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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,)

14)
15 Plaintiff,)

16 v.)

17 YOURITAN CONSTRUCTION COMPANY,)
18 a corporation; SHU TSUN TAN,)
19 JOAN E. CHANG TAN, individually)
and d/b/a TAN CONSTRUCTION COMPANY,)

20 Defendants.)
21)

) CIVIL ACTION
) NO. C-71-1163 ACW

) REPLY MEMORANDUM OF
) THE UNITED STATES

22 INTRODUCTION

23 On or about December 1, 1972, following an unusual
24 number of extensions, the United States received from
25 defendants a brief and appendices totalling more than two
26 hundred pages. The memorandum is replete with elaborate
27 rhetoric */ which appears to us to bear little relation to
28

29
30 */
31 See, for example, subject headings, such as "The Phillips
32 incident disproves plaintiff's whole case" and "fifty-four
witnesses, former Tan employees, interviewed by the FBI gave
proof there was no pattern or practice of discrimination"
this reference being to persons whom defendants could have
but did not call as witnesses.

1 the facts of the case. Since the Court had an opportunity
2 to hear the witnesses at a lengthy trial, and since
3 plaintiff's basic contentions are set forth in our
4 previously filed Proposed Findings of Fact and Conclusions
5 of Law, we do not now present anything purporting to be
6 an exhaustive analysis of evidence with which the Court
7 is already familiar. We confine ourselves, instead, to
8 rebutting a number of important, factual and legal themes
9 presented by defendants in their brief.
10

11 1. Defendants' attack on the testimony of the
12 "inside witnesses."
13

14 In the final analysis, the question whether
15 defendants, by Mrs. Boatwright, gave discriminatory
16 instructions, or made admissions of a racially discriminatory
17 policy, to Linda Tappan, Lynette Watkins, Marjorie Dwyer,
18 Betty Summers and Kenneth Romines must turn on the Court's
19 assessment of credibility. Since much of that determination
20 depends on the Court's appraisal of demeanor, there is
21 only a limited amount that can be said about this
22 issue. Nevertheless, we believe that defendants' lengthy
23 denunciation of alleged inconsistencies and bias is
24 somewhat overdrawn, and misses the central consistency
25 of the insiders' accounts.
26

27 It is true that there are some variations between
28 these witnesses as to what was said, when and where.
29 This, however, is a natural failing of witnesses. When
30 ten persons witness an accident at which an automobile
31 strikes a pedestrian, there are likely to be ten
32

1 different descriptions of the car, the driver, the
2 pedestrian, the lighting, the speed at which the driver
3 was travelling, and the length of time the transaction
4 lasted. But one thing common to all of the witnesses
5 will be their recollection that the automobile hit
6 the driver.
7

8 So it was here. While recollection of a few
9 individual transactions varied, each of plaintiff's
10 "inside" witnesses recalled, plainly and unequivocally,
11 that Mrs. Boatwright ordered or acknowledged racial
12 discrimination to them. Defendants' star witness,
13 Mrs. Colston, also testified that, Mrs. Boatwright lumped
14 Negroes among the undesirables. In general, the practices
15 described by the "inside" witnesses coincide with the
16 experiences of the bona fide applicants and the testers
17 in terms of both misrepresentation of unavailability and
18 the use of "credit checks" to deter and discourage
19 blacks. Moreover, at the time of these events, there
20 were no black tenants at the Americana. We submit that
21 to hold in defendant's favor on the basic issue of an
22 exclusionary policy at the Americana, the Court would
23 have to find that the five insiders all fabricated
24 Mrs. Boatwright's racial discrimination. We do not think
25 such a finding is compatible with the evidence.
26
27

28 Defendants also make much of these witnesses'
29 alleged bias, and it does appear that some of them may
30 not have been ardent admirers of Mrs. Boatwright.
31
32 Indeed, there may well have been reason for this. It

1 should be recalled, however, that these witnesses are
2 not complainants to the Government; their experiences
3 came to plaintiff's attention when their identities
4 were disclosed by pretrial discovery and they were
5 interviewed by the FBI. There is no suggestion that they
6 are volunteers who testified out of spite, and we submit
7 that their demeanor at trial belied any such suggestion.
8 Moreover, a number of defendants' attributions of bias
9 are one-sided, to say the least. At page 13 of their
10 brief, defendants purport to use Lynette Watkins'
11 negative reaction to a proposed line of questioning by
12 counsel for defendant which this Court ruled to be
13 highly improper, to argue that her testimony is
14 incredible because of bias.

15
16
17 Defendants also claim that the insider testimony
18 was contradicted by other former employees who
19 testified that they received no discriminatory
20 instructions. A more objective description of this
21 testimony would have revealed that these witnesses were
22 not employed at the Americana at the time plaintiff's
23 witnesses were there.*/
24

25
26 */
27 See RT-IV-73-79; VI-22-23 and D. Exh. AP, at
28 pp. 3-4.

