

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

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 70C108(1)
	)	
JOHN H. ARMBRUSTER AND	)	<u>PLAINTIFF'S RESPONSE TO</u>
COMPANY, et al.,	)	<u>THE MOTIONS TO STRIKE OF</u>
	)	<u>DEFENDANTS ARMBRUSTER, HOWE,</u>
	)	<u>CORNET, ZEIBIG, McMAHON,</u>
Defendants.	)	<u>GORMAN AND DRAIN, AND THE</u>
	)	<u>MOTION TO DISMISS OF DEFEND-</u>
	)	<u>ANT HOWE.</u>

The United States of America, plaintiff herein,
respectfully requests this Court to deny the Motion to
Dismiss filed by defendant Howe and the Motions to
Strike which have been filed by all defendants except
Dolan Company Sales for the reasons set forth in the
accompanying memorandum.

DANIEL BARTLETT, JR.
United States Attorney

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

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 70C108(1)
	)	
v.	)	<u>PLAINTIFF'S MEMORANDUM IN</u>
	)	<u>OPPOSITION TO THE MOTIONS</u>
	)	<u>TO STRIKE AND THE MOTION</u>
JOHN H. ARMBRUSTER AND COMPANY,	)	<u>TO DISMISS</u>
et al.,	)	
	)	
Defendants.	)	

In this housing discrimination case, brought by the United States pursuant to Title VIII of the Civil Rights Act of 1968, seven of the eight defendants have filed motions to strike certain allegations and a portion of the prayer for relief from the Complaint, and one of the defendants has moved to dismiss the Complaint. The defendants' motions are basically three-fold: (1) the portion of the Complaint alleging that defendants made statements of racial preference with respect to housing opportunities is attacked as unconstitutional; (2) the portion of the Complaint alleging that these defendants' employment practices support and perpetuate their racially discriminatory housing practices are attacked as not being relevant in an action brought under Title VIII; and (3) the portion of the prayer in the Complaint,

which requests whatever affirmative steps as may be necessary to correct the effects of past racially discriminatory practices and to insure the full enjoyment by Negroes of the rights secured by Title VIII, is attacked as requesting relief which the Attorney General is not authorized to seek and this Court is now empowered to grant.

We submit that each of the allegations in the Complaint is relevant in an action brought by the Attorney General under Title VIII, that the statute as we seek to have it applied here is constitutional and, that, since the defendants have a duty to correct the effects of their past discriminatory practices, */ the prayer for whatever affirmative relief appears necessary after a hearing on the merits is an appropriate request under Title VIII. **/ Since a motion to strike, a drastic remedy never favored by the Courts, is not to be granted unless the Court is certain that the matter to be stricken has no relation to the controversy and is prejudicial, the motions in this case should be denied. ***/

*/ E.g., Louisiana v. United States, 380 U.S. 145, 154 (1965), United States v. Sheetmetal Workers Local No. 36, 416 F. 2d 123 (8th Cir. 1969).

**/ Cf. e.g., United States v. Papermakers Local 189, 416 F. 2d 980 (1969), cert den., U.S. (1970).

***/ See, e.g., Augustus v. Board of Public Instruction, 306 F. 2d 862 (5th Cir. 1962); Blenke Bros. v. Chrysler Corp., 189 F. Supp. 420 (N.D. Ill. 1960); S.E.C. v. Quing N. Wong, 252 F. Supp. 608 (D. P.R. 1966).

THE COMPLAINT

The Complaint herein, after making preliminary allegations concerning jurisdiction, venue, and the identification of the defendants, alleges, in paragraphs 4 through 7, as follows:

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 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 policies and practices described in this paragraph are in violation of 42 U.S.C. §3604(a), (b), (c) and (d).

5. Each of the defendants Harry L. Cornet, Jr., Charles H. Zeibig, Thomas W. McMahon, Edmund F. Gorman, Fred J. Drain, Dolan Company Sales and Jerome L. Howe, Incorporated, has utilized a multiple-listing service within the meaning of 42 U.S.C. §3606, has denied black persons access to the same multiple-listing service, and has applied to black persons and continues to apply to such persons, discriminatory terms and conditions of such access, all on account of race or color, in violation of 42 U.S.C. §3606.

