court has recently pointed out: "the courts have come increasingly to recognize the standing of associations to raise in some circumstances the rights of their members." United Federation of Postal Clerks v. Watson, 409 F.2d 462, 469 (D.C. Cir. 1969), and cases there cited. See also, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D. Tenn. 1970); Chappell v. Olin-Mathieson Chemical Corp., 305 F.Supp. 544 (D. Tenn. 1969); Arrington v. City of Fairfield, Alabama, supra at 592.

Finally, several courts have recognized that insofar as plaintiffs represent an expressed public interest (as here, under Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §3601, et seq),

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21/ Although treating the question in relation to the term "persons aggrieved" the Second Circuit's decision in Scenic Hudson, supra, is also frequently cited for its recognition of the relevance of "the aesthetic, conservational, and recreational" interests of plaintiffs in assessing standing. Compare also Association of Data Processing Services v. Camp, supra.

they stand in the role of private attorneys general, discharging a particularly beneficial function through the judicial process. See, e.g., Office of Communication of United Church of Christ v. F.C.C., supra at 1003-1004. Whether this concept is in fact simply interchangeable with Scenic Hudson's "demonstrated interest" test is not clear, nor is it significant in the instant case since application of both standards unquestionably support the standing of the present plaintiffs. Compare South Hill Neighborhood Association, Inc. v. Romney, 421 F.2d 454 (6th Cir. 1969).

The foregoing authorities leave little room to doubt plaintiffs' standing to maintain the instant action against Metropolitan. The rationale of the decided cases make clear that standing does not constitute an artificial barrier to the maintenance of significant actions especially where -- as here -- important national policies are involved. These conclusions are further emphasized by a consideration of standing in the particular context of civil rights proceedings.

C. Standing in the Civil Rights Context.

The cases and principles above cited make clear the standing of plaintiffs before this Court. But even more is such standing emphasized by those decisions which have broadly interpreted the range of persons who may permissibly challenge deprivations of fundamental civil rights. Such authorities make clear -- particularly in light of the importance of remedying our sorry history of racial discrimination -- that the concept of standing is to be accorded a flexible and expansive interpretation in order to uphold the vital national interests asserted in such cases.[22] As the court noted in Marable v. Alabama Mental Health Board, 297 F.Supp. 291 (N.D. Ala. 1969): "Particularly in ... civil rights cases, when a plaintiff with an interest genuinely adverse to the [defendant] sued is before the court, the standing doctrine will not be used to delay still longer the operation of constitutional commands...."[23]

22/ It should be noted that many of the cases which have considered the concept of standing generally, and which are cited above in this Memorandum, have involved asserted racial discrimination. E.g., Powelton Civic Homeowners' Association v. Department of Housing and Urban Development, supra; Nashville I-40 Steering Committee v. Ellington, supra; Norwalk Core v. Norwalk Redevelopment Agency, supra; Western Addition Community Organization v. Weaver, supra; Arrington v. City of Fairfield, Alabama, supra; Shannon v. Department of Housing and Urban Development, supra; compare also Office of Communication of the United Church of Christ v. FCC, supra.

23/ Even beyond the broad approach to the question of standing under the recent cases above discussed, the Supreme Court has suggested that given the importance of remedying civil rights deprivations, the requirements for standing might appropriately be dispensed with in their entirety in certain situations. Thus, in Barrows v. Jackson, supra, a housing discrimination case (discussed infra at 40-41) the Court noted:

> "Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are

In Marable, plaintiffs, who were patients at some (but not all) of the mental health facilities in Alabama sued to challenge (a) the discriminatory treatment of patients at Alabama's mental health facilities throughout the state and (b) racial discrimination against facility employees. The standing of plaintiff-patients to raise each of the asserted claims was challenged. Such challenges were, however, rejected. As to the initial claim of discrimination against mental health patients, the court held that plaintiffs were proper parties to challenge the discriminatory practices alleged even with respect to those facilities where none of them were -- or had ever been -- patients. Citing the generally expansive concept of standing in civil rights cases generally (above quoted), the court found such plaintiffs "proper parties" within the principles of standing enunciated by the Supreme Court in Flast v. Cohen, supra.

Even more significant, however, the court held that the patient-plaintiffs had standing to challenge discriminatory employment practices at the mental hospitals. Although noting that plaintiffs would have no standing to challenge the asserted discriminations as "potential employees" of the system, the court nevertheless found "that they do have standing because of the secondary effects on plaintiffs as patients of the discrimination against staff personnel." (297 F.Supp. at 297; emphasis added). In so holding, the court relied upon its

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23/ (continued)

> outweighed by the need to protect fundamental rights which would be denied by permitting the damages [sic] action to be maintained. [Cite omitted]. In other relief situations which have arisen in the past, the broad constitutional policy has lead the court to proceed without regard to its usual rule."

earlier decision in Lee v. Macon County Board of Education, 267 F.Supp. 458, 472 (M.D. Ala. 1967), aff'd sub nom., Wallace v. United States, 389 U.S. 215 (1968), in which public school students were held to have standing to challenge faculty and staff segregation.[24/]

Similarly, in Carter v. Green County, 396 U.S. 320 (1969), affirming, 298 F.Supp. 181 (M.D. Ala. 1968), the Supreme Court ruled that potentially excluded black jurors had standing to challenge racial discrimination in Alabama's jury selection system. Although jury discrimination proceedings have, of course, been reported from all levels of the federal judiciary in recent years,[25/] the Court noted at the outset of its discussion that Carter was the "first case" to present such a challenge by other than a criminal defendant convicted by a racially imbalanced jury.

