IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General, Plaintiff, v. KNIPPERS AND DAY REAL ESTATE, INC., et al., Defendants.	CIVIL ACTION NO. 68-123 MEMORANDUM IN OPPOSITION TO MOTION TO DROP DEFENDANTS OR SEVER CLAIMS FOR MISJOINDER OF CLAIMS

Defendants, Kenneth C. Owens, Durward Gully, and Gully Agency, Inc., and Defendants, I. W. Knippers, William E. Day, Jr., Town & Country Homes, Inc., K & D Enterprises, Inc., and Knippers & Day Real Estate, Inc., in two separate motions for severance have cited the same grounds and made the same arguments in support of their motions. For the convenience of the Court, the United States will summarize in one memorandum its arguments in opposition to these motions.

I.

It is generally conceded that Rule 20(a) places two requirements on the permissive joinder of parties defendant: (1) that the right to relief asserted against the defendants arise out of the same transaction, occurrence, or series of transactions or occurrences; and (2) that some question of law or fact common to all defendants will arise in the action. 1/ Both requirements must be met. Gilmore

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1 / 2 Barron & Holtzoff, Federal Practice and Procedure §531 (Wright Ed. 1961); 3A Moore, Federal Practice, ¶20.02 (2d Ed. 1967); Nagler v. Admiral Corporation, 248 F. 2d 319, 327-28 (2d Cir. 1957).

v. James, 274 F. Supp. 75 (N.D. Texas 1967) aff'd 389 U.S. 572 (1968). Defendants assert that neither requirement for joinder is present in this case.

Taking first the contention that no question of law or fact common to the defendants will arise in this action, the pleadings and motions already filed in this action should sufficiently refute that contention. Some early decisions indicated that the question of law or fact must be common to the claims joined as well as to the defendants joined; 2/ but the 1966 Amendment to Rule 20(a), Federal Rules of Civil Procedure (Supp. 1968), rejected that view, indicating clearly that it is only necessary that the question of law or fact be common to the parties joined. 3/ Also, the Amendments to Rules 18(a) and 20(a) have reaffirmed, if it was ever doubted, 4/ that joinder does not require that each claim be against all the defendants; 5/ and Rule 20 by its plain wording allows joinder if any question of law or fact is common to all defendants. At the least, several questions of law are common to all defendants in this case and that in itself is sufficient to permit joinder even if no question of fact is common to all defendants. For example, in

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2 / 2 Barron & Holtzoff, Federal Practice and Procedure §533.1 (Wright Ed. 1961).

3 / See, Notes of Advisory Committee on Rules to Rule 20, Federal Rules of Civil Procedure (Supp. 1968).

4 / Eastern Fireproofing Co., Inc. v. United States Gypsum Company, 160 F. Supp. 580, 581 (D. Mass. 1958).

5 / See, Notes of Advisory Committee on Rules to Rules 18(a) and 20(a), Federal Rules of Civil Procedure (Supp. 1968).

Gilmore v. James, 274 F. Supp. 75 (N.D. Texas 1967) supra, the constitutionality of the exaction of a loyalty oath from professors and teachers was a question of law common to all defendants and was the only common question cited as justification for joinder under Rule 20(a). 274 F. Supp. at 89-90. Cf., United States v. Mississippi, 380 U.S. 128, 142 (1965) [as to joining individual voting registrars under Rule 20(a)]. Similarly, in the present case, common to all defendants are the questions of coverage under Section 803(a)(1)(B) and (C) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3603(a)(1)(B) and (C), and of violation of the same section of the Act, §804, 42 U.S.C. §3604, in the same area, where the same conditions exist and under essentially the same circumstances. These common questions of law should satisfy the first requirement for permissive joinder.

II.

Defendants also contend that the right to relief asserted against them does not arise out of the same transaction or occurrence or the same series of transactions or occurrences. Arguably, the right to relief against the various defendants did not arise out of the same transaction or occurrence; but the right to relief did arise out of the same series of transactions or occurrences.

Few cases have discussed what constitutes a series of transactions or occurrences for the purposes of Rule 20(a). At best, the determination must be made on a case by case basis; and the definition in Eastern Fireproofing Co., Inc.

v. United States Gypsum Company, 160 F. Supp. 580 (D. Mass. 1958), is as clear a statement of the test as has been made:

> . . . there can be no hard and fast rule, . . . the approach must be the general one of whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend jointly against them -- at least to some extent. 160 F. Supp. at 581.