29 #####
30 #####
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1 2. The Former Employees and Post-Suit Testers

2 Who Did Not Testify.

3 It was stipulated that in preparation for trial,
4 the United States interviewed 59 former employees of Tan
5 (RT-V-24-25). It was not stipulated that this number
6 constituted the total number of Tan's former employees,
7 which it did not. The United States introduced the
8 testimony of eight of these former employees^{*/} at
9 trial to prove discrimination by defendants. By a conjuring
10 trick worthy of Houdini, defendants now claim that since
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14
15 ^{*/} Linda Tappan, Lynette Watkins, Marjorie Dwyer,
16 Lupine Tatum, Kenneth Romines, (RT-I-1), Betty
17 Summers, Harold Milner (RT-II-i); and Kathryn
18 Hambley (RT-III-337-338).

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1 plaintiff did not call the remaining 51 witnesses,*/ the
2 inference is to be drawn that such witnesses would
3 necessarily have testified that no discrimination occurred.

4 But nothing has been stipulated as to what the
5 testimony of these witnesses would have been, and they
6 were at least as available to the defendants as they were
7 to the United States. In fact, a witness of this kind
8 would ordinarily have every reason to testify in favor
9 of defendants, for if there was discrimination, he may
10 have been implicated and therefore reluctant to admit
11 it, while if there was no discrimination, he has every
12 reason to testify enthusiastically. A former employee
13 is therefore more naturally a witness for defendants than
14 for plaintiff. For this reason, almost any defendant in a
15 civil rights case is in a position to present his own
16 testimony or that of his agents denying any unlawful
17 conduct. Such denials are therefore greeted with a certain
18 degree of skepticism where statistical or other evidence
19 makes out a prima facie case of discrimination. Turner v.
20 Fouche, 396 U.S. 346 (1970); Jones v. Lee Way Motor Freight,
21 Inc., 431 F.2d 245, 247 (10th Cir. 1970). Under these
22 circumstances, we believe it would be unreasonable to
23 infer from the failure of both parties to call certain
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29 */ Defendants go further and say fifty-four, not fifty-one,
30 witnesses are inferentially favorable to them. But fifty-
31 nine minus eight is fifty-one, not fifty four.

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1 former employees that the facts which are in those
2 employees' heads, but nowhere in the record, favor one
3 party rather than the other.

4 Defendants also seek to establish by inference
5 what they did not prove by testimony about "tests" of
6 Tan buildings by MCFH after this suit was brought. With
7 the exception of one test^{*}/ by a black - white team
8 at Tan Manor in July 1971, which was proved by the
9 United States, there was no other competent^{**}/ evidence
10 on post-suit tests. Defendants rely on written testing
11 reports, but since they could have but did not call the
12 testers to the stand, plaintiff had no opportunity to
13 cross-examine. Consequently, the facts were not
14 established in accordance with the traditional adversary
15 system, and defendants now present pure hearsay and ask
16 its acceptance as proof of compliance.^{***}/

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21 ^{*}/ See the testimony of Joe Ellen Murphy and Pam Wimberly
22 concerning their dissimilar experience concerning
availability at Tan Manor. (RT-II-240-246 and 270-274).

23 ^{**}/ Defendants did offer the deposition of Alan
24 MacPherson and the exhibits attached thereto in evidence.
25 See Defendants' exhibit AT. Some of the exhibits were
audit reports (see manila folder marked AM-4) dealing
with the experiences of white and black testers.

26 ^{***}/ The weight to be accorded post-suit events due to their
27 self serving nature is limited in any event. United States
28 v. West Peachtree Tenth Corp., 437 F.2d 221, 224
29 (5th Cir. 1971). Thus in the context of the present case,
the defendants' post-suit statistics (see RT-V-32-33)
30 and the letter from MCFH to Tan in December 1971 should,
like the post-suit "tests" be viewed with caution.

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1 3. Disparate Treatment of Black and White Testers

2 A part of the Government's case consisted of the
3 experiences of white and black testers,* / who received dis-
4 similar treatment at Tan buildings. These testers can be
5 divided into four groups (i.e., (1) Gross-Johnson visits;
6 (2) Brandt-Smith-McCullen visits; (3) Murphy-Wimberly visit;
7 and (4) the Bredt-Evans visit). Except for some discussion
8 in the appendices** /, however, we confine ourselves here to
9 the experiences of the first of these four pairs.
10

11 Gross and Johnson visited eight of Tan's buildings.
12 While the Government established by these witnesses that
13 defendants, through their managers and agents, used their
14 "credit check" ruse to discourage black prospects from these
15 buildings, this evidence was offered to prove discriminatory
16 misrepresentations of unavailability at only three Tan
17 buildings (Tan Village, Tan House, and Tan Plaza Inter-
18 national). At each of these, the proof was sufficient to
19 show that vacancies offered to whites were not made avail-
20 able to blacks.
21
22

23 Defendants attempt to discredit the testimony of
24 Gross and Johnson by arguing that the two allegedly asked
25 for different types of accommodations (furnished and unfur-
26 nished) at some of the buildings. But apart from the fact
27

28 * / These persons were matched up in many reports so as to
29 eliminate differences which could be used for rejection
(RT-I-171-172; 191-192).

