IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION
ELAINE MINTZES and ALVIN S. MINTZES, d/b/a CASTLE REALTY COMPANY,	:	NO. 20698
Defendant	:	

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DEFENDANTS' MEMORANDUM

It is now, and ever has been, the position of the named Defendants in this civil action that the alleged representations regarding the entry or prospective entry of persons of a particular race or color into the neighborhood of certain persons on Woodbourne Avenue were never made. The Government, because of the posture of this case as an Attorney General's action pursuant to 42 U.S.C. §3613, must not only prove to the satisfaction of the trier of fact that such a representation of race was actually made, a burden which on the recorded testimony at trial is far from convincingly carried, but must also prove that multiple representations were made in furtherance of a plan of dealing, a pattern or practice, engaged in for the purpose of depriving persons of the full enjoyment of their rights granted by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. Consistent with their position throughout this proceeding, the Defendants submit that no pattern or practice was engaged in, that no enjoyment of rights granted by the substantive provisions of the Act have been interfered with, and that the Plaintiff has

failed to prove either any such act or pattern or practice of such acts, or that any conduct of the Defendants has interfered with the enjoyment by any person of rights granted that person by the Act.

The phrase pattern or practice is not defined by the legislature within the section which authorizes the Attorney General to act remedially to cause a cessation of such pattern or practice. The phrase has, however, been employed in other legislation for similar purposes, and can be found in 42 U.S.C. §1971 (c) and (e), The Voting Rights Act, and in 42 U.S.C. §§2000 (a) et seq. and 2000 (e) et seq., the public accommodations and equal employment sections, respectively, of the Civil Rights Act of 1964. Cases arising under these laws must be the source, if any is required, of explanatory material as to the meaning of the words. In the helpful case of United States v. Mayton, 335 F. 2d 153 (5th Cir. 1964), the Court found it necessary to determine the intent of Congress in requiring a finding of pattern or practice precedent to an order requiring the extraordinary remedy of 42 U.S.C. §1971 (e). The appellants attempted to block issuance of such an order by contending that the required "finding" of a pattern or practice had not been set out by the District Court. The Court of Appeals, in denying the contention, said:

> The words pattern or practice were not intended to be words of art. No magic phrase need be said to set in train the remedy provided in §1971 (e). Congress so understood them. And the legislative history reflects the adoption of the approach epitomized by Deputy Attorney General Walsh before the House Judiciary Committee:
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> > "Pattern or practice have their generic meanings. In other words, the court finds that the discrimination was not an isolated or accidental or

> peculiar event; that it was an event which happened in the regular procedures followed by the state officials concerned."
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> That interpretation was reiterated by Mr. Walsh in subsequent testimony, and it was confirmed on the floor of the Senate by Senator Keating on the day the Act was passed:
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> > "The 'pattern or practice' requirement means only that the proven discriminatory conduct of the defendants was not merely an isolated instance of racial discrimination."
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> United States v. Mayton, 335 F. 2d 153, 158f (5th Cir. 1964).

The Court in Mayton footnoted the legislative history, above reproduced, to show that they found it at Hearings Before The House Committee on The Judiciary on H.R. 10327, 86th Cong., 2d Sess. 13, and at 106 Cong. Rec. 7223. By way of footnote the Court also presented a portion of the colloquy between Walsh and Senator McClellan, to be found at Hearings Before The Senate Committee on The Judiciary on H.R. 8601, 86th Cong., 2d Sess. 68:

> SEN. McCLELLAN: Now, what constitutes a pattern?
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> MR. WALSH: A pattern of discrimination would be discrimination that was widespread beyond an individual case. It would be the burden to be carried by the Attorney General which would be to prove this was the usual rather than the unusual situation.
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> SEN. McCLELLAN: What constitutes a practice?
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> MR. WALSH: Practice would be very much the same thing. Not only was it usual but it has been indulged — I mean the words have their generic meaning; there is no word of art involved.
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> * * *

SEN. McCLELLAN: To establish a practice there wouldn't there have to be repeated acts?

MR. WALSH: I think that would be the general sense of it; yes sir.

United States v. Mayton, 355 F. 2d 153, 158 n. 15 (5th Cir. 1964).

