

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 70-C-108
	)	
v.	)	<u>MEMORANDUM OF THE UNITED</u>
	)	<u>STATES IN OPPOSITION TO</u>
	)	<u>THE MOTIONS OF DEFENDANT</u>
JOHN H. ARMBRUSTER AND COMPANY,	)	<u>CORNET & ZEIBIG, INC.,</u>
et al.	)	<u>ALTERNATIVELY, TO DISMISS,</u>
	)	<u>TO STRIKE, FOR JUDGMENT ON</u>
Defendants.	)	<u>THE PLEADINGS, OR FOR</u>
	)	<u>SUMMARY JUDGMENT</u>

Defendant Cornet and Zeibig, Inc., ^{*/} has moved this Court, alternatively, to dismiss the action, to strike the operative paragraphs of the complaint, for judgment on the pleadings, or for summary judgment. In addition to repeating certain contentions made in the Motion to Strike of individual defendants Cornet et al., filed on or about March 31, 1970, to which we have earlier responded, these latest motions raise the following issues:

^{*/} The motions here at issue were filed on behalf of individual defendants Cornet, Zeibig, McMahon, Gorman and Drain. However, on May 1, 1970, this Court ordered the substitution of Cornet & Zeibig, Inc. for the individual defendants.

(1) Whether racial discrimination with respect to the sale or rental of single family houses was unlawful prior to January 1, 1970 when practiced by persons in the real estate business, as distinguished from the owners of such houses;

(2) Whether, as a matter of law, the evidence adduced or to be adduced by the Government is insufficient to show a pattern or practice of resistance to the enjoyment of rights secured by the Fair Housing Act, within the meaning of 42 U.S.C. 3613;

(3) Whether the unqualified prohibition in 42 U.S.C. 3604(c) against statements of racial preference with respect to the sale or rental of a dwelling applies to oral as well as written representations.

DISCUSSION

A. The Record Before the Court

While one of defendants' current motions is for summary judgment, the defendant seeks primarily to test the legal sufficiency of the complaint, as elaborated by the Answers to Interrogatories. A letter from counsel for Cornet & Zeibig to counsel for plaintiff makes it clear that the form of a summary judgment motion was used for the sole purpose of enabling defendant to place before the Court an affidavit showing that certain incidents during 1969 described in our Answers to Interrogatories dealt with single family homes. Consequently, the

general proposition obtains that for purposes of these motions, the allegations of the complaint, as further elaborated in the Answers to Interrogatories, are to be taken as true.*/

In this regard, we repeat for the Court's convenience the text of paragraph 4 of the Complaint, which applies to all defendants and summarizes most of the Government's allegations:

4. The defendants follow a policy and practice of furthering and perpetuating patterns of racial segregation in housing. This policy and practice has been implemented, among other ways, by the following:

(a) The defendants have failed and refused to show black persons listings for houses in predominantly white neighborhoods while at the same time making such listings available to white persons.

(b) The defendants have made listings for houses available to black persons only in changing or integrating communities, represented by the defendants as including, among others, the municipality of University City, Missouri. At the same time the defendants have made listings for houses in such communities unavailable to white persons.

(c) The defendants have made statements of racial limitation and preference with respect to the sale or rental of dwellings, including in particular, statements to white persons that black persons are moving into or residing in certain

*/ E.g., Edwards v. Duncan, 355 F. 2d 993, 994 (4th Cir. 1966); United States v. Georgia Power Co., 301 F. Supp. 538, 541 (N.D. Ga. 1969).

residential areas and that such integrating areas are undesirable.

(d) The defendants have advised black persons that houses in white residential areas were not available for purchase on asserted grounds that the houses were covered by offers for contracts or were temporarily off the market, when in fact such houses were available for purchase.

(e) The defendants have, on account of race, and in order to preserve residential segregation, given different and conflicting advice to white persons and to black persons as to the desirability of neighborhoods in which such persons wish or may wish to purchase a dwelling.

The Complaint also charges several defendants, including Cornet and Zeibig, with racially discriminatory utilization of a multiple listing service in violation of 42 U.S.C. 3606.

The character of these allegations has been further elaborated by our answers to interrogatories from the various defendants. With respect to Cornet & Zeibig, the following evidence is before the Court on the same basis as if the affected persons had filed affidavits.*/

*/ By agreement between counsel for Cornet & Zeibig, Inc., and counsel for the United States, the statements and experiences attributed to Mrs. Hedy Epstein, Mrs. Lorraine Parks, and Mrs. Sarah Standefer in our Answers to Interrogatories of this defendant are to be considered as testimony under oath for purposes of these Motions only.

(1) Henry A. Muckerman, an employee of the Cornet and Zeibig office at Clayton and Woods Mill Roads said, on July 11, 1969, in response to a question by a co-worker as to what is done if a "colored" wants to buy a house - "We don't sell unless there are 'colored' on the block already." He added that his firm tells the seller to take the house off the market for about two weeks and tells the buyer that the seller is no longer selling the house. (Answers, p. 5 - Mrs. Epstein)

(2) On November 3, 1969, Mildred R. Forsyth of the defendant's office at 37 North Meramac, told a person inquiring about selling her house, that the firm never sells to colored.*/
If "they" ask for a specific house, they are told there is already a contract on it. Mrs. Forsyth then went on to describe in detail the procedures by which the sales personnel of Cornet and Zeibig, Inc., insure that at least certain houses are never shown or sold to blacks, adding that they were careful never to put this in writing because "you never know when your records might be subpoenaed."