30 ** / Appendix "A" deals with the Gross-Johnson experiences
31 at Tan Village. Appendix "B" describes the Murphy-Wimberly
32 test, conducted after suit was brought. Appendix "C" dis-
cusses the Brandt-Smith-McCullen tests in connection with
defendants' motion to strike.

1 that plaintiff is only raising the question of availability
2 at three buildings, there are other operative variables which
3 show that defendants discriminatorily misrepresented the
4 status of availability apartments to Mr. Johnson on at least
5 three occasions. At Tan Village, there were at least five
6 apartments of the character he requested available at the
7 time (see P. Exhibit 1, (A) (4)). Defendant's contention
8 that these apartments, while vacant, were not available for
9 immediate rental, is incredible. See appendix "A". At Tan
10 Plaza International, after both testers visited the complex,
11 Gross called back and was told an apartment was still avail-
12 able.
13

14
15 With respect to Tan House, defendants claim that
16 Johnson only asked for an unfurnished one-bedroom apartment.*/
17 They assert that even though there was a furnished one-
18 bedroom apartment available at the time, it would have been
19 impossible to convert the apartment to an unfurnished unit
20 because of lack of storage space. But Mrs. Adonis' own
21 testimony indicates that there were several vacant apartments
22 available at the time.**/ Therefore, by her own admission,
23 there was existing temporary storage space***/ for the
24

25 */ Gross asked for a furnished apartment.

26 **/ Mrs. Adonis acknowledged that there was an exception to
27 the practice of not removing furniture from furnished apart-
28 ments when there were more than one or two vacant apartments
(RT-IV-6).

29 ***/ According to defendant's records (see Plaintiff's
30 Exhibit (A) (1) (5), January 24, 1971), there were at least
31 14 vacant apartments which could have been utilized for
storage of furniture from other apartment units.

1 furniture. Second, even though defendants had permanent
2 storage facilities at Tan Village (very close to Tan House)*/
3 and a company truck to move furniture and goods from the
4 various Tan buildings to the storage area at Tan Village,
5 Mrs. Adonis related that it was company practice not to move
6 furniture from Tan House to another Tan apartment building,
7 and even made the implausible assertion that Tan House never
8 unfurnished an apartment for a prospect (RT-IV-6-7). Such
9 a practice, at a time of many vacancies, would have been
10 entirely inconsistent with Mr. Tan's directive that vacant
11 apartments should be rented as quickly as possible.**/
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29 */ See Defendant's Exhibit G.

30 **/ See Plaintiff's Exhibit 9, memo from Tan to all apart-
31 ment managers.

1 4. The Use of "Testing" Evidence

2 In relation to the disparate treatment of black and
3 white "testers" or "auditors," defendants claim (pp. 152,
4 et seq.)

5 (1) That a claim based solely on the
6 experiences of auditors does not present
7 a case or controversy; and

8 (2) 42 U.S.C. 3604 requires that
9 housing discrimination suits be brought
10 by or for bona fide dwelling unit seekers.

11 Each of the foregoing propositions misstates the issue in
12 this case. Irrespective of whether the first proposition
13 is true or false, the present suit is not based solely on
14 the experiences of auditors. On the contrary, the case is
15 based in large part on the testimony of "inside witnesses"
16 and a few bona fide applicants, and the auditors' experiences
17 are not the wrong for which suit was brought, but merely
18 evidence of defendant's discriminatory practices. With
19 respect to the second proposition, this action was instituted
20 by the United States on behalf of its citizens, and with
21 particular reference to actual and prospective victims of
22 discrimination. The "testers" or "auditors" are not pro-
23 spective beneficiaries of the suit, but have provided
24 evidence which is designed to assist other persons to obtain
25 their rights.

26 The authorities cited in our proposed Conclusions
27 of Law 12 through 14 conclusively establish that the "bona
28 fide" requirement applies only to discriminatory refusals
29

1 to sell or rent.

2 The legislative history conforms to the foregoing.
3 During the debates on the Senate Floor regarding the enact-
4 ment of Title VIII, Senator Allott offered the following
5 amendment (No. 544) to what is now Section 3604(a) of the
6 Act:
7

8 after the word 'rent' insert the
9 following: After the making of
a bona fide offer, or.*/

10 In arguing for the adoption of his amendment, Senator Allott
11 offered the following explanation regarding its purpose and
12 scope:
13

14 Mr. President, this amendment is
15 applicable to page 11, line 7. In
16 essence, it would make the penalty
17 provisions of the proposed legisla-
tion applicable only where there is
a refusal to sell or rent after a
bona fide offer has been made. **/

18 In response to an inquiry by a fellow Senator concern-
19 ing its scope of operation, Senator Allott stated that:
20

21 . . . It applies to sale or rental --
the first four words only of line 7.

22 It will be noted that the latter
23 part of paragraph (a) is not condi-
24 tional upon a bona fide offer, because
the amendment as offered concludes
25 with the word "or" rather than "and." ***/

26 The foregoing discloses that, proponents of the
27 amendment intended to limit the bona fide requirement to
28 the refusal to rent category of section 804(a). Had they

29
30 */ 114 Cong. Rec. 5515.