It might be argued, and it might be the position of some that the Plaintiff in its memorandum has so argued, that because of the myriad special proceedings and extraordinary remedies authorized by The Voting Rights Act upon specific findings of pattern or practice of conduct to deny full enjoyment of rights to others, which special proceedings and extraordinary remedies are not paralleled in either the Public Accommodations or Equal Employment Titles of the 1964 Civil Rights Act, all interpretation of the burden placed upon the Attorney General by the legislative history and the cases interpreting the said Voting Rights Act are not germane to the present controversy, since a specific finding of pattern or practice does not work here as a prerequisite to the granting of a remedial power to the courts. This argument has no merit. The Equal Employment Opportunity provisions of the Civil Rights Act of 1964, 42 U.S.C. §2000 (e) et seq., may be enforced by the Attorney General of the United States where he has reasonable cause to believe that there has been a pattern or practice of resistance to the enjoyment of rights granted by the Act. 42 U.S.C. §2000 (e) - 6 (a). In United States v. International Brotherhood of Electrical Workers, 270 F. Supp. 233 (S.D. Ohio 1967), the Court held that the Attorney General did not have to allege and prove that he had such reasonable cause. In United States v. Building and Con-

struction Trades Council of St. Louis, 271 F. Supp. 447 (E.D. Mo. 1966), it was held that the signature of the Attorney General on the initial pleading constituted a certification of good grounds to support his decision to institute action. It can be seen from these cases that by 1967, the courts clearly understood that, unlike proceedings by the Attorney General to enforce the Voting Rights Act under 42 U.S.C. §1971 (e), in Equal Employment suits the Attorney General was presumed to bring an action only where action was appropriate. But did this presumption change the required burden of proving the acts purportedly constituting a pattern or practice of resistance to granted rights? The clear answer is that it did not. In United States, by Ramsey Clark v. International Brotherhood of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968), an Attorney General's suit pursuant to 42 U.S.C. §2000 (e) - 6 (a) decided together with Dobbins v. Local 212, International Brotherhood of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968), the same court which in 1967 decided that the Attorney General need not allege and prove his belief to be based on reasonable cause firmly held that there were certain other particular burdens to be carried by him as the moving party in such a case.

> In an action brought by the Attorney General under Title VII, the burden of proof in respect of the essential elements of the case is on the plaintiff by a preponderance. The plaintiff must show that a pattern or practice exists and it is of such a nature as to deny the exercise of the protected civil rights and that it was so intended by the defendant.
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> United States v. International Brotherhood of Electrical Workers, 292 F. Supp. 413, 443 (S.D. Ohio 1968).

Any result other than the one reached in the above-quoted case would be incongruous, and would contravene all established principles of the conduct of an adversary proceeding in our judicial system. The moving party must be required to prove the operative elements of his case, and the risk of non-persuasion can and will defeat his claim where he fails to carry the burden. That the I.B.E.W. case, supra, correctly states the various elements to be proven by the Attorney General in a pattern or practice action is reinforced by an earlier case, United States v. McClellan, 248 F. Supp. 62 (S.D. Miss. 1965). This was a Three-Judge District Court case in which two of the Judges were from the Circuit bench; the case arose under the Voting Rights Act, 42 U.S.C. §1971. There were two separate patterns or practices charged by the Attorney General, the second of which being in reference to harassment and humiliation of Negro applicants for voting registration. As to this particular, the court held that the Attorney General had failed to establish by a sufficiency of proof that the charge was justified:

> The evidence as to the Registrar's rudeness to Negro applicants relates to isolated instances and is not such as would justify a finding of a practice and pattern of harassment and humiliation of Negro applicants. There was evidence of erroneous entries in the Registrar's records with respect to Negro applicants. It was not shown that these errors were purposely made or with an intent to deny or delay the exercise by the applicant of the right to vote. [emphasis supplied]
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> United States v. McClellan, 248 F. Supp. 62 (S.D. Miss. 1965).

The Defendant's answer to the Attorney General's complaint in the case presently before this Court for determina-

tion of fact and application of law emphatically denied the Government's allegations that racial representations were made by them to any person or persons. The Government, absent admission by the Defendants, must prove by the preponderance of the evidence that racial representations were made, that they were made in an attempt to deny to a person protected by the Act the enjoyment of a right granted by the Act, that there were enough of these representations made in such a manner and at such times as to constitute something within the meaning of a pattern or practice, and that the Defendants made such representations in an intentional attempt to deny to such persons their rights granted them by the 1968 Civil Rights Act, 42 U.S.C. §3601 et seq. This is the state of the law as demonstrated by the cases and as required by common principles of jurisprudence, principles demanding that the Plaintiff, regardless of who he might be (for the courts are the great equalizer), prove his case.

With these burdens in mind, what does the record show that the Plaintiff has adduced, by way of testimony from its witnesses at the trial in open court? In succession, the Plaintiff produced one lot owner and three homeowners and their privies of Woodbourne Avenue in Baltimore. Each of these witnesses was asked to testify that the Defendants made representations regarding the entry of Negroes into their neighborhood upon visits made for the purpose of securing a listing, or upon phone conversations for the same purpose. Some said that as best they could remember the Defendants had not mentioned the racial question. Others seemed to recall that the Defendants had pointed out to them that there were now Negroes in the neighbor-