Considering the issue of standing in relation to who are persons "aggrieved" by such discrimination, the Court explicitly held that "people excluded from juries because of their race are as much aggrieved as those indicted and tried

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24/ As pointed out in Lee, supra at 472: "It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan - not because of teachers' employment rights, but because students are entitled to a non-racial education, and assignment of teachers to students on the basis of race denies students that right." See also Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (parents of white and black school children held to "have a realistic nexus" sufficient (under Flast v. Cohen) to permit them to challenge the racially discriminatory effect of the District of Columbia's ability "tracking" system in its public schools.

25/ See, e.g., Sims v. Georgia, 389 U.S. 404 (1967); Whitus v. Georgia, 385 U.S. 545 (1967); Swain v. Alabama, 380 U.S. 202 (1965).

by juries chosen under a system of racial exclusion." (396 U.S. at 330).[26] See also Lombard v. Louisiana, 373 U.S. 267 (1964) in which a white civil rights worker, inter alia, was permitted to raise a claim of racial discrimination as a defense to criminal trespass, and compare Walker v. Pointer, 304 F.Supp. 56 (N.D. Tex. 1969) (discussed infra) in which the court found standing for white plaintiffs who were allegedly subjected to reprisals because of their association with Negroes.[27]

What the foregoing authorities make clear for standing in the civil rights context generally, is further reinforced by decisions dealing with the very area of housing discrimination here at issue. Perhaps the leading case is the 1953 decision of the Supreme Court in Barrows v. Jackson, supra.

26/ The Supreme Court in Green affirmed the summary disposition of the standing question which had been made by the district court. Moreover, in the lower court proceedings, one of the challenging plaintiffs was a white civil rights worker "charges against whom [were] proposed to be submitted to the [Alabama] Grand Jury." This plaintiff, in addition to the potentially excluded Negro jurors, was held to have sufficient standing.

27/ Reference should also be had to the opinion of Judge Lord in Shannon v. HUD, discussed previously (at 32-4). There as we noted, white and black residents who were not to be displaced by a proposed Model Cities program were held entitled, "as persons aggrieved", to challenge the effect of such program on their "living environment". This holding was made notwithstanding the fact that the statute under consideration made no explicit provision for the standing of such persons. Quoting from the earlier decision of the Supreme Court in Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968), however, the court ruled that "no explicit statutory provision [was] necessary to confer standing." Noting further that plaintiffs "literally must live with the decision[s]" of the defendant, Judge Lord found that it was "evident that these urban renewal area residents were sufficiently interested in the national goals of 'well planned, integrated residential neighborhoods' and 'well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life'" to challenge administrative determinations concerning the proposed Model Cities program. Compare also Nashville I-40 Steering Committee v. Ellington, supra.

There, an action for damages was brought against defendant Viola Jackson, a Caucasian, who had allegedly breached a racially restrictive covenant by selling her property to Negroes. Under the Court's earlier landmark decision in Shelley v. Kraemer, 334 U.S. 1 (1947), it was clear that such restrictive covenant could not have been affirmatively enforced in an action at law against a co-covenantor. Plaintiffs alleged, however, that defendant Jackson, as a Caucasian, had no standing to avail herself of the benefits of such decision. The argument was firmly rejected.

In the first place, the Court noted that while respondent Jackson had not been subjected to racial discrimination herself, she was not without direct interest or concern for the proceedings, since she was subject to potential economic detriment in the pending action, which claimed some $11,000 damages against her, so that "a judgment against respondent would constitute a direct, pocketbook injury to her." (346 U.S. at 256). Compare allegations of Complaint and Complaint in Intervention at paragraph VIII.

Moreover, even apart from her potential economic injury, the Court explicitly held that respondent Jackson could appropriately assert the rights of the Negro "would-be users of restricted land." (346 U.S. at 260). Basing its conclusion on the broad public interest in equal housing, and the strictures against "widely condemned" racial segregation in housing, the Court ruled that it could not refuse to entertain a defense based upon Shelley v. Kraemer, supra, "simply because the person against whom the injury is directed is not before the Court to speak for himself."

More recently, the Supreme Court relied upon its

earlier conclusions in Barrow v. Jackson, supra, to uphold the right of a Caucasian to challenge (under 42 U.S.C. §1982) his expulsion from a recreational corporation on the ground that he had rented his home, and assigned his corporate membership share, to a Negro. Sullivan v. Little Hunting Park, 396 U.S. 230 (1969). Again, the defendant corporation asserted that Sullivan, as a Caucasian, had no standing to assert the rights arguably protected to Negroes under §1982. The Court summarily rejected such claim, stating that if Sullivan were denied such standing the resulting "sanction" would give impetus to the perpetuation of racial restrictions on property. Further noting, as it had some sixteen years earlier in Barrows, supra, that "the white owner is at times the only effective adversary 'of the unlawful' restrictive covenant" the Court held that "there can be no question but that Sullivan has standing to maintain this action."

Finally, in a case decided one month prior to Sullivan, the District Court for the Northern District of Texas found that white tenants who were evicted because of their alleged "association" with Negro guests were entitled, under §1982, to seek damages from their landlord. Walker v. Pointer, 304 F.Supp. 56 (N.D. Tex. 1969).

Plaintiffs there, as here, asserted that they had been "direct victims of black racial discrimination" and had been injured thereby. Defendant landlord, again much like landlord-Metropolitan, claimed that no action could be maintained by the tenants since they had not been discriminated against because of their race. (Compare Metropolitan's statement at page 9 of its Brief in Support of Motion to Dismiss, that since "neither plaintiff has been the victim of any discriminatory

housing practice proscribed by the Act" they are without standing to bring this action).