(Answers, pp. 5-8 - Mrs. Epstein)

*/ This obviously refers to the firm's policy with respect to white neighborhoods.

(3) June Morrissey, of the same office as Mr. Muckerman, on November 6, 1969 told another white person inquiring about selling her home of the procedure used by defendant's agents to insure that certain houses are not sold to Negroes. Mrs. Morrissey, in addition to recounting the technique of telling Negroes that a house has a contract on it (when it does not), added that another mode is to send blacks to Cornet & Zeibig's office in Clayton and steer them directly to University City. (Answers, p. 8, Mrs. Standefer)

In addition, the Answers reflect that black and white persons making similar inquiries about houses for sale were given different listings of houses for sale and conflicting advice about the desirability of certain areas, particularly University City. (Answers 1-3, 5, 9). In particular, a white person was told University City was "not a good area . . . the houses are rundown and the lawns are unkempt" (Answer 5(a)), while a black person was told, by the same employee of Cornet and Zeibig, that "University City was a nice place." (Answer 9(a)).

Since the Complaint alleges a pattern or practice of resistance to fair housing "by each defendant, and by the defendants collectively," our Answers to the interrogatories propounded by other defendants also shed light on the merits of the case against Cornet and Zeibig. We do not deal with these answers in detail here, except to say that they reflect with respect to each defendant not only incidents of steering whites and blacks to racially selected areas and refusals to sell in "opposite race" areas, but also admissions that this is pursuant to a policy. */ Consequently, the Answers to Interrogatories also reflect a potential showing by the Government in accordance with the allegations in the Complaint, that Cornet-Zeibig's conduct is a part of a broader multi-defendant pattern.

The Complaint itself does not specify that the alleged discrimination is limited to single family dwellings, and the answers to interrogatories make it clear that the policies communicated to our witnesses by agents of the defendants are general anti-integration policies applying to any kind of housing. By the affidavit of one of its

*/ A striking example is contained at page 7 of the Answers to the Armbruster interrogatories, wherein it is stated that an Armbruster representative told a white inquiring about listings that you "don't want to set a [white person] in the midst of 'coons' -- . . . by coons I mean niggers."

Vice-Presidents, however, Cornet and Zeibig has established that the addresses of the specific houses to which our Answers to that defendant's interrogatories refer are single family houses. This fact is undisputed, and it is almost the entire foundation for Cornet-Zeibig's attack on our case.

B. Racial Discrimination by Real Estate Companies
Prior to January 1, 1970.

Cornet & Zeibig's principal contention in these motions is that our Answers to Interrogatories disclose that our case deals with single family houses, that the incidents described in our Answers occurred in 1969, and that the defendant's alleged conduct was therefore lawful by reason of the limited statutory exemption from coverage relating to single family houses ^{*/} sold or rented by an owner during 1969. We disagree. We believe that this exemption, designed to protect the privacy of a single homeowner, does not apply to patterns of discriminatory conduct by real estate companies. Moreover, even if the exemption were applicable to professionals like these defendants, the action should not be dismissed because the defendants' policy was not limited to single family houses, and because, as the Court of Appeals for the Eighth Circuit expressly held in United States v. Sheetmetal Workers, 416 F. 2d 123 (8th Cir. 1969), a pattern or practice of resistance to civil rights laws can be shown without specific post-Act discriminatory incidents, if there has been

^{*/} 42 U.S.C. 3603(b)(1).

inadequate action to undo the effects of pre-Act discrimination. The record before the Court reflects no steps by any defendant to correct the effects of its pre-Act conduct.

1. The Single-Family House Exemption protects the privacy of owners and does not apply to racially discriminatory activities of real estate brokers.

The issue of the single family home exemptions does not arise in this case in a vacuum. This is not a situation where Cornet & Zeibig and its co-defendants are charged with reluctant obedience to discriminatory instructions from an owner of a single family house. The complaint alleges, on the contrary, that the defendants follow a policy - their policy - of perpetuating segregation. Both the complaint and the Answers to Interrogatories show how this is allegedly done. When, (as Mrs. Epstein will testify) a Cornet and Zeibig representative stated that "we don't sell unless there are colored on the block already," and that "we tell the seller to take the house off the market for about two weeks [when blacks inquire]", it is apparent that we are dealing with a policy of discrimination that originates from Cornet & Zeibig, not from someone else. The issue is

whether a statutory exemption designed to protect the privacy of the individual homeowner is applicable to large real estate companies charged with manipulating the racial characteristics of, and of segregating or resegregating, entire communities. We think not.

The predicate for defendant's contention that real estate agents were free to discriminate in 1969 is 42 U.S.C. 3603(b)(1), which provides in pertinent part as follows:

(b) Nothing in section 3604 (other than subsection (c)) shall apply to

(1) any single-family house sold or rented by any owner, provided that such private individual owner does not own more than three such single-family houses at any one time.