hood, as close as the next block. Some asked whether the apartments to be built would be rented to Negroes, to which the Defendants, the witnesses testify, replied that according to the law they would have to be rented without regard to race, and that therefore a Negro family might indeed inhabit the apartments. These witnesses, or some of them, could not testify as to the order of the conversation, as to whether the Defendant's alleged assertions were made to force the owners to decide to sell, or whether they were made in honest response to legitimate inquiry by the witness. It is argued by the Plaintiff, and authority is stated by the Plaintiff for the proposition that the mere statement alone, regardless of the circumstances in which it is made, is sufficient for the purpose of the Act. The Defendant respectfully submits, however, that the burden being on the Plaintiff to prove that the statements were intentionally made, purposefully made to deny full enjoyment of rights under the Act, the circumstances under which a statement is made are indeed both highly material and relevant. If it is the position of the Government in this case that the mere statement of a fact, demonstrably true, to the effect that there are Negroes in the neighborhood, or that an apartment complex must rent to all persons without discrimination as required by law, in response to a legitimate question answered without intimidation, constitutes an actionable representation within the meaning of 42 U.S.C. §3604 (e), Section 804 (e) of Title VIII of The 1968 Civil Rights Act, then it must be the position of the Defendants in this case that the First Amendment to the Constitution of the United States, purporting to guarantee to all citizens the freedom

of communicative speech, as construed by the courts to be the supreme law of the land, is today an utter, worthless nullity and of no effect. With regard to blockbusting laws in general, at least one court has noted this possible area of conflict between First Amendment freedoms and actionable representations. Abel v. Lomenzo, 267 N.Y.S. 2d 265 (App. Div. 1966). To prohibit brokers from imparting a factually accurate and non-inflammatory description of the nature of a neighborhood even regardless of their intent might be constitutionally suspect in light of the First Amendment as increasingly interpreted by the courts.

To return to the question of whether the testimony presented by the Plaintiff in this case was sufficient to carry the various burdens of proof required by the law, it is to be noted that those witnesses who testified as to actual racial representations made by the Defendants are, on the record, impeached as to their testimony that those racial statements were made by their prior inconsistent statements (made under oath at a deposition pursuant to the rules of discovery in preparation for this very case) that no racial statements were made. Clearly this presents an issue of credibility to the court as the trier of fact in this case, and the determination of that issue of credibility is undeniably within the sole discretion of the court. It is submitted, however, that where the fact essential to the Plaintiff's case, the fact testified to by his witness, is the very same fact as to which by prior inconsistent statement the witness has impeached himself, there is presented only a narrow avenue for permissible discretion, and certainly less than that exercisable to find the witness credible as to

fact A where he has testified as to facts A and B and impeached by his prior inconsistent statement as to fact B. It is, then, the position of the Defendant that the Government has not satisfactorily shown that an actionable racial representation was made, much less that enough were made to constitute a pattern or practice, or that they were purposefully made, if at all, with the intent to deny to another enjoyment of rights granted by the Act. The Defendant denies all of this. The Plaintiff has proved little, if any, of it, and has neither asserted nor pled any presumptions to carry the burden for him. In this state of the record, in this vacuum of proof, findings of fact such as would be necessarily found to support the relief requested would be based at least in part on conjecture beyond characterization as reasonable inference.

Much has been said, at the trial of this case and in the Plaintiff's Memorandum, of the complexities of the Act, specifically the staged coverage timetable of temporary exemptions as found in Section 803 thereof, at 42 U.S.C. §3603. It is the position of the Defendant that the property of Mr. Lincoln is exempted by this section, particularly §3603 (b) (1), from the coverage of the Act, and that therefore Mr. Lincoln is not granted any rights by the operative substantive rights-granting section of the Act, 42 U.S.C. §3604. This conclusion must follow from a reading of 42 U.S.C. §3603 (b), which clearly and unambiguously states that nothing in Section 3604 shall apply to a dwelling of Mr. Lincoln's description and type, except for prohibitions in Section 3604 (c). For a case in which the court appropriately demonstrates the way the exemptions work with the

substantive provisions of the Act to get a result compatible with the structure of the Act, see United States v. Knippers and Day Real Estate, Inc., 298 F. Supp. 551 (E.D. La. 1969). The Act makes it plain that Section 3604 in no way applies to Mr. Lincoln, or stated more properly, none of the discriminatory housing practices created by §3604 can exist with regard to his single family dwelling (unless after December 31, 1968 he attempts to sell through a broker, or by advertising). If this were all that the exemption from coverage stated, there might be a question as to whether Congress actually intended that not a single one of the enumerated prohibited forms of conduct should be applicable. But that is not all the exemption states. For it specifically exempts from the exemption activity prohibited by §3604 (c). In other words, even though Mr. Lincoln's house is exempted generally from §3604, if he should engage in a course of conduct violative of §3604 (c) he shall lose the shield of the exemption. Had Congress intended to remove also the exemption of Mr. Lincoln's home when the prohibited activity was that covered in §3604 (e), they would have done so. It is obvious from the carefully-worded construction of exemption section 3603 (b) that the Congress considered the question of when an exception to coverage would be itself removed, and they decided that such removal would only occur as to §3604 (c). The argument of the Government that because the Lincoln home was not in point of fact sold, and thus is not a single family dwelling "sold or rented by an owner," and is therefore not a dwelling exempted by the quoted language from 42 U.S.C. §3603 (b) (1) is a twisting of the statute into a construction clearly not intended, since

it would work to free any single family dwelling owner from liability in any case brought under any section of the Act prohibiting a refusal to sell to a buyer wholly motivated by the race of the buyer, simply by a decision never to sell the house at all. Furthermore, such a construction is not beneficial to the Government's case, for if upheld, it could by a parity of reasoning be argued that because the contracts of sale involved in this controversy were cancelled according to their own terms by reason of the failure of the contingency, there was no profit and therefore no possible violation of §3604 (e) by the Defendants.