31 **/ 114 Cong. Rec. 5515.

32 ***/ Ibid at p. 5515.

1 also desired to condition the succeeding provisos of Section
2 804 upon a bona fide requirement, it would have been a
3 simple task to add such qualifying language. The fact that
4 they did not do so indicates an intention to give it limited
5 application.
6

7 Defendants, while acknowledging that Dubose v. Gorey
8 Realty Company, No. 69-C-422 (N.D. Ill. 1969) construes the
9 "bona fide" requirement as did Senator Allott, suggest that
10 United States v. Gilman, 341 F. Supp. 891 (S.D. N.Y. 1972)
11 is to the contrary. A reading of that case refutes defen-
12 dants' claim. Judge Levet, while observing that the
13 auditors in Gilman represented themselves to be bona fide
14 applicants, admitted extensive evidence of "auditing," but
15 found with respect to the incident to which defendants here
16 allude that no discriminatory misrepresentation of avail-
17 ability was made. There is nothing in the opinion suggest-
18 ing that the "bona fide" requirement should be read into any
19 portion of the statute other than the portion in which it
20 was inserted.
21
22

23 The legislative history cited by defendants discloses
24 that members of Congress were concerned -- and understand-
25 ably so -- that "phony" plaintiffs who might be "on a lark
26 or whatever," */ or engaged in "agitation for agitation's
27 sake" **/ should not be able to bring contrived suits and
28 recover damages for injuries to them which are entirely
29

30 */ See, e.g. the remarks of Senator Mondale, 114 Cong. Rec.
31 5516.

32 **/ Remarks of Senator Scott, Id at 5515.

1 unreal. But there is nothing in this legislative history
2 which suggests that audit evidence is not to be used in a
3 suit brought by a legitimate plaintiff, such as the Attorney
4 General in an action under 42 U.S.C. 3613.

5
6 When he brings a suit to enjoin racial discrimination,
7 the Attorney General asserts the interest of the people of
8 the United States -- an interest which is both cognizable
9 and separate from that of the persons against whom dis-
10 crimination was practiced. United States v. Raines, 362
11 U.S. 17 (1959). Since equity looks to the future, he is
12 entitled to injunctive relief if he shows significant past
13 violations, or, in the absence of past violations, if he
14 shows a threat or likelihood of future unlawful conduct.
15 Swift & Co. v. United States, 276 U.S. 311, 326 (1928);
16 United States v. Reddoch, C.A. No. 6541-71-P (S.D. Ala.
17 1971), Conclusion of Law No. 15, aff'd ____ F. 2d ____
18 (5th Cir. 1972). Even if the discriminatory treatment of
19 testers were not itself a violation of the Act, it would
20 still be admissible as bearing on how defendants are likely
21 to conduct themselves vis-a-vis bona fide applicants,
22 cf. United States v. Mintzes, 304 F. Supp. 1305, 1310
23 (D. Md. 1969), especially where, as here, there is no
24 evidence defendants knew that the testers were, in fact,
25 testers. The "testers" are not plaintiffs and seek no
26 monetary or other relief, such as that disallowed in Dubose,
27 supra. The United States has sued for injunctive relief
28 alone, which was granted in Dubose, supra. Accordingly,
29 the concerns expressed by Senators Scott and Mondale and
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1 others do not arise in this case, and there is no reason in
2 law or public policy to exclude persuasive and probative
3 evidence from consideration when the right of the United
4 States to relief is being determined.

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1 5. The "Clean Hands" Defense.

2 Defendants apparently contend that the United States
3 forfeited any right to equitable relief by failing to
4 negotiate with them prior to filing suit and by failing to
5 enter into an out-of-court agreement with them after suit
6 was brought. We think that plaintiff acted properly and
7 that there is no authority to support defendants'
8 contentions.
9

10 Under defendants' "clean hands" argument the
11 United States would not be entitled to relief even if
12 it proved a pattern or practice of racial discrimination,
13 or the denial of rights to a group of persons raising the
14 issue of general public importance as required by
15 42 U.S.C. 3613. Under their theory, the right of blacks to
16 live on a nondiscriminatory basis at various Tan apartment
17 buildings would depend on matters quite extraneous to the
18 defendants' practices. This is a proposition which we
19 do not think a court could lightly accept, at least in
20 the absence of the most serious misconduct on plaintiff's
21 part. As the court stated in United States v. Board of
22 Educations of Lincoln County, 295 F. Supp. 1041, 1042
23 (S.D. Ga. 1968):
24
25

26 While the general principles of
27 equity apply to actions brought
28 by the United States 'they will
29 not be applied to frustrate the
30 purpose of its laws or to thwart
31 public policy'. Pan American
32 Petroleum and Transport Company
v. United States, 273 U.S. 456
506, 47 S.Ct. 416, 424, 71 L.
Ed. 734. The "clean hands"
principle cannot be resorted

1 to where it application would
2 have such an effect. Deseret
3 Apartments, Inc. v. United States
4 10 Cir. 250 F.2d 457; Bloomfield
Steamship Company v. United States,
D. C. 258 F. Supp. 891.