Relying on a host of prior decisions in the civil rights area including, inter alia, Barrows v. Jackson, supra, Lombard v. Louisiana, supra and Valle v. Stengel, 176 F.2d 697, 702 (1949), the court considered and explicitly rejected defendant's contentions:

> "To deny jurisdiction under section 1982 to plaintiffs would be to hold in effect that only those suffering from discrimination against black people who happen to be black come within the protection of the statute. This would surely be to read in 1982 a racist purpose. The jurisdictional basis of the statute so read would be antithetical to the ennobling objective of the statute and of the Thirteenth Amendment from which it was drawn....
>
> "It is the conclusion of this Court that the plaintiffs are within the jurisdictional scope of section 1982 in their own right - even though they are not Negro persons and irrespective of whatever harm might have befallen Negro persons as a result of the alleged interruption of the Walker leasehold by defendants."

D. The Interests and Injuries Asserted.

We come finally to the allegations of injury which are at the very heart of the claims raised by both plaintiffs and plaintiffs in intervention. For as has been clear throughout, these plaintiffs -- defendant's gratuitous characterizations notwithstanding -- are not mere well-meaning volunteers. They are persons whose daily lives are affected by the invidious policies of racial discrimination so long practiced at Parkmerced.

In brief, plaintiffs claim that as a result of Metropolitan's exclusionary housing practices they have been injured (a) by being deprived of the social benefit of living in a racially integrated community; (b) by loss of business and professional advantages accruing from contact with members of racial and ethnic minorities; and (c) by being stigmatized (with resultant economic and social detriment) as residents of a segregated community. See Complaint and Complaint in Intervention at paragraph 8.[28/]

28/ It is important to again note that for purposes of the instant motion to dismiss under Federal Rule 12(b)(6) all of the well pleaded and material allegations of the complaint -- including those asserting injury, as outlined above in text -- are to be taken as true. See, e.g., Walker Process Equip. Corp. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Dodd v. Spokane County, supra; Murray v. City of Milford, 380 F.2d 468 (2d Cir. 1967). The same is true of allegations contained in the supporting affidavits. Gardner v. Toilet Goods Ass'n., 387 U.S. 167 (1967). Thus, Metropolitan's instant motion does not address itself to the truth or substantiality of the harm asserted (which are issues to be tried), but simply the legal sufficiency of such alleged injuries to state a claim within the requirements of the Federal Rules.

It goes virtually without saying at this stage in our country's history that the continued existence of a racially segregated society is not only harmful to those who are the direct victims of racial exclusion, but infects all who live in such environment. As we were told by a unanimous Supreme Court some 16 years ago in Brown v. Board of Education, 347 U.S. 483 (1954), "separate" can never be "equal" in the context of racial discrimination. For the psychological and social toll which such an existence places upon all who are involved is inevitably injurious and not to be countenanced. See 347 U.S. at 493-95. See also, e.g., K. B. Clark, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (Midcentury White House Conference on Child and Youth 1950); Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. PSYCHOL 259 (1948); Allport, THE NATURE OF PREJUDICE (Addison-Wesley Pub. Co. 1954).

If the obvious truth of these assertions be not self-evident, then reference need be made only to the affidavit submitted here by Dr. Alvin F. Poussaint, Associate Dean of the Harvard Medical School and a psychiatrist who has had wide clinical experience treating both white and black patients in northern and southern urban areas. Dr. Poussaint, who has served as consultant to both the Department of Health, Education and Welfare and to the United States Commission on Civil Rights, firmly and unequivocally supports the allegations of injury to these plaintiffs (both white and black) in the instant proceedings.

As an initial matter, Dr. Poussaint notes the "intolerable stigma" placed upon professionals and business

men who must reveal their residence in a racially segregated community. Such individuals, Dr. Poussaint notes, "will suffer a loss of face and self-esteem not only in their relations with minority groups but also with whites." (Poussaint Affidavit at 4-5). The result, based upon Dr. Poussaint's clinical experience, is psychologically disadvantageous "feelings of hopelessness and despair." Moreover, as should again be self-evident, continuation of racial segregation in one's living environment will inevitably continue and reinforce feelings of racial prejudice in both whites and minority group members. See Poussaint Affidavit at 3, 8-9, and compare also Brink and Harris, THE NEGRO REVOLUTION IN AMERICA (Simon and Schuster 1963).

Equally, if not more, unfortunate is the psychological and social detriment caused to blacks who are not excluded from, but are token residents of, a generally segregated community.[29/] Again, as Dr. Poussant's affidavit points out, blacks living in communities such as Parkmerced "suffer a stigma because of their residence. They must face the taunts of other blacks, who accuse them of collaborating with racism because they live in a racially restricted neighborhood. . . . The psychological toll is even more severe since blacks living in places like Parkmerced are hampered in their dealings with the black community organizations. . . . They are looked upon as intruders

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29/ Plaintiff Dorothy Carr and Plaintiff in Intervention James Embree, as well as a handful of the Committee's members, are Negroes.

and their efforts are often sabotaged. Thus, they may begin to suffer an internal lack of self-esteem which, in turn, will give rise to conflicts leading to clinical symptoms and disease." Poussaint Affidavit at 6-7. See also K. B. Clark, DARK GHETTO (Harper & Row 1965).