* * *

Provided further, that after December 31, 1969, the sale or rental of any such single-family house shall be excepted from this title only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any person in the business of selling or renting dwellings, or any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice of any advertisement or written notice in violation of section 804(c) of this title

Defendant argues that since the "further" proviso eliminates the exemption for a single-family house sold or rented by an owner if such an owner uses a real estate agent only after December 31, 1969, it follows that real estate agents, like individual owners, were not precluded from discriminating in 1969 in selling single-family houses. In our judgment, this argument misses the main purpose of the exemption in §3603(b)(1) and leads to a self-contradictory reading of Title VIII.

Defendant's attempted reading of the statute produces an anomalous result. Under the first proviso Section 3603(b)(1), any person owning four houses was not entitled to the single family house owner exemption and, accordingly, was subject to all the prohibitions in §3604, even in 1969. Yet, the possible effect of his discrimination on the housing problems of this country is minimal, compared with the effects produced by discriminating real estate firms who control the bulk of residential sales. We have set forth in our Answers instances of the four defendants steering blacks toward University City and whites away from there, and of a policy of refusing to sell to blacks in white areas or to whites in black or changing areas. This practice, which creates and perpetuates ghettos, is among the very kinds of ills

with which Congress was concerned in enacting the Fair Housing Act. However, defendant's reading of the exemption for owners of single family houses would permit a major operation such as that here alleged to be absolutely immune from Title VIII during 1969, while at the same time prohibiting discrimination by the owner of four houses who can hardly affect racial residential patterns at all. This incongruous result flowing from defendant's construction of the statute militates in favor of a reading by which the activities of real estate agents would be far more circumscribed. The language, legislative history, and judicial construction of the exemption are all consistent with a reading which avoids the incongruities inherent in defendant's position.

Section 3603(b)(1) does not exempt from coverage all single-family houses. Rather it exempts such houses only if they are "sold or rented by an owner." As we show in detail below, the Congressional concern here, as with the "Mrs. Murphy" exemption in §3603(b)(2), was with the discretion given to private individuals in certain limited types of real estate transactions. To ascertain the limits of that discretion and, correspondingly, the extent to which real estate agents

were subject to the Fair Housing Act during 1969, requires an analysis of the history of §3603(b)(1), of the other provisos to that subsection, and of the correlation between these exemptions and other sections of Title VIII.

What is now Title VIII of the Civil Rights Act of 1968 first appeared as Title VI of the Administration's omnibus civil rights bill of 1967 introduced in the Senate in February 1967 as S. 1026 (90th Cong. 1st Sess.). The several titles of this bill were separated, and the housing title was separately introduced as S. 1358 (90th Cong. 1st Sess.).

In February 1968, while the Senate was considering H. R. 2516 (a bill containing the version of all titles except housing of the administration's original bill passed by the House in August 1967), Senators Mondale and others, offered a bill identical to S. 1358, as an amendment to H. R. 2516 (114 Cong. Rec. S. 980, daily ed. Feb. 6, 1968). Neither the original S. 1358 nor the version of it offered as an amendment to H. R. 2516 contained any provision analogous to the single family house-owner exemption now found in §3603(b)(1).

After approximately three weeks of debate on Senator Mondale's amendment, it was unanimously agreed that that bill be tabled, and Senator Dirksen's fair housing amendment ("In the nature of a substitute") was introduced (114 Cong. Rec. S. 1875-77, daily ed. Feb. 28, 1968). The Dirksen amendment contained the first single family house-owner exemption. The amendment excluded from coverage:

(1) any single-family house sold or rented by an owner residing in such house at the time of such sale or rental, or who was the most recent resident of such house prior to such sale or rental: Provided, That after December 31, 1969, the sale or rental of any such single family house shall be excepted from the application of this title only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities [continues in language identical to the statute as enacted].

There are no Committee or other reports which deal with this exemption. Consequently, the intent of Congress can best be gleaned from the character of certain proposed amendments to define or augment the exemption.. It is evident from the history of the provision that the intent of Congress, by the single family dwelling exemption in §3603(b)(1), was to exempt the owner, not the house.

In March, 1969, Senator Byrd of West Virginia proposed an amendment to the Dirksen substitute which provided as follows:

(1) None of the prohibitions contained in this title shall apply to (A) any private person with respect to the sale or rental of a dwelling owned or rented by such person or by such person and other private persons, or (B) any real estate broker, agent, salesman, or other person while he is acting in accordance with instructions by any private person with respect to the sale or rental of a dwelling owned or rented by such private person or by such private person and other private persons. 114 Cong. Rec. S. 2040 (daily ed. March 4, 1968). (emphasis added)

By this proposal, Senator Byrd did not suggest that real estate companies be permitted to discriminate, but only that individuals choosing to do so might secure the cooperation of realtors. In an attempt to gain support for this modest proposal, Senator Byrd amended it to cover only one-family dwellings (114 Cong. Rec. S. 2040, daily ed. March 4, 1968). Even in that form it was rejected (Id. at S. 2053). The defeat of an amendment which would have allowed a realtor to discriminate when instructed to do so suggests that a proposal to allow him to discriminate, absent the customer's discriminatory instruction, would have had even less support.