5 See also United States v. Hunter, 459 F.2d 205, 220 (4th
6 Cir. 1972), modifying 324 F. Supp. 529 (D.Md. 1971), on
7 which defendants rely.

8 But, in any event, there has been no improper
9 conduct by the United States. There are, indeed, statutes
10 which do require notice to defendants prior to suit.
11

12 For example, 42 U.S.C. 2000 C - 6 permits
13 suits by the Attorney General to desegregate school
14 systems only after a statutory notice has been given to
15 the school authorities. But the Fair Housing Act contains
16 no such provision. Accordingly, Congress has vested in
17 the Attorney General discretion whether to write a letter
18 and negotiate for an agreement, or to bring suit and seek
19 an injunction (by litigation or by consent), and left the
20 determination whether an injunction is proper to the court.
21 In the instant case, the record reveals that the
22 defendants had received at least three known housing
23 discrimination complaints by black apartment seekers
24 since 1967.*/ Nevertheless, years later, blacks were still
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28 */ FEPC complaint by Cottons in 1967 (RT-V-23-24); private
29 suit by Fitch in 1970 (RT-II-104); HUD complaint by Miss
DuBrossac in 1971 (RT-V-13).

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1 being subjected to discrimination, and the United States
2 therefore sued.

3 Defendants also contend that the conciliation
4 requirements of 42 U.S.C. 3610 should apply to suits
5 by the Attorney General. They do not. See United States
6 v. Luebke, 345 F. Supp. 179 (D. Colo. 1972)

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1 6. Proof Requirements Under 42 U.S.C. 3613.

2 At page 161 of their brief, defendants contend that
3 it is incumbent on plaintiff to show a pattern or practice
4 of intentional discrimination in housing, and that in-
5 sufficient supervision of employees resulting in "un-
6 authorized" discrimination is therefore not actionable under
7 Section 3613. This proposition misstates the governing
8 law.
9

10 The civil rights laws are directed to practices with
11 discriminatory consequences, without regard to defendants'
12 motivation. See our proposed Conclusion of Law No. 10, and
13 Carmical v. Craven, 451 F. 2d 399 (9th Cir. 1971). The
14 statute prohibits thoughtless as well as intentional denials
15 of equal opportunity, and the duty to comply with the Act
16 has been held to be nondelegable. See our proposed Con-
17 clusion of Law No. 7. Defendants, at page 161, cite two
18 decisions under the fair employment law to support an
19 "intent" requirement in this case, but intent is explicitly
20 included in the language of the employment statute,^{*/} while
21 the Fair Housing Act contains no reference to it at all.
22
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24

25 ^{*/} Even the explicit intent requirement in Title VII does
26 not require evil motivation. In Rowe v. General Motors
27 Corp., 457 F. 2d 348 (5th Cir. 1972), the Court, in
28 imposing injunctive relief even against an employer with
29 a remarkable record of affirmative action so as to preclude
30 discrimination by lower echelon officials, noted that
31 "intentional means only that the activity or practice was
32 not accidental," Id. at 359-360, and that only business
necessity can justify practices which discriminate even
inadvertently (Id. at 354). See also United States v.
Mintzes, 304 F. Supp. 1505 (D. Md. 1969) (bad intent not
required under 42 U.S.C. 3613.)

1 Defendants also seek to differentiate extrajudicial
2 admissions by agents with full rental authority from those
3 by agents who lack it. This distinction is hardly plausible
4 in the context of Mrs. Boatwright at the Americana. The
5 discrimination alleged consists of racially based misrep-
6 resentations of unavailability and of discouragement of
7 blacks through the racially selective credit check ruse.
8 Mrs. Boatwright had sufficient autonomy not only to dis-
9 criminate in the respects indicated, but to instruct
10 several subordinates to do so as well. That, without more,
11 is a pattern or practice of discrimination, United States v.
12 Reddoch, supra, Conclusion of Law No. 13, and a group denial
13 of rights, id, Conclusion of Law No. 15; United States v.
14 Real Estate Development Corp., 347 F. Supp. 776 (N.D. Miss.
15 1972).

16
17
18 With respect to the "second alternative" under
19 Section 3613 -- denial of rights to a group of persons --
20 defendants say that this case, to which they have addressed
21 200 pages raising innumerable issues -- is unimportant,
22 irrespective of the Attorney General's determination to
23 the contrary. This contention leaves unanswered the cases
24 expressly holding that the Attorney General's determination
25 of general public importance is not subject to judicial
26 review.^{*/} Even assuming that this Court would or should
27 ever review the Attorney General's determination, we do not
28 think it should overturn that determination in the first
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32 ^{*/} See our Proposed Conclusion of Law No. 20.

1 pattern or practice housing suit to go to trial in California,
2 which involves a major apartment company, in which the use
3 of "testing" evidence has been so energetically challenged,
4 in which the nondelegability of the duty to comply with the
5 Act is placed in question, in which issue has been joined
6 as to the inferences to be drawn by the parties' failure
7 to call former employees as witnesses, and in which the
8 relevancy of statistics, employment practices, and many
9 other facts is in dispute.