Certainly neither side contends that the Act is, with all of its intricacies, easily understood. But a reading of the Act as a whole does shed some light on the nature of its construction and the means of its enforcement. It is first to be noted that there are several alternative methods of enforcement. The Department of Housing and Urban Development is given primary responsibility in this area by Section 808, 42 U.S.C. §3608 (a). Persons aggrieved are directed to report their claims to this administrative agency by 42 U.S.C. §3610, and this section describes the procedure to be followed upon such filing. The detailed statutory description of this means of enforcement lends credence to the proposition that it is to be considered the primary manner in which persons aggrieved are to be assisted. 42 U.S.C. §3612 permits direct enforcement by private persons in civil actions, without first recourse to the administrative agency, as an alternate procedure. It is to be noted, however, with respect to this procedure that the court is directed to

continue such cases where it believes that the administrative agency previously noted as being the primary enforcer might be able to conciliate the differences upon which the controversy is based. Such a provision further establishes the primacy of the Department of Housing and Urban Development as administrator of the Act.

The third alternative of enforcement is the means pursued in the instant case, the Attorney General's action under 42 U.S.C. §3613 to remedy a pattern or practice of discriminatory housing practices. While it cannot be argued that this third means is not available for use in enforcing the Act, when read in conjunction with the rest of the enforcement provisions, and in light of the inclusion of this remedy for alleviating the effects of pattern or practice cases, it is abundantly clear that the Attorney General's suit is not intended for the enforcement of the de minimus case. It is submitted that the record of this controversy presents just such a de minimus case, and that the enforcement procedure chosen was, while undeniably available, unfortunate nonethless, and has had the effect of forcing upon these facts burdens of proof which they cannot support.

Because the Department of Housing and Urban Development is the agency to which Congress has delegated primary administration of the provisions of the Act, the interpretations by the said Department of the Act's terms are to be accorded deference by courts faced with a problem of construction. It is not contended that the interpretations of the Department are binding on the courts, for that is not the law. It is, however, clearly the law that the court may look to such administrative

interpretations for assistance, and should defer to the interpretation therein found if it is both reasonable and not incongruous with legislative intent. L'Enfant Plaza North, Inc. v. District of Columbia Redevelopment Land Agency, 300 F. Supp. 426 (D.D.C. 1969); Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968) (supplemental opinion 1969); Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965). In light of this doctrine, it is submitted that the Court might review, for purposes of determining the proper construction of the Act, a publication of the Department of Housing and Urban Development dated 1968 and entitled Fair Housing 1968, subtitled "An Interpretation of Title VIII (Fair Housing) of the Civil Rights Act of 1968." The Defendants must apologize for their inability to present to the court and to opposition counsel a copy of the document; the publication is available upon request addressed and payment of five (5) cents made to the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. The document number for ordering is #1968-0-310-306. The pamphlet bears the seal of the U. S. Department of Housing and Urban Development, Federal Housing Administration. It says, in pertinent part:

> Your Rights Under the Fair Housing Law
>
> The law protects you from the following acts when they are based on discrimination on account of race, color, religion, or national origin:
>
> *Refusal to deal. To refuse to sell or rent or to negotiate for the sale or rental of a dwelling (Section 804(a)).
>
> *Discrimination in terms. To discriminate against any person in the terms or conditions of sale or rental of a dwelling (Section 804(b)).

*Discriminatory advertising. To make, publish or print any statement with respect to the sale or rental of housing, indicating any racial or religious preference, or an intention to discriminate (Section 804(c)).

*False representations. To represent falsely to any person that a dwelling is not available for sale or rental (Section 804(d)).

*Blockbusting. For profit, to induce owners to sell or rent dwellings by representations regarding the entry into the neighborhood of a person or persons of a particular race, color, religion or national origin (Section 804(e)).

*Discrimination in financing. To deny a loan to any person or to discriminate in the fixing of the terms or conditions of a loan. This prohibition is applicable to banks, building and loan associations, insurance companies, or any other business involved in the making of commercial real estate loans (Section 805).

*Discrimination in real estate services. To deny access to or participation in any multiple-listing service, real estate brokers' organization or other service, organization or facility relating to the business of selling or renting dwellings (Section 806).