Three days later, Senator Byrd introduced a second amendment, also directed to exempting a private owner's discrimination in the sale or rental of his single-family house. This proposal struck that portion of the Dirksen substitute that required the owner either to reside in the house or to have been the most recent resident, and added two provisos:

Provided, that such owner does not own more than three such single-family houses at any one time; Provided further, that in the case of any such single-family house by an owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any 24 month period; . . . [continues as present section]. 114 Cong. Rec. S. 2355 (daily ed. March 7, 1968).

This amendment, with the addition of the phrase "private individual" before "owner" was adopted by the Senate (114 Cong. Rec. S. 2360, daily ed. March 7, 1968). The kinds of conduct cited by Senator Byrd at 114 Cong. Rec. S. 2356 (daily ed. March 7, 1968) that he especially thought should be exempt from the Act reflect the same concern for the sensibilities of the owner as prompted the "Mrs. Murphy" exemption in rental cases. */ In explaining his

*/ 42 U.S.C. 3603(b)(2).

amendment, Senator Byrd made clear that the thrust of this section was toward the owner affected:

I believe, Mr. President, that Senators will want to provide a clear-cut exemption in the case of a single-family dwelling, especially when the owner rents or sells the dwelling without the assistance of a real estate salesman or agency. Id.

In fact, the debate on the amendment (114 Cong. Rec. S. 2355-60 March 7, 1968) concerns only the issue as to who qualifies as a private individual owner. This pre-occupation with private individual owners shows that the amendment was designed to exempt a certain type of person who chooses to discriminate in the sale of his house, not any real estate agent or other person who chooses to discriminate in the sale of a particular type of housing.

As Senator Mondale put it, in comparing the limiting provisos of Senator Byrd's amendment to the portions of what is now §3603(c)(1)-(2) (defining "a person . . . in the business of selling or renting dwellings"):

The amendment . . . would as it is presented, incorporate and be related to those two provisions. If someone were trying to conform to the terms of the amendment . . . I think the law is quite clear that he would, if he sold his own home three times or more in a single year, or rented someone else's premises, or sold someone else's premises more than twice a year, become a person in the business of selling or renting property. 114 Cong. Rec. S. 2358 (daily ed. March 7, 1968).

Senator Byrd agreed with this statement:

. . . I have attempted by my language to obviate the situation to which the Senator has referred, in which a real estate operator would attempt to utilize this language as a gimmick and sell house after house, or transact rental after rental, and thus circumvent the purpose and intent of the legislation. (same)

Plainly, a real estate dealer, even a small-time operator who sells only three houses, could not sell his own single-family house discriminatorily. That is so because the exemption was not intended to apply to the house, but to the individual who is the owner of the house. It is his option to discriminate that is exempted. A real estate dealer has no such option, and he was not given that option for 1969 or thereafter merely because he is selling someone else's single-family house, especially where, as here, the discriminatory policy is not contingent on the owner's wishes.

While there are no decisions, to the best of our knowledge, directly in point, Chief Judge Thomsen's holding in United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969) provides support for our position by analogy. At issue in that case was whether 42 U.S.C. 3604(e), relating to block-busting, covered representations made to owners of single family houses. The Court was confronted with the language of 42 U.S.C. 3603(b) to the effect that nothing in Section 3604 "other than subsection (c)" shall apply to any single

family house sold or rented by an owner. Acknowledging some ambiguity in the statute, the Court pointed out that to exclude single family houses from the blockbusting provisions would make the statute inapplicable to the very situation in which protection was needed. The Court avoided this result by reference to the words "sold or rented by an owner"; since the victims of the blockbusting did not sell, the exemption was inapplicable. The statutory language relied on by the Court in Mintzes points to a similar result here. The limitation of the exemption to homes "sold or rented by an owner" shows that the exemption deals with what an individual owner may do in a single transaction, not what a real estate company may do in a mass of transactions. In this case, as in Mintzes, the words "sold or rented by an owner" would have to be treated as mere surplusage to reach the incongruous result contended for by defendant, but can be given meaningful effect by the construction which we suggest to the Court.

We suggest that the only interpretation of the exemption consistent with the Congressional purpose is as follows: during 1969, a homeowner was permitted to use a real estate agent to procure potential customers for his house, but not to tell the real estate agent to discriminate in the customers to whom the house is shown; nor may the real estate agent himself discriminate. (In

the latter instance, for example the real estate agent is in large measure controlling the potential sale rather than the homeowner, and, the "sale", at least insofar as it involves discrimination, is being made by the real estate agent, not the homeowner). After December 31, 1969, the owner may not use a real estate dealer even to procure potential customers for him, or he loses his exemption.

Such a reading of the exemption in section 3603(b)(1) is also consistent with the provisions of Section 3606, while defendant's construction is not. That section prohibits, after December 31, 1968, denial of "access to or membership or participation in any multiple listing service, real estate brokers' organization . . . on account of race, color, religion, or national origin." While a major concern of this section relates to membership rights in organizations such as the RESCO service involved in this litigation, the statute also makes unlawful the denial of "access" to such a service on racial grounds. Accordingly, the discriminatory refusal to show Negroes those single-family houses available to real estate agents through a multiple-listing service such as RESCO, would be a denial of access and a violation of §3606. The

single-family exemption, it should be remembered, only exempts such houses sold or rented by an owner from the prohibitions of §3604 (except subsection (c)). Yet to read the single-family exemption as defendant suggests -- i.e., permitting discrimination by real estate agents in 1969 -- would conflict with the express requirements of the multiple-listing service section.