11 Defendants next contend that the proof insufficiently
12 identifies the "group of persons" whose rights were denied.
13 In United States v. Hunter, 459 F. 2d 205, 218, note 17
14 (4th Cir. 1972), there was no evidence that identifiable
15 blacks had even read the discriminatory advertisements
16 in question, but a group denial of rights was found.
17 Similarly, in United States v. Real Estate Dev. Corp., 347
18 F. Supp. 776, 785 (N.D. Miss. 1972), in which no identifi-
19 able black victim existed, the Court said:

22 The group of persons whose rights were
23 denied for purposes of the 'second
24 alternative' of 42 U.S.C. 3613 include
25 not only the blacks as to whose
26 rejection Mrs. Hoskins testified, but
27 also all those who did not come to
28 apply to the apartments as a result
29 of Mr. Leach's conduct and the apart-
30 ments' all-white image.

31 * * *

32 Even if only the testimony and the statistics as to
the Americana are considered -- and there is no reason for
the case to be so restricted -- the testimony of the five
insiders conclusively establishes a "pattern or practice"

1 and a prohibited denial of rights there. United States v.
2 Reddoch, supra; United States v. Real Estate Development
3 Corp., supra. Proof of a pattern or practice at a single
4 building warrants injunctive relief as to all buildings
5 operated by the defendants. United States v. Reddoch,
6 supra; United States v. Gilman, supra.^{*/}
7

8 Nor is the problem cured, as defendants intimate,
9 by the fact that Mrs. Boatwright no longer works for them.
10 In the first place, some disparate treatment was proved
11 at trial at no fewer than eight buildings. But even if
12 only the Americana were considered, relief in equity cases
13 is not limited to the particular employee who did the
14 discriminating. When their agent, Mrs. Bowman discriminated,
15 defendants discriminated. Rule 65 of the Federal Rules of
16 Civil Procedure provides that an injunction will lie
17 against all of their officers, employees, agents, and
18 against persons acting in concert with them. In civil
19 rights cases especially, injunctions are not to be
20 grudgingly issued and their scope should be broad enough
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25 ^{*/} With respect to relief, defendants claim that there is
26 no authority for requiring them to undo the white image
27 of several complexes by advertising in the black media.
28 This kind of relief has been required, however, in employ-
29 ment discrimination cases, see, e.g. United States v. Iron-
30 workers Local No. 86, 443 F. 2d 544 (9th Cir. 1971). aff'd
31 315 F. Supp. 1202, 1249 (W.D. Wash. 1970); and in numerous
32 consent decrees in housing cases brought by the Attorney
General, including the only other such case brought in
this district. United States v. WESCO, C.A. No. C-71-1164
(N.D. Calif. December 3, 1971). See also HUD's Affirma-
tive Marketing Guidelines, 24 C.F.R. Part 200, and
Advertising Guidelines, 37 F.R. 6700.

1 to assure correction of the wrongs done.^{*/} In this context,
2 it would be incongruous to require the Attorney General,
3 if he can prove Tan discriminated through Mrs. Boatwright,
4 to bring another case alleging new discrimination by new
5 employees before securing the injunctive relief which the
6 Act provides.
7

8 CONCLUSION

9 For the foregoing reasons, we respectfully pray that
10 the Court enter Findings of Fact, Conclusions of Law and
11 a decree consistent with our proposals.
12

13 Respectfully submitted,
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31 ^{*/} See authorities cited in support of our Proposed Con-
32 clusion of Law No. 23; also Rowe v. General Motors, 457
F. 2d 348 (5th Cir. 1972).

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This 15th day of December, 1972

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APPENDIX "A"

The Tan Village Tests

Although acknowledging that there were numerous vacant apartments at Tan Village on the date of Mr. Johnson's visit on January 24, 1971, defendants claim that, due to their dirty condition and the lack of available manpower to clean them, the vacant apartments were not suitable for rental. It is difficult to understand how defendants can argue on the one hand that they had a large number of vacant 2 bedroom apartments which they could not clean, and therefore could not rent, from August 1970 to January 24, 1971 and beyond -- a result squarely contrary to their announced business policy of renting apartments as soon as possible so as to not lose rental income^{*/} -- and then in the next breath acknowledge that in early January 1971, they were able to muster up enough manpower, not only to clean three apartments which became vacant during the latter part of December 1970 but also to remove the furniture from two of them.^{**/}

Defendants' general claim that the fact an apartment was vacant did not mean it was available for rental is not supported by the record. Two former custodial employees of defendants (Harold Milner, RT-II-167-168, and Lupine Tatum, see Pl. Exh. 4E), have testified that it only took about two hours to clean a vacated apartment for a new tenant.

^{*/} See Plaintiff's Exhibit No. 9, Memorandum dated Sept. 17, 1968, from Mr. Tan to all of his apartment managers.

^{**/} See Plaintiff's Exhibit No. 1 (A-4), weekly reports for December 27, 1970 and January 10, 1971.