6. The discriminatory practices of the defendants described in the preceding paragraphs of this complaint are maintained, supported and perpetuated by the defendants' employment practices. The defendant John H. Armbruster and Company employs approximately 85 persons, all of whom are white, including 30 clerical workers. The defendant Dolan Company Sales employs approximately 120 persons, all of whom are white, including 50 clerical workers. The defendants Harry L. Cornet, Jr., Charles H. Zeibig, Thomas W. McMahon, Edmund F. Gorman and Fred J. Drain, all doing business as Cornet and Zeibig, Incorporated, employ all, or very nearly all, white persons. The defendant Jerome L. Howe, Incorporated, employs 13 persons, all of whom are white except for one black janitor. Many black persons, qualified to do the various jobs offered by these defendants, reside in the city and county of St. Louis,

Missouri. None of these defendants has taken any steps to recruit black persons for these jobs or to change the racial image of their respective real estate companies.

7. The conduct described in the preceding paragraphs constitutes a pattern or practice of resistance by each defendant, and by the defendants collectively, to the full enjoyment by groups of persons of the rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq.

All of the defendants (except Dolan Sales Company which has made no motions at all) have moved to strike paragraphs 4(c), 6 and 7 of the Complaint. In addition, defendant Howe has moved to strike paragraphs 4(a), 4(b) and 5; and the six other defendants (again excepting Dolan) have also moved to strike paragraph 4(e).

The portion of the prayer, which all defendants (except Dolan) have moved to strike, asks this Court to enter an order enjoining the defendants, their officers, agents, etc., from:

(2) Failing or refusing to take such affirmative steps as may be necessary to correct the effects of their past racially discriminatory policies and practices, and as may be necessary to insure the full enjoyment by black persons of the rights granted to them by Title VIII, including appropriate revisions in their employment practices.

DISCUSSION

A discussion of the motion to strike must begin with the proposition that it is a drastic remedy which is not favored by the courts and which should be denied

unless the pleading sought to be stricken bears no possible relation to the controversy. Rackley v. Board of Trustees of Orangeburg Reg. Hosp., 310 F. 2d 141, 143 (4th Cir. 1962); Augustus v. Board of Public Instruction, 306 F. 2d 862, 868 (5th Cir. 1962); Brown & Williamson Tobacco Corp. v. United States, 201 F. 2d 819, 822 (6th Cir. 1953). "If there is any doubt as to whether under any contingency the matter may raise an issue, the motion should be denied." 2A Moore's Federal Practice, pp. 2429-31 (2d Ed. 1968).

In the Rackley case, a suit to desegregate a hospital, the Court of Appeals for the Fourth Circuit ordered reinstatement of allegations which had been struck by the trial court, because

from the record before the District Court it did not conclusively appear that this circumstance was not germane to the claimants' case. 310 F. 2d at 143.

In Augustus, which was relied on by the Fourth Circuit in Rackley, the Fifth Circuit held that

when there is no showing of prejudicial harm to the moving party, the courts generally are not willing to determine disputed and substantial questions of law upon a motion to strike. Under such circumstances, the court may properly, and we think should, defer action on the motion and leave the sufficiency of the allegations for determination on the merits. 306 F. 2d at 868.

A principal reason for the reluctance of courts to grant motions to strike is the existence of a wide variety of pretrial discovery procedures which enable the pleader to prepare for trial, Shore v. Cornell Dubilier Electric Corp., 33 F.R.D. 5 (D. Mass. 1963).

It is in this context -- that the motion to strike must be denied unless the allegations can now conclusively be determined to be both irrelevant and prejudicial -- that defendant's arguments must be appraised. We submit that the paragraphs under attack possess not only a possibility of relevance and constitutionality -- and that is all that is required to resist the motion successfully -- but are in fact demonstrably germane and within Congressional power under the decisions of the courts in analogous cases.