Finally, the toll of residential segregation is great not only upon adult residents of such communities -- such as plaintiffs -- but upon their children. "It has been observed by such eminent child psychiatrists and anthropologists as Kenneth Clark, Erik Erikson, Mary Ellen Goodman and Robert Coles, to name just a few, that white children grow up much less prejudiced if they have the opportunity to play and socialize with black children. . . . We may conclude, therefore, that so long as the present cultural provisions prevail a lack of contact between white and black children can only reinforce the acquisition of racist attitudes." Poussaint Affidavit at 8, and compare also Affidavit at 7, reflecting the erosion of family relationships which tends to occur in the homes of "token" black residents of racially imbalanced communities.

Plaintiffs are, of course, concerned in these proceedings for the rights and interests of minority persons to have the opportunity to enjoy the benefits of living at Parkmerced. Such concern is, moreover, appropriate and legally cognizable. See, e.g., Barrows v. Jackson, supra. But even more, the persons who are now before this Court are concerned for the effect which a continuation of discrimination and racial imbalance at Parkmerced has had and will have on themselves and their families. Unless we are to declare that the rights of such persons

are of no concern to the law and that plaintiffs must either abide the racial exclusion practices of their landlord or remove themselves from the community, their presence as plaintiffs before this Court is not only to be upheld, it is to be encouraged.

V

DEFENDANT'S SALE OF PARKMERCED WILL NOT MAKE THESE PROCEEDINGS MOOT AS TO METROPOLITAN

In its Brief in Support of Supplement to Motion to Dismiss, Metropolitan argues that this action has become moot (and should, therefore, be dismissed) by reason of its pending disposition of Parkmerced "in a manner by which it will be divested of the power to continue the acts complained of."

Defendant's argument is only notable for its temerity. For the argument, and the cases cited in its support, simply ignore the legal situation presented by this case. As an initial matter, the mere fact that Metropolitan has unilaterally elected to "flee the scene" through its proposed sale of Parkmerced can hardly be said to render "moot" the claims and injuries of plaintiffs who continue to reside in a racially imbalanced community. It was never the purpose of the doctrine of "mootness" to apply to such a situation. Rather, such principle has application to those cases (unlike the one now at bar) in which the provoking controversy has ceased and nothing remains to be (or could be) done to satisfy plaintiffs' demands.

More disturbing, however, is the second premise of Metropolitan's argument--that it can somehow sell Parkmerced

"in a manner by which it will be divested of the power to continue the acts complained of" and is therefore impliedly relieved of any power or duty to correct its discriminatory practices. To the contrary, Metropolitan can and should be required by this Court to act affirmatively to correct the conditions of racial segregation at Parkmerced, whether or not it still owns that property. Defendant cannot free itself of liability and responsibility to plaintiffs by the simple device of selling Parkmerced. Furthermore, Metropolitan's argument ignores plaintiffs' well-pleaded demands for compensatory and punitive damages for past acts by Metropolitan, clearly an obligation which no sale can erase.

A. The Case Is Not Moot Because Much Remains To Be Done.

Metropolitan's Supplemental Brief has cited a variety of cases allegedly supporting its mootness claims. However, such cases are simply not relevant to the instant action--nor were they intended to be so applied. Defendant's authorities, rather, involve situations where the controversy had ended or where the illegal conduct sought to be enjoined no longer existed and was not likely to recur. The analogous situation here would be presented if Metropolitan had voluntarily embarked on a broad program of affirmative action to integrate Parkmerced, under the scrutiny of this Court or an appropriate public or private agency. And, even in such case, the action taken would not totally obviate judicial scrutiny. See Parham v. Southwestern Bell Telephone Co., F.2d , 2 FEP Cases 1017 (7th Cir., October 28, 1970), where the District

Court was required to retain jurisdiction, notwithstanding satisfactory voluntary affirmative action subsequent to institution of the lawsuit. Compare U.S. v. IBEW, Local 38, 428 F.2d 144 (6th Cir. 1970). Certainly if, in the instant case, Parkmerced had become fully integrated and plaintiffs' damage claims were satisfied, this action would not only be moot, but plaintiffs would be delighted to have it dismissed. However, Metropolitan advances no such claim here, nor could it. More, plaintiffs suggest that a claim of "mootness" ill-befits a defendant who has, over a period of many years, continuously and systematically refused to provide substantial housing opportunities to minority persons, and whose discriminatory conduct continues unabated.

B. The Case Is Not Moot Because, Despite Its Proposed Sale, There Is Much That Metropolitan Can Do.

By their complaints, plaintiffs seek not only prospective relief through injunctive and affirmative action, but also compensatory and punitive damages for Metropolitan's past and continuing violations. Thus, the most obvious answer to Metropolitan's claim of mootness is that plaintiffs have requested such monetary compensation. As such, Metropolitan cannot escape its responsibility for such damages here any more than a person involved in an automobile accident could escape liability by selling his car. Indeed, in one of the cases relied upon by defendant, Powell v. McCormack, 395 U.S. 486 (1969), the court held that a similar damage (back salary) claim by Rep. Adam Clayton Powell meant that his action could not be deemed moot. See also Wilson v. Prasse, 404

F.2d 1380 (1968).

However, plaintiffs are in no sense limited to such claim against Metropolitan here, for there is a far broader sense in which much remains to be done that Metropolitan can be required to do. Plaintiffs have already indicated, in their Memorandum of Points and Authorities in Support of Motion to Join Additional Defendant (a copy of which is appended hereto, as Exhibit "E", for the convenience of the Court), that affirmative action can and should be required of the owner of Parkmerced in order to correct the cumulative effect of Metropolitan's discriminatory policies. The attention of the Court is directed to that Memorandum and the pertinent authorities cited there. We there maintained that the new owner of Parkmerced, who takes with notice of its predecessor's past practices, will be responsible for correcting the segregation found there. This is not to suggest in any way, however, that Metropolitan is relieved of responsibility in this area; rather, Metropolitan and its purchaser should be required to work together, after the sale, to integrate the community by an appropriate affirmative action plan. Compare Exhibit "E" at 4.