2. This Action May Not Properly be Dismissed, Even if Discriminatory Activities of Real Estate Agents with respect to Single-Family Houses were not Prohibited by the Fair Housing Act Prior to January 1, 1970.

Two factors, with which the moving defendant does not deal, preclude dismissal and summary judgment, even if this Court were to hold that the exemption for the single family house owner was applicable during 1969 to persons in the real estate business.

First, the evidence now before this Court includes statements attributed to three of defendant's agents to the effect that the company's policy is not to sell to Negroes in certain areas. Nothing in these statements or in the affidavit filed by the defendant limits defendant's discriminatory conduct to single-family dwellings. In fact, the statements of policy attributed to Mr. Muckerman, Mrs. Forsyth and Mrs. Morrissey, are applicable to all

sales, not just single-family dwellings. Accordingly, even if defendant's construction of the exemption were adopted, there would remain at issue defendant's alleged discriminatory policy with respect to dwellings other than single-family houses. Recently, in United States v. H. G. Smithy, et al., C. A. No. 21470 (D. Md. May, 1970), the Court denied summary judgment as to some defendants solely because of an affidavit alleging that the resident manager had told a white girl that she did not want Negro tenants and had a policy against them.

Second, even with respect to single-family houses, there is no evidence before the Court which indicates that the defendant has taken a single step to eliminate the effects of past discrimination alleged in the complaint. See United States v. Louisiana, 380 U.S. 145, 154 (1965). The Court of Appeals for the Eighth Circuit in United States v. Sheetmetal Workers Local No. 36, 416 F. 2d 123 (1969) held that discrimination pre-dating the effective date of the Fair Employment Act had created a discriminatory image which required comprehensive affirmative relief, and that failure to take adequate post-Act affirmative steps to eliminate the discriminatory image constituted a pattern or practice irrespective of the lack of post-Act incidents.

In Sheetmetal Workers, the District Court, having found pre-Act discrimination, dismissed the suit on the ground that "there is no pattern and practice of discrimination since the effective date of the Act." 280 F. Supp. 719, 730 (E.D. Mo. 1968).

A portion of the reversal of that decision by the Court of Appeals was predicated on the existence of a kind of "grandfather clause" in the union's referral procedure - i.e. pre-Act exclusion of blacks from the union put them at a competitive post-Act disadvantage under the referral procedure, since priority was given to persons with experience under union agreements. The Court also held, however, that the pattern and practice extended as well to the unions' admission policies with respect to journeymen and apprentices, even though there were no post-Act refusals of applicants for admission. The unions had embarked on programs to publicize their non-discriminatory policies, but the Court of Appeals held that in view of the extensive evidence of pre-Act discrimination and the discriminatory image created thereby, these efforts were not sufficient.

In this case, there is the promise, in our Complaint and Answers to Interrogatories, of abundant evidence of alleged discrimination. Although the parties are in

disagreement as to whether it is pre-Act or post-Act, - whether realtors could or could not lawfully discriminate during 1969 with respect to single-family houses - there is no evidence in the record to date of Cornet & Zeibig's having taken a single step to correct the effects of past discrimination. Accordingly, its various motions to end the case almost before it has begun should be denied.

C. A Pattern or Practice of Racial Discrimination is Sufficiently Alleged in the Complaint and Sufficiently Detailed in the Answers to Interrogatories To Resist Successfully Defendant's Motions.

Defendant Cornet & Zeibig, Inc. contends that the incidents of racial discrimination set forth in our Answers are not "as a matter of law, . . . the reasonable cause contemplated by 42 U.S.C. 3613." ^{*/} Defendant's motion also asserts the several instances of alleged racial discrimination in our Answers to its Interrogatories are not sufficient to constitute a pattern or practice of resistance giving rise to the Attorney General's authority to sue.

Section 3613 of Title 42 is the portion of Title VIII of the Civil Rights Act of 1968 authorizing the Attorney General to sue to rectify violations of Title VIII in two instances: ^{**/} 1) whenever he has

^{*/} Defendant's Motion, p. 2.

^{**/} "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title."

"reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VIII]," and 2) whenever "any group of persons has denied any of the rights granted by [Title VIII] and such denial raises an issue of general public importance." The Complaint in this action alleges both of these alternative grounds (paragraphs 7 and 8).

Insofar as defendant Cornet and Zeibig, Inc. seeks to attack the Attorney General's certification of reasonable cause, it is well settled that such determinations are not subject to judicial review. In United States v. Building & Construction Trades Council of St. Louis, 271 F. Supp. 447, 454 (E.D. Mo. 1966), the defendants, in a suit under the equal employment title of the Civil Rights Act of 1964, which is identical to Title VIII in this regard, sought to have the action dismissed because the Attorney General had not specifically alleged reasonable cause, and also attempted to inquire via discovery into the Attorney General's finding of reasonable cause. Judge Meredith rejected these arguments:

[Section 707(a)] sets forth what the complaint must allege, and nowhere does it indicate that the Attorney General

is required to plead reasonable cause
The statute does not contemplate that the
courts shall make a preliminary determination of the Attorney General's finding of reasonable cause. Rather, the Court's function is to determine whether the defendants have, in fact, engaged in such a "pattern or practice", and to do so as expeditiously as possible. 271 F. Supp. at 453.