A. Paragraphs 4(c) and 4(e) -- Statements of Racial Preference.

Defendants move to strike from the Complaint allegations that they have made unlawful statements of racial preference with respect to the sale or rental of dwellings, and, more particularly, have given conflicting advice to Negroes and whites as to whether certain neighborhoods are desirable. The foundation for this portion of defendants' motion is supposed to be the alleged unconstitutionality of Section 804(c) of the Act, 42 U.S.C. 3604(c). A motion to strike is intended to eliminate from the complaint "redundant,

immaterial, impertinent or scandalous matter." Rule 12(f), F.R.C.P. Even if there were a substantial question as to the constitutionality of 804(c) -- and we think there is none -- we do not think that such an issue is properly resolved by motion to strike. As the Court said in Augustus v. Board of Public Instruction, supra, 306 F. 2d at 868, a motion to strike is inappropriate "for determin[ing] disputed and substantial questions of law." In order to grant this portion of the motion, this Court would have to rule, in effect, that Congress passed a law which is not only unconstitutional, but is so plainly so that the arguments in support of its validity are frivolous. There is no basis here for such a ruling.

Decisions of the United States Supreme Court and other federal and state courts in analogous areas are persuasive that Section 804(c) does not contravene the First Amendment guarantee of freedom of speech.

This statute does not restrict the general dissemination of information or ideas. It does not involve political and philosophical arguments competing in the marketplace of ideas. Rather, it makes unlawful racially discriminatory conduct in a commercial context -- here, that of real estate. While the conduct is in this case verbal, the qualifying words "with respect to the sale or rental of a dwelling" make it clear that

it is what the defendants say in the context of their business affairs that is reached by this statute.

Commercial activities are not entitled to the same First Amendment protections that are afforded to the expression of social, religious or political views.

See, e.g., Valentine v. Chrestensen, 316 U.S. 52, 54

(1942) (state may prohibit use of streets for distribution of purely commercial handbills); Jamison v. Texas, 318 U.S. 413, 417 (1943) (religious handbills distinguished from commercial); Halstead v. Securities & Exchange

Commission, 182 F. 2d 660, 668-69 (D.C. Cir. 1950)

(SEC prohibition against soliciting fees in a certain manner upheld; petitioners were "engaged in the market place of affairs rather than ideas."); Planned Parent-

hood Committee v. Maricopa County, 92 Ariz. 231, 375

P. 2d 719 (1962) (prohibition against advertising

contraceptives upheld; advertisement by brand name distinguished from advocacy of ideas and general information about use of contraceptives); Supermarkets General

Corp. v. Sills, 225 A. 2d 728, 93 N.J. Super 326 (1966)

(state, in order to regulate pharmacy business, may prohibit advertising of prescription drugs at discount prices, even though advertisements are true); Markham

Advertising Co. v. State, 439 P. 2d 248 (Wash. 1968)

(upholding prohibition of billboards).

An analogous provision of Title VIII, which also prohibits verbal conduct in a commercial context, Section 804(e), 42 U.S.C. 3604(e) (the "blockbusting" portion), has been upheld against constitutional attack by the Chief Judges of two District Courts. Brown v. State Realty, 304 F. Supp. 1236 (N.D. Ga. 1969) (Smith, J.) and United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969) (Thomsen, J.). This portion of the statute, too, prohibits words -- in this case, representations, whether true or false, about the race of persons moving into a neighborhood. In those cases, as with the allegations here, words are the vehicle for a pernicious commercial activity which results in ghettos and segregation and a profit to the real estate company which uses such tactics. The First Amendment does not insulate statements of racial preference in this context any more than it protects blockbusting.

The statute cannot reasonably be read in the sweeping manner which some of the defendants suggest. The section provides

[I]t shall be unlawful . . .

(c) 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 based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

Contrary to defendants' assertions, it does not purport to reach all responses, accurate or inaccurate, to questions put to real estate agents. To reply to a question whether a school is integrated would not, standing alone, be a statement of racial preference, and our evidence in this case is not founded on so slender a reed. What the law does curtail is the kind of statement which indicates "any preference, limitation or discrimination based on race . . . or an intention to make any such preference, limitation or discrimination." The section does not reach all speech about real estate which involves race, but only those statements which are indicative of racial discrimination.*/

The memorandum submitted on behalf of defendants Cornet, Zeibig, et al. contends that Section 804(c) is constitutionally infirm because it is either to be read literally -- and thus void for overbreadth -- or to be read more narrowly than written, and thus too vague. Even in criminal cases, a statute is sufficiently definite to escape invalidation under the "void for vagueness" doctrine if it conveys a sufficiently definite warning as to the proscribed conduct either on its face

*/ Of course, to volunteer to white "out of town buyers" but not to black "out of town buyers" that University City has racial trouble with Negroes in the schools is a quite different matter from truthfully answering specific questions of fact. Such conduct not only indicates a preference but advertises it, loud and clear. See Cornet Zeibig's brief, p. 2.

or as measured by common understanding and practices.