What is Covered by the Law? When?

Discrimination in Financing, Real Estate Services and Advertising

The prohibitions against discrimination in financing and the prohibition against denying access to or participation in real estate services become effective after December 31, 1968 and apply to all dwellings. The prohibition of Section 804(c) against discriminatory advertising applies upon enactment to all dwellings which have received the kind of Federal assistance described in stage 1 below and applies to all other dwellings after December 31, 1968.

The Other Prohibitions -- Three Stage Coverage

With respect to the other four categories

of discrimination in the sale or rental of housing prohibited by Section 804--namely, Refusal to Deal, Discrimination in Terms, False Representations, and Blockbusting--the prohibitions become applicable on a three-stage basis.

STAGE 1-- Upon enactment, the kinds of housing listed below are covered by the prohibitions if they are federally owned or operated or if they have received (under agreements or contracts entered into after Nov. 20, 1962, and still outstanding at the time of passage of the Fair Housing Title) certain types of Federal assistance; such as, public housing loans or grants, and urban renewal or slum clearance program assistance:

*Multi-family dwellings of five or more units.

*Multi-family dwellings containing four or fewer units, if the owner does not reside in one of the units.

*Single-family houses not owned by private individuals.

*Single-family houses owned by a private individual who owns more than three such houses or who, in any two-year period, sells more than one in which he was not the most recent resident.

STAGE 2-- After December 31, 1968, the prohibitions apply to any of the four kinds of dwellings described immediately above, regardless of whether they are federally assisted.

STAGE 3-- After December 31, 1969, single-family houses owned by private individuals become covered if they are sold or rented through a broker or other person in the business of selling or renting dwellings, or if a discriminatory written notice or advertisement is used in offering to sell or rent.

It can be seen from the foregoing pronouncement that the Department construes the stages of applicability and exemption from

coverage in the manner submitted by the Defendants in this case to be the proper construction. The §3604 (e) blockbusting prohibition becomes applicable in stages as exemptions expire, and as to Mr. Lincoln there has been no violation of the Act even assuming, only for argument, the most blatant of prohibited tactics were employed.

The Defendant took the position at the trial of this controversy that because Mr. Lincoln was exempted by dwelling type, and because Mr. Ragonese was the owner of a vacant lot that he at no point in time held up for sale, the attempt of the Government to place before the court the testimony as to whatever representations the Defendants might have made to these persons at any time should be blocked. The theory of the objection to the proffered testimony as stated in the record at the time was that the representations, regardless of their content, could not be actionable under the Act because the persons to whom they were made were not granted any rights by the Act as interpreted, that they were therefore immaterial to the controversy and should be excluded, as they could not form a part of the basis for a finding of a pattern or practice as a matter of fact in the case and might be prejudicial. The position of the Government was that the representations were both relevant and material, and should be admitted on that basis. The Government further argued that the testimony was admissible to show pattern or practice even if it be decided that the individuals concerned were not covered by the Act. The Government restates this position in numbered section 3 of its Supplemental Memorandum, and cites authority therefor. The testimony was admitted, subject to exception.

The questions of admissibility of such testimony, the purposes for which it may be admitted, and its use upon admission by the trier of fact, are covered in detail by the case of United States v. International Brotherhood of Electrical Workers, 292 F. Supp. 413 (S.D. Ohio 1968) (the Dobbins case), discussed above. It will be recalled that this was an Attorney General's pattern or practice case under 42 U.S.C. §2000 (e) - 6, the Equal Employment Title of the 1964 Civil Rights Act. The Court is again reminded of the great similarity between the pattern or practice section authorizing suits by the Attorney General to remedy unfair employment practices and the parallel section of the 1968 Act, the section under which the Attorney General brings the present action, 42 U.S.C. §3613. The teachings of the carefully considered opinion in this recent case are set out here:

> In considering whether defendants are discriminating in violation of Title VII, evidence of the defendants' conduct prior to July 2, 1965, is relevant. Such past conduct may illuminate the purpose and effect of present policies and activities and show that policies which appear neutral are in fact designed to presently discriminate. Discrimination by labor unions, based on race or color, was illegal long before July 2, 1965. Steele v. Louisville & N. Railroad Co., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944). Pre-Act discrimination does not furnish the basis for any relief under Title VII. United States v. Sheet Metal Workers, 280 F. Supp. 719, particularly at page 728 (1968, D.C. Mo.). The pattern or practice based on which a successful Title VII action may be maintained must be shown to have been one which existed or took place after, and not before, July 2, 1965. "Its effect is prospective and not retrospective." (Interpretive Memorandum of Title VII, Senators Clark and Case, 110 Cong. Rec. 7213.) From the same Memorandum: "The principal purpose * * * is to obtain future compliance."