It is appropriate that Metropolitan, whose practices and policies through the years have resulted in the present racial imbalance at Parkmerced, should bear primary responsibility here, including, e.g., the cost of tenant solicitation in minority neighborhoods and the salaries of those required to change the discriminatory practices in the Parkmerced rental offices. Clearly, any plan of affirmative action must be carried out in cooperation with

the new owner of Parkmerced, and thus, this new owner must be a party to this action (compare Rule 25, F.R.C.P.). However, the primary burden should be placed by this Court on Metropolitan.

Plaintiffs' position that defendant's sale will not relieve it of responsibility here, nor make this case moot, is supported by substantial authority. Thus, defendants who, in order to avoid integration, closed parks, released plaintiffs from reformatories or ceased rental of their apartments, have failed in their attempted arguments that their respective cases were thereby mooted. City of Montgomery, Alabama v. Gilmore, 277 F.2d 364 (5th Cir. 1960); Singleton v. Board of Commissioners of State Institutions, 356 F.2d 771 (5th Cir. 1966); United States v. Beach Associates, Inc., 286 F.Supp. 801 (D.Md. 1968). Furthermore, even corrective action by defendants is often not enough to make a case moot; thus, promotion of a Negro employee who had filed a class action alleging job discrimination, did not bring about mootness. Jenkins v. United Gas Corporation, 400 F.2d 28 (5th Cir. 1968). Nor did abandonment of a county-unit election system, Gray v. Sanders, 372 U.S. 368 (1963). Finally, a controversy arising from a contract between an employer and a local union was held not to become moot by the merger of the union with another union, resulting in the formation of a new local. The new union was simply added as a party. Retail Clerks International Association v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).

By contrast, defendant has cited no authority which goes to the questions presented by this case.

Defendant's cases (with the exception of Powell, supra, which affirmatively supports plaintiffs' claims) uniformly involve situations in which the controversy between plaintiff and defendant had either entirely terminated or the practice complained of had in some way been corrected by defendant and would assuredly not recur. As has been shown, this is not in any sense true of the instant case. For example, Pittenger v. Home Savings & Loan Assn., 166 C.A.2d 32 (1958), a case cited as particularly relevant by defendant, involved a sale in which the purchaser had corrected the practice complained of by plaintiff--a fact omitted from Metropolitan's extensive discussion of the case.30/

30/ Metropolitan's reliance upon the Supreme Court's decision in the leading case of United States v. W. T. Grant Co., 345 U.S. 629 (1953) is similarly misplaced. Subsequent to the filing of the government's suit, alleging violation of the interlocking directorate provisions of the Clayton Act (15 U.S.C. §19) defendant Hancock [the director charged] resigned his conflicting posts, and all parties defendant filed affidavits that the violations, if any, would not be repeated. On the basis of such facts, defendants moved for summary judgment on the ground that the proceedings had thereby become moot--a claim which the District Court upheld. On direct appeal to the Supreme Court, the Court noted initially that discontinuance of illegal conduct, either prior to or during the pendency of proceedings, will not oust a court of its jurisdiction either "to hear and determine the case" or "to grant injunctive relief" (345 U.S. at 632-33). Indeed, the Court explicitly warned against facile acceptance of "protestations of repentance and reform" by defendants. Compare United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1952). What is, rather, required in a case of asserted mootness, held Justice Clark, is to determine whether "relief is needed." So tested there, the Court found that the trial court had not "abused its discretion" in accepting defendants' plea.

From any fair reading of the Court's cautionary language, and its reliance upon whether relief from the defendants' unlawful conduct was still "needed" it is hard to see how defendant can derive any comfort from that case here. Indeed, Metropolitan has made no pretense of ever

The most charitable assessment of defendant's supplemental claim of mootness is that it is merely pro forma. For such argument, if seriously intended, reflects the height of cynicism and disdain for corporate responsibility and the judicial process. If Metropolitan, having created the current racial situation at Parkmerced, is now able to exit discreetly from these proceedings, it will become even more difficult to convince this country's minority residents of the availability of equality under law.

CONCLUSION

For the foregoing reasons, plaintiffs and plaintiffs in intervention respectfully request that the motion of Metropolitan Life Insurance Company to dismiss the Complaint and Complaint in Intervention be denied.

Respectfully submitted,

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Dated: December 11, 1970

30/ (continued)

satisfying the threshold test of discontinuance, let alone proving that its reform is genuine and permanent.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL J. TRAFFICANTE and DOROTHY M. CARR, Plaintiffs, vs. METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation, Defendant, COMMITTEE OF PARKMERCED RESIDENTS COMMITTED TO OPEN OCCUPANCY, an unincorporated association; THE REVEREND ARTHUR H. NEWBERG; JAMES EMBREE; ALBERT JAMES HEICK; JACQUELINE TCHAKALIAN, Plaintiffs in Intervention.	NO. C-70-1754 (LHB) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO JOIN ADDITIONAL DEFENDANT

Because of the announced intention of defendant METROPOLITAN LIFE INSURANCE COMPANY ("Metropolitan") to dispose of its interest in the Parkmerced complex, and because of the vitally significant effect which such sale may have upon the relief available in these proceedings, plaintiffs and plaintiffs in intervention (hereinafter collectively referred to as "plaintiffs") move for an order substituting the transferee[1/]

1/ Because of the expressed desire of defendant Metropolitan

EXHIBIT "E"

pursuant to the provisions of Rule 25(c), Fed.R.Civ.P.[2/]

Rule 25(c) of the Federal Rules provides for the substitution or joinder of parties defendant "in case of any transfer of interest" pendente lite, such as will imminently occur here. Such motion, which is addressed to the discretion of this Court (McComb v. Row River Lumber Co., 177 F.2d 129 [9th Cir. 1949]), is particularly appropriate here since plaintiffs seek in this proceeding a decree not only for damages, but for affirmative action to correct the effects of past racial discrimination at Parkmerced. While such discrimination has undoubtedly been caused by present owner, Metropolitan, it is inevitably necessary that its transferee -- who takes with notice of the pendency of these proceedings -- may be called upon to take affirmative action necessary to uphold the strong national interest (compare 42 U.S.C. §3601) in fair housing.