1 Defendants' testimony on this point is conflicting. While
2 Mr. Zee testified at trial that extensive cleaning and
3 preparation (i.e. drapes, rugs, painting, etc.) which took
4 about 1 week were necessary to get an apartment ready for
5 occupancy, it was the defendants' announced policy, at least
6 since 1968, to accommodate rental applicants desiring an
7 immediate vacancy by having the manager clean the apartment
8 immediately. If the manager's maintenance staff was in-
9 sufficient to get the job done, he was to contact the
10 central office for help. It was also defendants' policy
11 to retain professional apartment cleaners to perform the
12 work if defendants were short of maintenance help at the
13 time. While it was customary for draperies to be cleaned
14 within one day, defendants instructed their managers to
15 keep an extra set of drapes for immediate installation.
16 In addition it was also defendants' practice to charge a
17 large cleaning deposit so as to induce the tenant to leave
18 a clean apartment on termination of his tenancy. The
19 manager was to encourage the tenant to do his own cleaning,
20 rather than to use management's time and to cause a loss
21 of rent for the time the apartment was vacant.^{*/} In
22 instructing their managers to make every effort to rent
23 apartments prior to vacancies, defendants tried to persuade
24 departing tenants to clean their apartments and, short of
25 that, to have the manager take whatever steps were necessary
26 to prepare an apartment for occupancy immediately after a
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31 ^{*/} See Plaintiff's Exhibit No. 9, Memorandum from Tan to
32 apartment managers dated September 17, 1968.

1 tenant vacated. Under these circumstances, we believe that
2 the court should reject defendants' contention that vacancy
3 was not the equivalent of availability, and find that
4 defendants made a racial misrepresentation to Mr. Johnson
5 as to the availability of an apartment at Tan Village.
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Pamela Wimberly and Jo Ellen Murphy Test

On July 14, 1971, at about 3:15 p.m., Mrs. Pamela Wimberly, a black "tester" for MCFH, went to Tan Manor and, upon noticing an "apartment for rent" sign in front of the apartment building, went inside and inquired about the availability of a one or two bedroom apartment for rent. The manager, Mrs. White, told Mrs. Wimberly that the complex contained only studio apartments. When Mrs. Wimberly asked whether a studio was available, Mrs. White told her that she could not say, because she never knew when anybody was leaving the complex. Mrs. Wimberly took this statement to mean that there were no current vacancies at the complex, RT(II) 270-273; see also Defendants' Exhibit No. AS, at pp. 25-26, 42-43. Although Mrs. Wimberly asked to see a studio apartment she was not shown one.

About forty-five minutes later, Mrs. Jo Ellen Murphy, a white "tester" for MCFH, also went to Tan Manor and inquired about the availability of an apartment. Mrs. White, showed Mrs. Murphy three studio apartments and told her that she could move in immediately RT(II) 242-245.

Mrs. White acknowledged that she may have told Mrs. Murphy that the apartment was available for rental at the time. In addition, defendants' own business records reveal the existence of 10 vacant studio apartments (9 furnished and 1 unfurnished) and 4 unfurnished studio apartments to become vacant by August 14, 1971.

APPENDIX "C"

1 Opposition to Defendants' Motions to Strike

2 Defendants have moved to strike certain testimony
3 of Arthur McCullen and Phillip Smith relating to their
4 visits to the Americana on the alleged ground that no
5 proper foundation was laid in either instance for using
6 the audit reports they wrote up immediately after visiting
7 the complex. We oppose the motion.

8 Since the trial judge, especially in a non-jury trial,
9 is in a position to insure that the written memoranda used
10 for refreshment of memory is actually used to revive a
11 present recollection and not for any ulterior purpose, the
12 courts have held that the use of such writings lies in the
13 sound discretion of the trial judge. See United States v.
14 Socony Vacuum Oil Co., 310 U.S. 150, 233 (1939). In the
15 present case, McCullen related that he went to the
16 Americana on January 6, 1971, and asked the manager, Mrs.
17 Boatwright, whether there were any one-bedroom apartments
18 available. After being shown an apartment, he testified
19 that Mrs. Boatwright quoted a rental price of \$200 per
20 month and told McCullen of other matters pertaining to the
21 application procedure at the complex. (Plaintiff's Exhibit
22 4(c) RTAM 8-10, 13). However, when asked what portion of
23 the deposit was refundable, McCullen testified that he
24 recalled discussing the subject with the manager, but could
25 not recall the exact amount. In an effort to refresh
26 McCullen's recollection, counsel for plaintiff asked him
27 whether and when he made any notes concerning his experiences
28 at the complex. McCullen responded that he wrote his
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1 notes ^{*/} up immediately after leaving the complex. When
2 asked whether it would refresh his recollection to examine
3 his notes, McCullen responded that it would. After McCullen
4 confirmed the accuracy and the authenticity of the notes,
5 counsel asked him whether he could not answer the question
6 concerning the refundable portion of the deposit (Plaintiff's
7 Exhibit 4(c), RTAM 12). After examining his notes to refresh
8 his recollection, McCullen testified that he was told he
9 would have \$160 returned to him. ^{**/} McCullen also related
10 that he was told by Mrs. Boatwright that an application
11 would be necessary, so that the management could make a
12 credit check on him. However, when asked about other aspects
13 of the application procedure, McCullen indicated that he
14 did not recall the specifics. When allowed to refresh his
15 recollection by examining his notes, McCullen stated that
16 he was told that he could not move in before the applica-
17 tion was processed ^{***/} (Plaintiff's Exhibit 4(c), RTAM 15).