While only a post-Act practice or pattern may furnish the basis for a Title VII claim, evidence of conduct pre-Act is competent and relevant for a number of purposes. One of them, for example, would be to aid in the determination of whether or not a particular practice or pattern, or system had been originally instigated by reason of anything discriminatory based on race or color. Obviously, if it was, the continuance for a day after July 2, 1965, would be discriminatory. If it was not — or stated otherwise, if it was adopted originally for a purpose having nothing to do with discrimination and for a legitimate economic purpose — the continuance could not be "per se" discriminatory. As another example of relevance, the Act requires an inquiry into the "intention" of the defendant, and that is true whether the case is a private one or one brought by the Attorney General. See 2000e-5 and 2000e-6. In each situation the plaintiff has the burden of proving "intentional" engagement (in 2000e-5) and "intended to deny" (in 2000e-6). It is hornbook that even in the criminal field, in which evidence of prior conduct should be held more tightly in line than in a civil case, evidence of prior criminal activity is frequently competent and relevant to the question of "intent" of the defendant. It must necessarily follow that the same is true to a greater extent in the civil field. To take another and practical example from this case — the question whether a given examination administered after the Act was or was not a discriminatory "chilling" is much more approachable if it can be compared with pre-Act examinations than if it is approached in a vacuum. It is, therefore, concluded that pre-Act activity for a reasonable time before July 2, 1965 — a reasonable time in this case being approximately six years — is competent and relevant, not for any substantive purpose; not for supplying proof of an essential element of the plaintiff's case; not for any purpose of visiting the sins of the forefathers on a present-day defendant; but for the purpose of interpreting post-Act activity and for the purpose of determining the intention — post-Act — of the defendant. While it should be limited to a reasonable length of time, latitude should be accorded a defendant for the

> purpose of counter-explanation. For example -- taken from this case -- if the evidence had been cut off at the five or six year stage, it would have indicated that some W's who did not have applications filed were examined at a time when N's were not; actually they did have applications filed prior to the six-year period.
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> United States v. International Brotherhood of Electrical Workers, 292 F. Supp. 413, 443-4 (S.D. Ohio 1968).

With regard to the above discussion of the law as applied to the particular facts in this case, it would appear that the Government should be permitted to introduce testimony as to representations made to persons not within the coverage of the Act, in that such testimony is deemed relevant to the controversy for certain limited purposes. It is noted, however, that the position of the Defendants remains firm that such racial representations, if they are found to have been made, to persons whom they argue are not covered by the Act, may not be included in any catalogue of racial representations which it is concluded constitute a pattern or practice within the ambit of 42 U.S.C. §3613 entitling the Attorney General to relief under that section.

The Attorney General seeks by this action to enjoin what he alleges is a pattern or practice of blockbusting, prohibited by 42 U.S.C. §3604 (e) as a discriminatory housing practice. The operative section makes it unlawful, except as exempted by 42 U.S.C. §§3603 (b) and 3607, and only where made applicable by §3603,

> For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin. 42 U.S.C. §3604 (e).

Apart from questions of coverage, exemption, pattern or practice, burden of proof, and other questions for consideration in this case, the quoted operative section itself raises at least two issues. The first is an issue of construction.

The Government contends that the inverted word order chosen by the Congress, whereby the words "for profit" were placed at the beginning of the prohibition rather than where they would normally appear, six words later after the second induce, is to be explained thus: that the legislative branch wished to make it clear that they were not attempting to make mere conversation in the social environment an arguably unlawful representation. The Defendant would agree that the inverted word order is indeed significant, but for another purpose. It is the Defendants' position that the activity Congress sought to prohibit was not conduct such as the Government alleges, and the Defendants deny, took place here, but rather was the classic, self-serving profiteering practice of blockbusting which breeds on the panic that is its own creation and derives its profit from proving its original assumption wrong. The sponsors of the legislation can undoubtedly describe it best:

> One of the most common and most abused arguments against fair housing is that integrated neighborhoods suffer rapid declines and [sic] property values....
>
> In some cases, the myth of the decline in property values is actually brought into being either by panic selling or by the unscrupulous practice of blockbusting. White householders are told by real estate speculators that their property will decline because of the recent Negro entrant into the neighborhood. They are encouraged to sell at ridiculously low prices,and later Negroes wishing to buy are forced to pay exorbitant prices for homes in that neighborhood....

Remarks, Senator Mondale, on the floor of the Senate, regarding the Bill he authored. 113 Cong. Rec. #130 p. S 11598 (August 16, 1967.)

> The so-called blockbusters — the conscienceless real estate agents who spread fear and rumor in order to buy sacrificed property — are doing so with a very good understanding of that fact. [The "fact" being that property values do not decrease upon integration of a previously all-white neighborhood.] They are not buying it to take a loss. The very fact that they are buying the property indicates that they know that the very rumor they are spreading — that property values will be destroyed — is not true. They buy the property and they take a profit.

Remarks, Senator Jacob Javits, co-sponsor of the Bill, 113 Cong. Rec. #130 p. S 11603 (August 16, 1967).