Discovery into the Attorney General's determination of reasonable cause was likewise not permitted. Id at 458.

See, also, United States v. Greenwood Municipal School District, 406 F. 2d 1086, 1088-91 (5th Cir. 1969)

(analogous holding with respect to Attorney General's certificate in school desegregation lawsuits).

If defendant Cornet & Zeibig, Inc., is contending that the Answers to Interrogatories do not indicate a pattern or practice of resistance to the rights secured by Title VIII, it has failed to take into account both the the purview of "pattern and practice" litigation and the detailed allegations of comprehensive racial discrimination in our Answer to Interrogatories.

In the Memorandum filed on May 6, 1970 in response to the motions of other defendants to dismiss, strike, or sever, we detailed (pp. 8-16) the two varieties of "pattern or practice" with which the civil rights acts are concerned. In brief, one involves a policy of

resistance by a single defendant, who commits a number of unlawful acts, e.g., United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969), or is otherwise shown to have a discriminatory policy. */ The second kind involves common resistance by several defendants, usually in the same geographic area, and this kind of pattern or practice may exist, irrespective of whether the evidence is sufficient to establish that each of the individual defendants' resistance is sufficient to constitute such a pattern. See, e.g., United States v. The Warren Co., ____ F. Supp. ____, 10 Race Rel. L. Rep. 1293 (S.D. Ala. 1965) (three-judge court).

Our complaint charges both kinds of pattern or practice, and the Answers to Interrogatories contain details concerning the alleged discriminatory activities of all defendants more than sufficient to indicate both varieties. Defendant Cornet and Zeibig, Inc. contends that there is not enough indication of a "single defendant"

*/ While in Mintzes unlawful representations were made to three homeowners, there is no magic numerical minimum. The "pattern or practice" requirement excludes the "isolated, accidental or peculiar" incident which is an aberration from a generally nondiscriminatory policy. United States v. Mayton, 335 F. 2d 153, 158-59 (5th Cir. 1964). A single act may be a pattern or practice, if its racial effect is generalized. United States v. Ramsey, 331 F. 2d 824, 837, note 19 (Opinion of Rives, J.); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969).

pattern or practice by it alone contained in our Answers to Interrogatories, but completely ignores the allegation in our Complaint that the defendants are collectively engaged in a pattern or practice. We do not believe that it is even seriously arguable that all of the incidents and admissions of discriminatory policy by the four companies and their agents, when taken together, could not upon the trial add up to a collective pattern or practice, and yet Cornet & Zeibig, in effect, asks for dismissal on the pleadings.

Even if the collective "pattern or practice" allegation is disregarded, the facts recounted in our Answers to the moving defendant's interrogatories, some of which are set forth above (pp.), reflect alleged statements by defendants' employees of a policy of not selling to Negroes "unless there are 'colored' already on the block," of telling Negroes that a house has been sold when it has not, and of sending Negroes to a particular office from which they are directed, because of race, to University City but not to "white" areas." The references by Cornet & Zeibig's own employees to a generally discriminatory policy cannot in any sense be construed as representing peculiar, isolated or atypical incidents,

United States v. Mayton, supra. In fact, Mrs. Epstein quotes a Cornet and Zeibig representative as saying that

[E]very Tuesday all their salespeople meet and discuss and exchange information about the listings they have accepted . . . [I]t is at this meeting that it is also mentioned that a house is not to be shown to "colored" [in a white area]. (Answers, p. 6, Mr. Epstein).

Accordingly, even prior to our having begun discovery, we have presented a picture, as yet uncontroverted, of a pervasive policy of racial discrimination by this defendant, and respectfully submit that the portion of Cornet & Zeibig's motions predicated on the absence of a pattern or practice be denied.

D. The Language and History of the Statutory Prohibition Against Statements of Racial Preference with Respect to the Sale or Rental of a Dwelling Establish its Applicability to Oral as well as Written Statements

Defendant Cornet and Zeibig, Inc. again attacks paragraph 4(c) of the Complaint, that portion predicated on alleged violations of 42 U.S.C. 3604(c). That subsection makes it unlawful

To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination.

This defendant, in addition to elaborating arguments put forth in earlier motions, ^{*/} now suggests that §3604(c) does not reach any oral statements, but only prohibits statements of racial preference that are printed or otherwise published in written form. The basis for this contention are several: 1) the principle of ejusdem generis; 2) an incomplete and misleading reference to United States v. Mintzes, 304 F. Supp. 1305, 1309 (D. Md. 1969); ^{**/} 3) a cross-reference in the statute to §3603(b); 4) the argument that constitutional issues can be avoided by not reading the statute to cover oral statements; and 5) that the statute "is really designed to prohibit . . . the classified ads . . . headed 'For Sale - Colored' and 'For Rent - Colored'." (defendant's Motions, p. 5).