See, e.g., the discussion in Jordan v. DeGeorge, 341 U.S. 223, 230-232 (1951).

Civil statutes, even those involving quasi-criminal sanctions such as deportation, Jordan, supra, will not be struck down unless they involve a rule or standard that "was so vague and indefinite as really to be no rule or standard at all." Boutelier v. Immigration and Naturalization Service, 387 U.S. 118, 123, quoting Small Co. v. American Sugar Refinery Co., 267 U.S. 233, 239 (1925); cf. Wirtz v. Fowler, 372 F. 2d 315, 334-35 (5th Cir. 1966).

In this case, Section 804(c) puts real estate agents on notice that statements of racial preference are unlawful in the commercial context of selling real estate. The statute does not -- nor could it -- list each of the words and phrases which Congress intended to prohibit. But it does provide fair and clear warning to persons in the real estate business that their verbal conduct must exclude such statements. Insofar as there may be words or phrases which are on the borderline between what the statute reaches and what it does not, we suggest that

One of the prime functions of the judiciary is to interpret statutory provisions so as to clarify their meaning. Thus, the routine existence of differences in interpretation of

[civil] statutes do not make them so vague that they cannot be constitutionally applied. Maley v. National Acceptance Co., 250 F. Supp. 841, 845 (N.D. Ga. 1966) (Smith, J.)

With respect to the defendants' contention that a literal reading of the statute makes it unconstitutional for overbreadth, the cases cited above exemplifying broad legislative power affecting speech in a commercial context support the limitations on verbal conduct here involved. By this section of the Act, Congress sought to reach those real estate practices which, if not literally in violation of the other substantive provisions of the statute, would nonetheless inhibit, directly or indirectly, "the policy of the United States to provide . . . for fair housing throughout the United States." Section 801, 42 U.S.C. 3601.

Moreover, we submit that Title VIII, like the Fifteenth Amendment, should be interpreted to nullify sophisticated as well as simple-minded discrimination, Lane v. Wilson, 307 U.S. 268 (1939). In light of the broad construction to be given civil rights statutes to relieve the humiliation and harm they are designed to rectify, e.g., Daniel v. Paul, 395 U.S. 295 (1969); Jones v. Mayer, 392 U.S. 409 (1968); Nesmith v. Y.M.C.A., 397 F. 2d 96 (1968); United States v. Beach Associates, Inc., 286 F. Supp. 801, 808-809 (D. Md. 1968), Section

804(c) should be interpreted to reach the more subtle, as well as the more blatant, means of stating racial preferences.

It is, of course, somewhat difficult to discuss statutory interpretation and constitutional considerations without the requisite factual and evidentiary materials that would be present after a hearing on the merits. This is a further reason why defendants' motions are premature, for the motion to strike is ill-suited to resolve disputed legal issues. Augustus, supra, 306 F. 2d at 868, and cases cited in the third footnote on page 2, supra.

B. Paragraph 6 --- Employment Practices.

All defendants have moved to strike paragraph 6 of the Complaint, which generally alleges that their earlier enumerated racially discriminatory practices are "maintained, supported and perpetuated" by their employment practices, and specifically alleges the essentially all-white character of the defendants' work forces and their failure to take "any steps to recruit black persons for these jobs or to change the racial image of their respective real estate companies."

At this preliminary stage, the defendants cannot successfully have this allegation stricken unless there is no possible contingency which would make evidence concerning their employment policies relevant. See

cases collected in 2A Moore's Federal Practice, ¶12.21, pp. 2429-2431. The defendants' employment practices may be relevant in a number of ways. If, for example, we can show deliberate exclusion of blacks from jobs, this will tend to shed light on the nature of the defendants' housing practices, place such housing practices in a broader and more illuminating context, and bear on the issues of intent, lack of accident, etc. See Machinists Local 1424 v. Labor Board, 362 U.S. 411, 416 (1960). Conversely, if the defendants were able to show that they had long had a nondiscriminatory employment policy, and that they have recruited and hired Negroes at all levels to dispel any discriminatory image, such evidence would surely be pertinent on the issue whether particular conduct in housing was or was not racially tainted.