> I am particularly pleased that.... [Senator Javits] made note of one of the most odious characters in American society — the blockbuster. As the Senator knows, this measure includes a special provision to make those acts by a blockbuster illegal.
>
> As the Senator has stated, the very nature of that technique puts the lie to the argument that a Negro who moves into a neighborhood reduces the value of property, because the blockbuster's whole strategy is based on a theory that is exactly the opposite, and he profits from it.

Remarks, again of Senator Mondale, 113 Cong. Rec. #130 p. S 11603 (August 16, 1967).

And in his testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Tuesday, August 1, 1967, the then Attorney General of the United States, Ramsey Clark, said at p. 79 of the Hearing Reports,

> The practice of profiteers inducing persons to sell their houses at distress prices by representations regarding entry

> into the neighborhood of members of minority groups, a form of "blockbusting," would be prohibited.

The Government in its Supplemental Memorandum, at page 9, belittles the importance of legislative history in general as a helpful aid in determining the actual intent of the Congress and thus the proper construction of their legislative pronouncements. If such a practice is as unreliable as the Government contends, it is indeed remarkable that the Supreme Court has for so long diligently examined the reports of hearings and records of debate to ascertain the meaning of a statute. It is indeed even more remarkable that the Government, having taken the position that legislative history is weak authority for the meaning of legislation, still cites such authority for its own purposes on pages 1 and 6 of its Supplemental Memorandum, and on pages 2 and 6 of its Pre-Trial Memorandum. Most remarkable, however, in view of what cannot be ignored as some special significance in the words "for profit" in the 1968 Civil Rights Act, Section 804 (e), is the Government's citation to three cases, all of which pre-date the Act here before the Court for construction, which are brought forward to be helpful in deciding what the 1968 Act meant. It is the position of the Defendants that while the entire body of the case law is helpful in construing the legislature's intentions, in that the lawmakers are presumed to know the meanings ascribed to certain words and phrases by the courts, the immediate legislative history undeniably in point is not to be ignored, especially where it might show the reaction by the Congress to those prior judicial determinations as to the effect of their use of the language.

The Defendants assert that the proper meaning of the prohibition of 42 U.S.C. §3604 (e) is the one which gives the most importance and significance to the mandatory signpost "for profit." In no instance in the present case has the Plaintiff shown that the Defendants by their actions caused panic among those residents of Woodbourne Avenue from whom they sought listings. In no instance has it been shown that the listing price agreed to was other than what the owner was seeking for his property or other than a reasonable market price, according to recent voluntary sales of similarly situated property, the accepted measure of fair market value. In fact, it would be a patent absurdity to maintain that it would be in any way in the interest of the Defendants to force the sale price on these properties down, since such activity on their part could have but one result: a smaller commission for them. It is a matter of record in the case that the Defendants' realization of commissions on these sales was wholly a function of the sale price. On the other hand, it is neither alleged nor proved that the Defendants had any agreement with a prospective purchaser which could result in further benefit to them if prices could be kept low. Absent any such showings, and mindful of the burdens the Government bears in this pattern or practice case, McClellan, above, and I.B.E.W., above, a finding of a knowing, purposeful and intentional attempt to deprive the residents of Woodbourne Avenue of the full enjoyment of rights granted them by 42 U.S.C. §3601 et seq. cannot be supported by the facts. Neither can such a finding be supported by reasonable inferences from the few facts that are somehow clearly established on the record.

In summary, it is submitted to the Court that no prohibited racial representations within the meaning of §804(e) of Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §3604(e), were made by the Defendants to any persons. It is submitted that to find as a fact that the alleged racial representations were made would fly in the face of the testimony developed at trial, considering the impeachment of the government witnesses by their prior inconsistent statements in their depositions taken under oath. These were inconsistencies which are not only relevant and material to the issues in this case, but which are inconsistent as to the single operative fact most central to the Plaintiff's case: the fact of the making of racial representations.

It is further submitted that should the trier of fact determine the question of credibility of even a part of the impeached testimony in a way favorable to the Plaintiff, should the Court find that some particular racial representation was in fact made by the Defendants herein, such a finding would amount only to an isolated or sporadic instance insufficient to support a determination that the Defendants engaged in a pattern or practice of resistance to the full enjoyment of rights granted by the Act (42 U.S.C. §3601 et seq.), and that therefore the Attorney General is not entitled to the injunctive relief prayed in this case.

It is further submitted that the time-table for coverage set forth in §803, 42 U.S.C. §3603, must be given effect as a part of the Act, and that the clear and unambiguous effect of that

section, even construed most strongly against the Defendant would preclude as the basis of a finding of a pattern or practice any representations made, if at all, by the Defendants to Mr. Ragonese or to the Lincolns. The Defendants strenuously argue that this strict construction is improper, and that the proper construction would be that testimony introduced to prove any representations to Mr. Ragonese or the Lincolns is immaterial to this controversy, posed as it is in the form of an Attorney General's suit pursuant to the language of 42 U.S.C. §3613, for by the terms of the Act and the definitions therein, these are not persons granted rights by the Act.