^{*/} We responded to these arguments in our Memorandum in Opposition to the Motions to Strike and the Motion to Dismiss, filed April 17, 1970, at pp. 7-14.

^{**/} While summarizing the five provisions of Section 3604, Chief Judge Thomsen referred to 3604(c) as dealing with discriminatory advertising, which it does. He did not say or hold that it deals only with discriminatory advertising, which it does not.

We respectfully suggest that the statute itself, its legislative history, and the principles applicable to the interpretation of civil rights acts all indicate that oral, as well as written, statements of racial preference are subject to the congressional prohibition.

Section 3604(c) includes the phrase "to make . . . any [discriminatory] statement." The usual meaning of the word "statement" includes oral remarks. "Statement: 1. Act of stating or presenting orally or on paper." Webster's Seventh New Collegiate Dictionary (G. & C. Merriam Co., 1965).

"Statement: . . . a communication or declaration in speech or writing setting forth facts, particulars, etc." American College Dictionary (Random House, Inc., 1966). This natural and usual reading of the word "statement" to encompass oral remarks finds specific support in the legislative history of this section. In addition, it would be an incongruous reading of this statute to permit oral discriminatory statements when so much of the contact between home-seekers and prospective defendants - realtors, resident managers, rental agents and the like - involves oral rather than written communications which can divert the Negro from securing housing.

Title VIII, the Fair Housing Title, is one of ten titles in the Civil Rights Act of 1968, all of which became law on April 11, 1968. As previously noted, this title is

predicated in large measure on S. 1358 (90th Cong. 1st Sess.), a bill introduced by Senator Mondale in March 1967.^{*/} Section 4(c) of that bill made it unlawful

(c) To make, print, or publish, or cause to be made, printed or published, any oral or written notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

This provision is identical with the enacted §3604(c), except that the phrase "oral or written" precedes the words "notice, statement or advertisement."

After the House of Representatives had passed H. R. 2516 in 1967, action in the Senate on the bill did not commence until February 1968. On February 6, 1968, Senator Mondale introduced a bill identical to S. 1358 as an amendment to H. R. 2516 (114 Cong. Rec. 5980); this contained the section quoted immediately above, including the phrase "oral or written." After three weeks of debate, it was agreed to table the Mondale amendment and to accept the introduction, as a substitute, of Amendment No. 554 proposed by Senator Dirksen (114 Cong. Rec. S. 1875-77, Feb. 28, 1968).

^{*/} S. 1358, in turn, was, with a minor exception not here relevant, taken from S. 1026 (90th Cong. 1st Sess.), the Administration-sponsored omnibus Civil Rights Act of 1967.

With respect to what is now §3604(c), the section at issue was identical with Senator Mondale's bill, except that the phrase "oral or written" was omitted. The Senate ultimately passed Senator Dirksen's amendment with certain modifications not here relevant, and the House concurred in the bill as it was passed by the Senate.

No hearings were held on the Dirksen Amendment and so there is no Committee or other report as to the reasons for eliminating the phrase "oral or written." The clear inference - in fact the only possible inference - is that this language was omitted as surplusage. If the intent had been, as defendant Cornet & Zeibig, Inc. contends, to limit the section to written statements of racial preference, this could have been readily accomplished by deleting the words "oral or," and leaving no room for doubt on the question. For example, Congress readily accomplished this result in part (B) of the fourth proviso to §3603(b) (1) where it referred to "advertisements or written notice."

Senator Ervin, an opponent of Title VIII, had severely attacked an earlier version of Title VIII on free speech grounds when the subsection here at issue contained the phrase "oral or written," on the ground, among others, that it prohibited oral statements.^{*/} After the introduction

^{*/} See, e.g., Hearings before the Subcommittee on Constitution Rights of the Committee on the Judiciary on S. 1026, etc. (90th Cong. 1st Sess.) at pp. 233-34.

of the Dirksen substitute amendment, which omitted the phrase "oral or written," he continued to object to this subsection on the ground that it continued to prohibit oral statements of racial preference:

I invite the attention of the Senate to the words of subsection (c) on page 11 of the proposed Dirksen substitute This provision . . . would absolutely forbid anyone . . . desirous of selling his residential property even to say that he would prefer to sell it to a man of his own race, his own religion or his own national origin. 114 Cong. Rec. S. 1941 (Feb. 29, 1968) (emphasis added).

Senator Ervin's assumption that the subsection means the same with or without the phrase "oral or written" comports with the natural meaning of §3604(c), and the absence of any indication that the Congress intended to eliminate oral statements from the list of proscribed activities.

Moreover, even if there were ambiguity on the question, the broad construction given civil rights statutes would point toward the reading we suggest for § 3604(c). Civil rights statutes have been regularly given a broad construction to relieve the humiliation and inconvenience they are designed to rectify, e.g., Daniel v. Paul, 395 U.S. 295 (1969), Nesmith v. YMCA, 397 F. 2d 96 (4th Cir. 1968), United States v. Sheetmetal Workers Local No. 36, 416 F. 2d

123 (8th Cir. 1969), and should be interpreted, as the Fifteenth Amendment has been, to nullify sophisticated as well as simple-minded modes of discrimination, Lane v. Wilson, 307 U.S. 268, 275 (1959); Dobbins & United States v. Local 212, IBEW, 292 F. Supp. 413, 447 (S.D. Ohio 1968).