The right to affirmative relief in the instant proceedings as well as the responsibility of Metropolitan's successor to take such affirmative action, in conjunction with the present

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1/ (continued) for confidentiality concerning its proposed sale transaction, it has been agreed that the identity of the proposed purchaser should not be revealed until the time of the sale. For this reason, such name is omitted from the instant motion and all papers in support thereof, and the name of such purchaser is indicated throughout by a blank. When the identity of the purchaser is made public, plaintiffs will move this Court to substitute such party's name at all appropriate points by an order to be entered nunc pro tunc.

2/ Rule 25(c) provides as follows:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to which the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

defendant, is discussed in detail below. It should preliminarily be noted, however, that while we believe this motion is properly granted[3/] so that all parties whose interests may potentially be effected will be before the Court, it is clear that the transferee may be legally bound by any judgment rendered against Metropolitan -- including the obligation to take affirmative action -- without regard to the disposition made by the Court on the present Rule 25 request. See, 3B Moore, ¶2508 at 25-325; Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9 (1945); United States v. Griffith Amusement Co., 94 F.Supp. 747 (W.D. Okla. 1950); O'Donohue v. First National Bank of Philadelphia, 166 F.Supp. 233 (E.D. Pa. 1958).

WHERE RACIAL DISCRIMINATION HAS BEEN PREVIOUSLY PRACTICED A PROPERTY OWNER MUST TAKE ALL ACTION NECESSARY TO CORRECT THE EFFECTS OF SUCH DISCRIMINATION

It is, without question, clear that a party guilty of unlawful racial discrimination is required to discontinue and desist from his unlawful conduct. It is equally well-established, however, that a party guilty of such past discrimination must also take affirmative action to correct the effects of past discriminatory policies. Indeed, so strong is the national policy favoring equal treatment of all persons that a defendant may be prohibited from adopting even racially neutral policies where, because of past practices, such policies will have the effect of perpetuating the unlawful discrimination.

3/ See, e.g., Montecatini Societa Generale per L'Industria Mineraria e Chimica v. Humble Oil & Refining Co., 261 F.Supp. 587 (D. Md. 1966); Vandenbark v. Busiek, 1 FRD 366 (E.D. Ill. 1940) (transferee held properly joined as additional rather than substitute party) and Killebrew v. Moore, 41 FRD 269 (N.D. Miss. 1966).

The instant proceeding represents a classic case of racial discrimination requiring affirmative action for its resolution. Both under the principles applicable to civil rights proceedings generally, as well as under specific statutory authority, the right to such affirmative relief is clear here. Plaintiffs intend to prove that as a result of the discriminatory policies of Metropolitan at Parkmerced, the number of units occupied by all racial minorities is substantially less than 1%. Moreover, the effect of such discrimination has been to create, in effect, a self-perpetuating system of exclusion fully as effective as a billboard stating "no minority person need apply." If the unlawful and unconscionable effects of these practices are to be ended, it can only be through a meaningful program of affirmative judicial relief. Accordingly, in these proceedings plaintiffs seek a judgment which includes the following:

1. Advertisement to and solicitation of minority tenants in local minority neighborhoods.

2. Abolition of practices which, given the present racial makeup of Parkmerced, are inherently discriminatory, e.g., giving preference to family members of existing residents, reserving certain classes of apartments for transfers from within the community.

3. Granting expedited treatment on the "waiting list" to some or all minority applicants until such time as the effects of Metropolitan's past discriminatory practices have been eliminated.

4. Integration of the personnel in the rental office.

A. Statutory Authority.

Recognizing that many -- and, indeed, the most

successful -- schemes of racial discrimination could only be discouraged through effective affirmative relief plans, Congress has wisely mandated authority for such action into various enactments in the area of civil rights. In terms of the law most directly pertinent here, Title 8 of the 1968 Civil Rights Act (42 U.S.C. §§3601, et seq.) §810(d) authorizes a court in cases of discrimination in housing to "order such affirmative action as may be appropriate." Likewise, §812(c) states that "the court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order or other order."

These provisions are, on their face, affirmative mandates for the type of relief which plaintiffs seek here. Moreover, such mandate is strengthened by reference to numerous decisions construing similar provisions or granting affirmative relief in line with the strong national policy against racial discrimination. See, e.g., Title 7 of the 1964 Civil Rights Act (42 U.S.C. §2000e-5[g]) and compare also Jones v. Mayer, 392 U.S. 409, 414 (1968) ("the fact that 42 U.S.C. §1982 [Civil Rights Act of 1866] is couched in declaratory terms and provides no explicit methods of enforcement does not, of course, prevent a federal court from fashioning an effective equitable remedy....").