21 Common sense dictates, and the law requires that
22 witnesses be allowed to refresh their recollections from

25 ^{*/} The notes for the Americana are contained in an audit
26 report which can be found with the deposition of McCullen
27 (see Plaintiff's Exhibit 4(c)).

28 ^{**/} The two white testers (Brandt and Smith) who went to
29 the Americana on the same day, were quoted a \$160 deposit
30 amount by Mrs. Boatwright and told that they could expect
31 to have \$110 refunded to them.

32 ^{***/} The two white testers (Brandt and Smith) were told that
a credit check would not be necessary.

1 memoranda on matters of detail.^{*/} It defies reason to suggest
2 that a man who wrote something down contemporaneously to
3 assure accuracy should not be allowed to look at what he
4 wrote when he is testifying under oath about details of
5 the transaction months and even years later. Since counsel
6 inspected the notes and cross-examined the witness upon
7 the subject matter contained therein, all of the ordinary
8 safeguards against any claimed unfairness in the use of
9 the writing were fully satisfied. Moreover, since no jury
10 was involved, the court can consider any questions of
11 reliability of the testimony and accord it whatever weight
12 is appropriate.^{**/} The evidence here is consistent with
13 that adduced by other testers.^{***/}
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16 The objection as to Phillip Smith is similar. Mr.
17 Smith testified that he went to the Americana on January 6,
18 1971, and upon inquiring about apartment vacancies, was
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20 ^{*/} It should further be noted that the witness was not
21 examining notes involving a complex narrative, but a simple
22 form type document. After looking over the report on both
occasions, McCullen was able to answer the questions.

23 ^{**/} Both the case law and statutory law permit the use of
24 writings of the type utilized in the present case. See
25 Santa Fe Drilling Company v. N.L.R.B., 416 F. 2d 725, 730
26 (9th Cir. 1969), wherein the Court of Appeals for this
27 Circuit rejected the efforts of an adverse party to dis-
28 count a witness' testimony due to the fact it had been
refreshed at trial. The Court cited California Evidence
Code Section 771(a) (governing the use of writing for
refreshment purposes) with approval.

29 ^{***/} Even assuming, arguendo, that McCullen's testimony is
30 not admissible as "refreshing recollection," it would be
31 admissible under the stricter "past recollection recorded"
32 exception to the hearsay rule. See California Evidence
Code, §1237.

1 told by Mrs. Boatwright that there were some. She quoted
2 him a rental price of \$200 per month for a one-bedroom
3 apartment and told him that it was available immediately^{*/}
4 (Plaintiff's Exhibit 4(b), RTPS 11-14, 17, 22). When asked
5 about the amount of the deposit and the refundable portion,
6 Smith stated that he had no present recollection. Counsel
7 for plaintiff thereupon handed the audit report^{**/} to
8 Smith and asked him whether it refreshed his recollection.
9 After examining the report, Smith testified that he was
10 quoted a rental deposit of \$150 of which \$110 would be
11 refundable (Plaintiff's Exhibit 4(b) RTPS 27. Smith did not,
12 however, as defendants claim, use the audit report when
13 answering the Government's question concerning when the
14 apartment was available. As previously mentioned, Smith's
15 testimony on this subject came from his own independent
16 recollection (Plaintiff's Exhibit 4(b) RTPS 13-14, 17, 22).
17 Furthermore, the truthfulness of Smith's testimony is
18 corroborated by the testimony of the other white tester
19 (Brandt) who related an experience virtually identical to
20 that of his own.^{***/} Accordingly, any claimed lack of founda-
21 tion for the admission of Smith's testimony relative to
22 current availability of the apartment, is a red herring in
23 the context of this case.
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28 */ Smith was testifying from his own independent recollec-
29 tion at this point.

30 **/ Smith testified that he recorded his experiences at
31 the complex immediately after leaving the apartment office
32 and that the information in the report was true and that it
was an accurate record of the report (see Plaintiff's
Exhibit 4(b), RTPS 18-21).

***/ See Plaintiff's Exhibit 4(a), RTWB 12-13, 16-17.

1 William Brandt

2 Defendants object to testimony by William Brandt
3 that one of defendants' managers made an extrajudicial ad-
4 mission of a discriminatory policy to him in 1970. The basis
5 of the objection -- that the evidence is pre-Act, state,
6 and that the Government is guilty of laches -- is entirely
7 without merit. United States v. West Peachtree Tenth Corp.,
8 437 F. 2d 221, 227 (5th Cir. 1971), and cases there cited.
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