Also, in Nagler v. Admiral Corporation, 248 F. 2d 319 (2d Cir. 1957), the Court said in reference to Rule 20:

> It substitutes principles of trial convenience and efficiency for rigid rules of interrelationship of parties. 248 F. 2d at 327.

These antitrust suits, where several defendants were charged with independent attempts to monopolize or with independent acts of unlawful discrimination against a single plaintiff or group of plaintiffs, offer a close analogy to the present case. Likewise, United States v. Mississippi, 380 U.S. 128 (1965), presents an analogous situation where joinder was held to be proper. There the defense contended that six county registrars could not properly be joined in one suit because their acts of discrimination were ". . . nothing more than individual torts committed by them separately with reference to separate applications." 380 U.S. at 142. The Supreme Court found, however, that these separate activities constituted a ". . . series of transactions or occurrences the validity of which is dependent to a large extent upon 'question[s] of law or fact common to all of them.'" 380 U.S. at 142. Cf., Poindexter v. Louisiana Financial Assistance Commission, 258 F. Supp. 158, 165-66 (E.D. La. 1966) aff'd 389 U.S. 571 (1968).

Similarly, in the instant case the validity of the separate acts of racial discrimination in which each defendant engaged depends to a large extent upon common questions of law or fact. Each defendant in control of the subdivisions named in the complaint engaged in acts of discrimination at approximately the same time in the same local area and against the same potential purchaser. Under the authorities, those factual concurrences should be sufficient to permit the conclusion that the defendants' separate acts of discrimination constitute the same "series of transactions or occurrences" for the purpose of joinder under Rule 20(a).

III.

In the end, the overriding consideration in determining whether a party should be dropped or a claim severed is that a multiplicity of suits ought to be avoided for the convenience of the court and the parties, if that result can be accomplished without prejudicing any party to the action. Rule 18(a) on unlimited joinder of claims, Rules 19 and 20 on joinder of parties, Rule 22 on interpleader, Rule 24 on intervention and Rule 42(a) on consolidation of actions provide a variety of methods for avoiding a repetition of actions concerning common questions of law or fact and reflect the strong federal policy of joining as many claims and parties as can fairly be joined in one action. To accomplish this result, the language of Rule 20(a) should be given the broadest possible reading. 6/

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6 / 2 Barron & Holtzoff, Federal Practice and Procedure §§531 and 533 (Wright Ed. 1961).

Although the defendants have alleged that they would be prejudiced by being joined in this action, they state no fact that indicates how they will be prejudiced, and the proceedings thus far have not resulted in any embarrassment or inconvenience to the defendants that would justify putting this Court to the inconvenience of three separate trials. When the trial is before a judge sitting without a jury, there is no likelihood that multiple defendants will be prejudiced by being joined in one suit and thus there is no need for severing claims or dropping defendants. If any prejudice or embarrassment should appear later in the proceedings, Rule 20(b) provides the Court with an effective remedy. Goodman v. H. Hentz & Co., 265 F. Supp. 440, 443 (N.D. Ill. 1967). As stated in Nagler v. Admiral Corporation, 248 F. 2d 319 (2d Cir. 1957) supra:

> To force on this already overcrowded court the necessity of separate actions -- with accompanying pleading, discovery, pre-trial, and trial activities -- in all the various combinations possible . . . would be quite intolerable. On the other hand, at this preliminary stage joinder seems to have attractive possibilities. . . . And there is always at hand the authority to order separate trials of particular issues. 248 F. 2d at 328.

Another reason makes a broad reading of Rule 20(a) even more appropriate in the present case. Section 813 obviously contemplated that this type of multiple-defendants suit would be brought by the United States. By the terms of the Section, when the Attorney General has reasonable cause to believe that "any . . . group of persons is engaged in a pattern or practice of resistance. . ., he may bring a civil action . . . against the . . . persons responsible. . . ." The term "person" includes all of the

entities joined as defendants in this suit. Section 802(d), Title VIII of the Civil Rights Act of 1968. It is not necessary to show that the individual persons in the group conspired or agreed to a certain line of resistance. Therefore, this type of multiple-defendant suit where the group of defendants engaged in the same type of discrimination, at approximately the same time, in the same local area, and against the same potential purchaser must have been contemplated by the Act; and those factual concurrences should be sufficient to satisfy Rule 20(a). Under analogous "pattern or practice" statutes, the United States has in the past often brought litigation against multiple defendants under such sets of circumstances and has obtained injunctive orders against all the parties in such actions. See, e.g., United States v. The Warren Co., et al., Civil Action No. 3437-64 (S.D. Ala.) June 30, 1965.