It is the position of the Defendant that the instant case can be, and therefore should be decided on the facts as presented in the record, as analized above, and that the relief prayed must be denied due to a complete failure on the part of the Government to bear the burden of persuasion assigned to it by the law in analogous cases. However, the Government in both its Pre-trial Memorandum and its Supplemental Memorandum has raised the issue of the constitutionality of the Act in certain respects, and has submitted to the Court for consideration cases which devote substantial energy to the Constitutional issues. Therefore while it remains the position of the Defendants that the present controversy can be decided without reference to Constitutional questions, it is at the same time felt that the Court should have the benefit of the Defendants' views on the questions of Constitutionality.

The second question raised by the operative substantive section of the Act here involved, 42 U.S.C. §3604(e), is the issue

of Constitutionality. Several theories have been advanced on the Constitutional basis for the Act. Congress has the undoubted power to regulate commerce among the several states, for the said power is given by the Constitution in Article One, Section 8, and many different forms of the exercise of this regulatory power have been upheld by the Courts. It is the position of the Defendants in the instant case, however, that the commerce power of the Congress does not support an attempt to regulate the sale of a house of which it can truly be said that all of its materials have long ago come to rest permanently within this state. In any event, Plaintiff has not adduced any evidence in this case that the activity is in interstate commerce.

Much theory has been recently advanced to the effect that the fifth section of the Fourteenth Amendment can be utilized by the Congress to reach wholly private, in the sense of an absence of state involvement, activities. Until the Supreme Court rules on this theory it must remain exactly that: theory. Those who seriously advocate the principle find their comfort in language from United States v. Guest, 383 U.S. 745 (1966) and the companion case, U.S. v. Price, 383 U.S. 787 (1966). Unfortunately, such comfort is grossly misplaced, in view of the clear holding in both cases of the necessity for state involvement. The Plaintiff in the present case has produced no evidence of state involvement in the acts of the Defendants, and the attempt to regulate their conduct through the Fourteenth Amendment must therefore of necessity fail.

The very recent case of Brown v. State Realty, Civil Action Number 12943, District Court, Northern District of Georgia

(Atlanta Division) (September 2, 1969) has decided that the recent Supreme Court decision in Jones v. A. H. Mayer Co., 392 U.S. 409 (1968) requires a conclusion that the prohibition against blockbusting as it exists in 42 U.S.C. §3604(e) is constitutionally supported by the Thirteenth Amendment. It is the argument of the Defendants in the present case that such a view is erroneous, that the Thirteenth Amendment and its effecting legislation, The Civil Rights Act of 1866, 42 U.S.C. §1982, do not require such a conclusion, and further that to so conclude is to ignore the holding of the Jones case itself. The Jones case can be accurately stated in very simple terms: the effect of the 1866 Civil Rights Act was to conclusively, and constitutionally (pursuant to the necessary and proper clause of the Thirteenth Amendment) bar all racial discrimination, whether it be public or private in character. The Court in Jones took great care to show that there were differences in The Civil Rights Acts of 1866 and 1968, that the two were independent and, while in some areas overlapping, in other particular areas quite different as to conduct reached. The Civil Rights Act of 1866 clearly did not reach any form of blockbusting. Contract Buyers League v. F & F Investment, 300 F. Supp. 210 (N.D.Ill. 1969). The Civil Rights Act of 1866 forbids racial discrimination, and as interpreted by Jones, this reaches any attempt to deny housing to a person because of his race. Where, in any form of blockbusting, does the purported wrongdoer discriminate against any person in the availability of housing? When and how does a blockbuster keep any non-white from enjoying the right to inherit, purchase, sell, lease, convey, or hold realty that is enjoyed by whites? The

holding in Jones v. Mayer, above, is clearly inapposite to blockbusting facts, and the Supreme Court all but announced that conclusion in the opening paragraphs of their opinion. For the District Court in Georgia now to conclude that it must, by sole reference to Jones, uphold the Constitutionality of the 1968 Civil Rights Act is anathema to the very opinion they feel bound by, for the Court in Jones made it abundantly clear that the two Acts are different and independent, the earlier barring only racial discrimination and the later purporting to reach all manner of conduct. It is implicit in Jones that the question of the Constitutionality of the 1968 Act as to portions thereof not prohibiting racial discrimination is reserved.

Respectfully submitted,

/s/

Norman P. Ramsey
Attorney for Defendants

I HEREBY CERTIFY that on this 25th day of Sept., 1969, ~~four~~ 3 copies of the aforegoing Defendants' Memorandum were ~~mailed~~ delivered to Barnet D. Skolnik, Assistant United States Attorney, District of Maryland, Room 409, United States Post Office & Court House Building, Baltimore, Maryland 21202.

Attorney for Defendants