B. Decisions Requiring Affirmative Action.

Where appropriate, affirmative action is the rule, not the exception, in civil rights cases. In the very area -- housing -- here at issue, decrees have not only required such action but have set forth in detail specific acts required to be done to rectify the effects of past discrimination. Thus, in Gautreaux v. Chicago Housing Authority, 296 F.Supp. 907

(N.D. Ill. 1969) the trial court found defendant Housing Authority guilty of racial discrimination both in its tenant assignment practices and in selection of sites for proposed housing projects. To remedy the effects of such unlawful conduct, the court then adopted a detailed plan for affirmative action (the salient features of which are set out in the margin below).[4/] To similar effect, see also Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), a case brought under 42 U.S.C. §1982, in which the Court of Appeals required advertisements to be placed in newspapers selected by the court. Such advertisements were explicitly required to state that qualified potential minority applicants would be accepted by defendant.

In addition to the foregoing cases, which were adjudicated on their merits, numerous consent decrees in the area of housing discrimination have required substantial affirmative commitments. Among these are, United States v.

4/ The order in Gautreaux, which is published at 304 F.Supp. 736, required defendant to take the following actions, among others:

(a) Required the construction of a specific number of dwelling units in formerly "white" areas prior to permitting any new construction to be commenced in areas 30% or more non-white;

(b) Provided for future construction in previously "white" areas;

(c) Imposed limits upon the placement, size and building height within any project;

(d) Required a freeze of the "waiting list" for public housing, along with "intensive publicity [to] be employed in such a manner as effectively to inform low income families throughout the City of Chicago ... that substantial numbers of dwelling units will be made available..."

In order to assure compliance with its adopted plan, the court retained continuing jurisdiction over the proceedings.

Weingart, #70-530-CC (C.D. Cal. 1970) in which the decree provided that "new tenants will be encouraged to select apartments in a building so as to eliminate racial identification of any specific building in an apartment complex ..." In addition, defendant was required to take affirmative steps to cause minority persons to be employed at the apartment complexes. In United States v. Charnita, Inc., #69-409 (M.D. Pa. 1970), an order filed June 8, 1970, required the defendant to integrate its staff and to "endeavor to place negroes in supervisory and professional positions as vacancies for which they are qualified arise..." Further, in both Weingart and Charnita the consent decrees required that a certain percentage of the respective defendant's advertising expenses be directed specifically toward the minority community. See also United States v. Lake Caroline, Inc., #CA-432-69R (E.D. Va. 1970); United States v. Palmetto Realty Corp., #70-1419 (E.D. La. 1970) and United States v. Associated Estimates Corp., #C-70-233 (N.D. Ohio 1970).

What is true of housing discrimination since 1968[5/] is even more the case in other areas where racial exclusions

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5/ Prior to the passage of Title 8 to the 1968 Civil Rights Act and decision of the United States Supreme Court in Jones v. Mayer, supra, federal suits for housing discrimination were limited to those involving "state action." Compare, e.g., Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950). For this reason, there are at present only a limited number of reported opinions dealing with the private property owner's affirmative obligations to correct the effects of past racial discrimination. Yet as noted above, the cases which have considered the question to date have shown no hesitancy in applying the same rigorous requirements of affirmative corrective action which have been so prevalent in other areas of civil rights litigation (see discussion in text, post).

have been common, including discrimination in jobs, voting, jury selection and school attendance. For example, in the area of job discrimination (under Title 7 of the 1964 Civil Rights Act) it has been held that "where necessary to insure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination." Local 53, Int'l Ass'n of Heat & Frost I & A Wkrs v. Vogler, 407 F.2d 1047, 1052-53 (5th Cir. 1969). There, moreover, the Fifth Circuit affirmed a district court order which, inter alia, required chronological referrals for work alternating between white and negro applicants until objective membership criteria were established. The court further struck down a union policy which had given preference to close relatives of existing union members. See also United States v. Int'l Bhd. of Electrical Workers, 428 F.2d 144 (6th Cir. 1970) (lower court order refusing to require defendant to affirmatively advise eligible negroes that union would no longer discriminate vacated and remanded for consideration of appropriate affirmative action plan); United States v. Sheet Metal Workers, Int'l Association, 416 F.2d 123 (8th Cir. 1969) (union required to publicize new non-discriminatory policies)[6/]; Local 189, United

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6/ In the Sheet Metal Workers case the Eighth Circuit's opinion pointedly noted the "chilling effect" (Dombrowski v. Pfister, 380 U.S. 479 [1965]) class discrimination can have upon future applications for employment or, as here, housing:

> "We recognize that the best publicity programs will not fully convince Negroes that they now have the opportunity to attempt to qualify for apprenticeship training. We also recognize that no such program can hope to be as effective as parental guidance, but a good public information program can help persuade the doubtful and skeptical that the discriminatory bars have been removed. Such a program is mandatory...."
> 416 F.2d 123, at 139 [emphasis added].

Paper Makers and Paper Workers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (a seniority system which carried forward the discriminatory effects of previous employment practices held partially unenforceable).

The principles held applicable to such cases were well summarized by the recent opinion of the District Court for the Western District of Washington in United States v. Local No. 86, 315 F.Supp. 1202, 1236-37 (1970). There, the court held that:

> "Where a defendant has engaged in a pattern of practice of discrimination on account of race, such defendant must not only refrain from future discrimination but must also undertake whatever affirmative action may be necessary to assure those discriminated against the full enjoyment of their right to equal employment opportunities."

Similar requirements for affirmative action are found in other areas as well. In Louisiana v. United States, 380 U.S. 145 (1965) the Court held that where a discriminatory test had been employed in voter registration, the Court not only required the adoption of a new, non-discriminatory exam, but further required the re-registration of all voters under the new test, so that the effects of the prior discrimination would be eradicated. As Mr. Justice Black noted for the unanimous court: "We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." (380 U.S. at 154).