Moreover, the legislative history concerning the "pattern or practice" authority of the Attorney General clearly indicates that Section 813 was intended to authorize this type of suit against multiple defendants. In the debates on the 1964 Act, 7/ Senator Humphrey stated:

> That is where several companies are involved the Attorney General could not show a pattern or practice by proving that one company refused to serve a Negro because of his race and several other companies also refused service but for legitimate reasons. That kind of a showing would not satisfy the requirement of intent; what is required is a showing of intentional discrimination. Intention could, of course, be proved by, or inferred from, words, conduct, or both. The issue would then be whether, as

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7/ The 1964 Act grants a "pattern or practice" authority to the Attorney General in public accommodations and equal employment cases that is closely analogous to the authority granted by Section 813.

> a matter of fact, there was a refusal of service or employment amounting to a pattern or practice, not whether the companies acted in concert or conspiracy. And the bill would authorize the Attorney General to join all or some of several defendants in the same action. 110 Cong. Rec. 14270 (June 18, 1964) (emphasis supplied).

Likewise, Senator Magnuson, in explaining why only the Attorney General could request a three-judge court under Title II, stated:

> As suits by the Attorney General under title II and suits involving a probability of a three-judge court under title VII will involve a pattern or practice it is anticipated that most cases will involve a substantial number of defendants. 110 Cong. Rec. 12,947 (June 8, 1964) (emphasis supplied).

These statements and the judicial history of pattern or practice suits against multiple defendants clearly indicate Congress' understanding that in pattern or practice cases the Attorney General is authorized to join all defendants located in the same area when they will not be prejudiced by such joinder. If it were otherwise, enforcement efforts would be hampered, and the relief obtained would not be as effective in promoting the discontinuance of resistance to the rights granted by Title VIII in the local area or line of business.

Rule 42(a), in allowing the trial judge on his own motion to consolidate separate actions merely because they contain a common question of law or a common question of fact, evinces the strong federal policy of conserving the efforts of the court. Rule 20(a) permits a plaintiff to affect the same consolidation in the first instance if ". . . the right to relief [is] in respect of or arising out of the same . . . series transactions or occurrences...."

Cases that have given this rule a properly broad interpretation 8/ have indicated that this requirement means only that the interest of the plaintiff in obtaining the requested relief must be related to his separate transactions with each defendant in some way that is common to all defendants. 9/

The interest of the United States in obtaining the relief requested here is expressed in §801: ". . . to provide, within constitutional limitations, fair housing throughout the United States." 42 U.S.C. §3601. In furtherance of that interest, the United States has brought this suit charging each defendant with resisting the full enjoyment by Negroes of the rights granted to them by Title VIII. The relief sought is an injunction to prevent the continuation of the policy and practices of resistance. The interest of the United States in obtaining that relief is clearly related to the separate acts of each defendant in a manner common to all defendants. Whether the acts of discrimination were against the same Negro at the same time or against various Negroes at separate times, they were committed in the same local area, under the same local conditions, by defendants engaged in the same line of business, and are charged as violations of the same section

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8/ Since the 1966 Amendment made it clear that Rule 20 was to be broadly applied, restrictive interpretations prior to that Amendment must be viewed with some circumspection.

9/ If a plaintiff were a private individual, for example, he could not sue one realtor for violation of 42 U.S.C. §1982 and join in the same suit another realtor for breach of warranty of good title. There is no common denominator in the relief sought on those separate transactions that would lend any "sameness" or "identity" to the series of separate transactions. But an individual plaintiff could join in one action any number of local realtors who had refused to sell him a house in violation of §1982. In such a case, the common relief sought for a violation of law common to all defendants (such as damages resulting from the unlawful acts of discrimination) would justify joinder under Rule 20(a). Cf. McNeil v. American Export Lines, Inc., 166 F. Supp. 427 (E.D. Pa. 1958); Foster v. Central Gulf Steamship Corp., 25 F.R.D. 18 (E.D. Pa. 1960).

of the Act. These common concurrences of fact and law give a "sameness" or "identity" to the series of separate transactions by the defendants that justifies constituting them the "same series of transactions" for the purposes of Rule 20(a).

The interest of the Court in joining these defendants is apparent. Otherwise, three separate pre-trials would be required; discovery and deposition proceedings would be complicated; factual issues and law issues common to all defendants would have to be developed and considered three separate times; and the witnesses common to all defendants would have to be brought to court three separate times for three separate trials. Rule 20(a) was designed to prevent these inconveniences; it should be given an interpretation that will accomplish its purpose.

For the foregoing reasons, defendants' motions to drop defendants and sever claims should be denied.

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