The section here at issue is part of a congressional enactment designed to help alleviate the difficulties in this nation caused by racial discrimination in housing. Its companion subsections (i.e., 42 U.S.C. 3604(a), (b), (d), and (e)) render unlawful explicit kinds of housing discrimination, including among others, refusal to sell or rent, discrimination in terms, and blockbusting. The acceptance of the defendant's proposed restrictive reading of §3604(c) would severely debilitate the Act and, in essence, authorize a pattern of action that could effectively undermine the other substantive prohibitions of Title VIII, just because the particular misdeeds are verbal.

The maintenance of a discriminatory image can be an effective way to attempt to circumvent the requirement of the law. In a variety of contexts, courts have both pre-dicated and shaped relief on the basis of a discriminatory image. E. g., United States v. Sheetmetal Workers Local No. 36, 416 F. 2d 123, 129-132, 140 (8th Cir. 1969); (employment; union's discriminatory image resulting from restrictive pre-Act policies requires comprehensive affirmative steps to correct it); United States v. Medical

Society of South Carolina, 298 F. Supp. 145, 148, 152 (D. S.C. 1969) (hospital desegregation case; withdrawal from government programs after passage of Civil Rights Act, creating an all-white image, is a discriminatory pattern of practice when no steps were taken to correct the image). In United States v. Plumbers Local No. 73, _____ F. Supp. _____, 61 C.C.H. Lab. Cases Para. 9239 (S.D. Ind. August 15, 1969) the court said:

Very few Negro plumbers ever applied for membership in Local 73. Those who did, both before and after July 2, 1965, the effective date of the Civil Rights Act of 1964, were stalled along on one pretext or another so that none ever appeared before the examining board for admission. The reputation of Local 73 in the Negro community was that it was a "whites only" local, which effectively discouraged the Negro applicants from pursuing their applications vigorously, and also discouraged other Negro plumbers from applying in the first place.

The Court found a pattern and practice of discrimination and awarded comprehensive affirmative relief.

Section 3604 (c) seeks to prohibit directly one of the several techniques by which such an image might be created. By precluding, as we read it, both oral and written statements of racial preference, the law attempts to cut off at their source discriminatory remarks in a commercial context which not only serve no legitimate business purpose, but also deter people from living somewhere on account of race.

The effective enforcement of the right to fair housing could be seriously impaired if no barriers were placed on statements of racial preference. As we indicated in our Memorandum responding to defendants' first series of motions (Memorandum filed April 17, 1970, pp. 7-14), there are no constitutional difficulties, in our judgment, in applying § 3604(c), which is directed to activities in a commercial context, to oral as well as written statements of racial preference. See United States v. Mintzes, supra.

In spite of the natural meaning of the language, the legislative history and the usual broad construction given civil rights statutes, defendant suggests that the principle of eiusdem generis requires reading the statute to exclude oral statements. The statute, however, makes reference to notices, statements and advertisements in the disjunctive. If Congress had intended to cover only advertisements, there would have been no reason to refer to statements at all.^{*/} Statutes should be construed in such a manner that, "if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." Ex parte Public Bank, 278 U.S. 101, 104 (1928); McDonald v. Thompson, 305 U.S. 263, 265 (1938).

^{*/} Compare part (B) of the fourth proviso to §3603(b) (1) where Congress demonstrated that it could say, if it wished, "advertisement or written notice."

In rejecting an analogous, though less far-fetched, attempt to use ejusdem generis to secure a restrictive interpretation of the public accommodations provisions of the Civil Rights Act of 1964, the Court of Appeals for the Fifth Circuit said, in Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1958) (en banc):

The rule of ejusdem generis does not prevail when the result of its use would be contrary to the obvious purpose of the statute in question We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. Our system does not favor mechanical jurisprudence, it seeks to find the purpose and spirit of a statute and the intention of its makers. Id. at 350, 353.

The Court held in Miller that the phrase "place of . . . entertainment" in Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq. which made unlawful, among other things, racial discrimination in

any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment*/

encompasses establishments which provide recreational activities and amusements for their patrons as well as those which present shows and exhibitions to a passive audience, e.g., amusement parks, bowling alleys, etc. The result in Miller was later adopted by the Supreme Court in Daniel v. Paul, 395 U.S. 298 (1969).

*/ 42 U.S.C. 2000a (b) (3).

The Court in Miller was dealing with a problem of statutory construction in a context where the Government as amicus curiae and the majority characterized the legislative history as "inconclusive" or "obscure" on the question presented. Id. at 349. With respect to statements of racial preference, however, the language and legislative history are both clear, and show that the unqualified prohibition against statements of racial preference applies to all such statements in the context of sale or rental, whether written or oral. The reasons for rejecting defendant's ejusdem generis arguments are, therefore, even stronger in this case than those which prevailed in Miller.

CONCLUSION

We believe that what has been said establishes that this is an important, complex case which should go to trial. For the reasons stated above, we respectfully request this Court to deny all of the defendant's motions.

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CERTIFICATE OF SERVICE

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