Equally pertinent, in its past term, the Supreme Court emphasized the power and duty of the federal courts to order affirmative action to correct the effects of past

discrimination in jury selection. Carter v. Greene County, 396 U.S. 320 (1970). In so holding, moreover, the court cited with approval numerous lower court decisions which had required affirmative action to remedy improper jury selection policies and practices. Compare opinion at footnote 46.

Finally, it goes without saying that in the area of school desegregation courts have regularly imposed and supervised the most rigorous and detailed of desegregation plans in order to compel compliance with the long-ignored mandate of the Court in Brown v. Board of Education, 347 U.S. 483 (1954). An exhaustive listing of such cases would represent a virtual compendium of recent civil rights decisions. Among such cases are United States v. Jefferson County Board of Education, 372 F.2d 836, 895 (5th Cir. 1966) ("school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hallmark of the dual system."); Porcelli v. Titus, ___ F.2d ___, 2 FEP Cases 1024 (3rd Cir. [September 23] 1970) ("it would therefore seem that the Board of Education has a very definite affirmative duty to integrate school faculties...."); Green v. School Board of New Kent County, 391 U.S. 430 (1968).[7/]

7/ It is finally pertinent to note that Metropolitan has itself previously entered into an affirmative action plan in connection with analogous housing operations in New York City. In settlement of a racial discrimination claim filed by the New York Human Rights Commission in 1968, Metropolitan agreed as follows:

> "In addition to processing the names on its existing waiting list, Metropolitan will accept new applicants. They will be considered simultaneously with those on the old list....
>
> "A conscious, affirmative effort will be made to employ more Negroes and Puerto Ricans on the renting and clerical staffs of the projects...

METROPOLITAN'S PURCHASER, HAVING NOTICE OF THIS LITIGATION AND OF THE DISCRIMINATORY PRACTICES AT PARKMERCED, TAKES TITLE SUBJECT TO AN OBLIGATION TO CORRECT THE EFFECTS OF PAST DISCRIMINATION

If plaintiffs are to obtain effective relief from the past discriminatory policies at Parkmerced, they must look to the new owner. Only that company will control the rental offices, the "waiting list", the tenant-selection and transfer procedures, and only that company will be in a position to solicit minority tenants. Thus, unless the new owner is joined as a party under Rule 25, and unless he is made subject to the obligation to correct the effects of past discrimination, plaintiffs may be deprived of much of the relief to which they are justly entitled.

We respectfully submit, however, that such requirement should impose no substantial hurdle to the granting of full and effective relief in these proceedings. Indeed, while the precise question has not apparently been adjudicated in any proceeding involving alleged housing discrimination, there is ample legal precedent supporting the obligations imposed upon one who acquires a property or business with knowledge of defects which the former owner had an obligation to correct. Thus, it is hornbook law that a person who acquires real property with knowledge of an existing nuisance

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7/ (continued)

> "A letter will be sent to all Riverton tenants [a non-white project] asking them if they would be interested in transferring to [the white projects]....
>
> "The practice of giving preference to tenants' relatives will be stopped."

(Press release of the New York Commission on Human Rights, July 18, 1968.)

on such property is not only liable for the damages caused by the nuisance following purchase, but may be required to abate it. See, e.g., 66 C.J.S. "Nuisances", §88(e)(2); Anno.: "liability of purchaser of premises for nuisance thereon created by predecessor", 14 ALR 1094 (1921). Indeed, such principle is of ancient vintage, in this state as elsewhere. See, e.g., Pierce v. German Savings and Loan Society, 72 C. 180 (1887).

To similar effect, in the field of labor relations, it is settled that "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct." Perma Vinyl Corp., 164 N.L.R.B. #119, 65 L.R.R.M. 1168, 1169 (1967), enforced sub nom., United States Pipe and Foundry Co. v. N.L.R.B., 398 F.2d 544 (5th Cir. 1968). The Board there effectively summarized the reasons -- equally applicable to the present proceeding -- requiring such transferee liability:

> "In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the

> unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business wno is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." [Cites omitted].

See also the concurring opinion of Judge Leventhal in International Ass'n of Machinists v. N.L.R.B., 414 F.2d 1135, footnote 3 at 1139 (D.C. Cir. 1969).

More, in John Wylie & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) and Wackenhut Corp. v. International Union, United Plant Guard Workers of America, 332 F.2d 954 (9th Cir. 1964), the Supreme Court and Ninth Circuit, respectively, held that where there is a substantial similarity of operations and a continuity of business identity, a collective bargaining agreement entered by the predecessor employer would be held binding upon his successor. See also United States v. Griffith Amusement Co., supra, which stated, in dicta, that a successor corporation would be bound by an injunction against block-booking entered in a proceeding brought under the Sherman and Clayton Antitrust Acts.

CONCLUSION

Plaintiffs' right to an affirmative action decree, and their right to enforce such decree against Metropolitan's transferee undeniably mandate the presence of such transferee before this Court from the very outset of the instant proceedings.

The scope and significance of this action not only requires all parties concerned to have their "day in court", but it is additionally imperative that this Court be an effective forum to truly put an end to the long-standing policy of racial exclusion which now obtains at Parkmerced and to correct the injurious effects of said discrimination. If Metropolitan and its purchaser are able to evade their legal responsibility to provide fair and open housing to all persons, then such action will stand as a monument to the failure of the law to effectuate the declared policy of fair housing throughout the United States (42 U.S.C. §3601).

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Respectfully submitted,

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