The propriety of the allegation as to employment practices is even more apparent from the fact that this is a "pattern or practice" case. The phrase "pattern or practice," also present in the public accommodations and employment titles of the Civil Rights Act of 1964, 42 U.S.C. 2000a et seq., and 42 U.S.C. 2000e et seq., is based on the original "pattern and practice" provision of the Civil Rights Act of 1960, 42 U.S.C. 1971(e), which is a part of the legislation prohibiting racial discrimination in voting.

The decisions construing the pattern and practice provisions, upon which the language here at issue was modeled, have uniformly held that the scope of permissible inquiry is extremely broad, both as to time and as to subject matter. For example, courts have permitted inquiry into conduct well predating the effective date of the appropriate legislation for purposes of establishing a pattern or practice when the alleged pre-Act conduct was illegal (e.g., Kennedy v. Lynd, 306 F. 2d 222, 228 (5th Cir. 1962), cert den. 371 U.S. 952 (1963)) (voting) ("Establishing a pattern or practice . . . may go back many, many years"), or of shaping relief where the alleged pre-Act conduct was not illegal (e.g., United States v. Building & Construction Trades Council of St. Louis, 271 F. Supp. 447 (E.D. Mo. 1966) (employment)).

In United States v. Mintzes, 304 F. Supp. 1305, 1310 (D. Md. 1969), Chief Judge Thomsen explicitly admitted evidence which he found not a violation of Title VIII for the limited purpose of showing that violations of the Act were not accidental, but purposeful and intentional.

In the preliminary stages of this litigation, the possible proof from our allegations, as illustrated above, precludes a determination that the defendants' employment practices can be in no way relevant to this lawsuit and, accordingly, the motions to strike paragraph 6 of the Complaint should be denied.

C. Paragraph 7 -- "Pattern or Practice"

All defendants (except Dolan) have moved to strike paragraph 7 which alleges that the practices enumerated in the earlier paragraphs of the Complaint constitute a "pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VIII]."

Section 813, 42 U.S.C. 3613. This allegation of "pattern or practice" is a principal foundation for a suit by the United States under Title VIII. Id. As it is necessary for the Attorney General to have reasonable cause to believe that defendants such as these are engaged in a pattern or practice of resistance to rights secured by the Act in order to file a complaint under Title VIII on behalf of the United States, it cannot be "immaterial" for the complaint to allege a pattern or practice of racial discrimination.

D. Paragraph 2 of the Prayer -- Necessary Affirmative Relief.

All defendants (except Dolan) ask this Court to strike the second paragraph of the prayer, which requests an Order requiring the defendants to take whatever affirmative steps are necessary to correct the effects of their past discriminatory practices and to insure that all persons fully enjoy the rights secured by Title VIII.

Many of the considerations discussed in the preceding pages of this memorandum are applicable to

the defendants' attack on the prayer as well and support a denial of their motion.

Three additional factors here require denial of this portion of defendants' motion. First, since a prayer for relief is involved, the defendants' attack is premature. If the evidence presented at a hearing on the merits is insufficient to sustain the relief prayed for, the Court need not grant it. In any event, there is no occasion at this stage to invoke a motion to strike.

Second, the prayer is not in any way prejudicial to the defendants; they do not have to do anything until after relief is granted. As one District Judge put it

Motions to strike are rather strictly considered and have been denied even when literally within the provisions of Rule 12(f) where there is no showing of prejudicial harm to the moving party [citing cases] Tivoli Realty Co. v. Paramount Pictures, Inc., 80 F. Supp. 800, 803 (D. Del. 1948).

The defendants here do not claim prejudice, and could not reasonably do so, for there could be no possible prejudice to them by this portion of the prayer remaining in the Complaint until a hearing on the merits.

Third, the relief requested by the portion of the prayer under attack has been sanctioned by decisions of the Supreme Court of the United States. In Louisiana v. United States, 380 U.S. 145 (1965), the Court made clear

that the requisite scope of relief in racial discrimination cases encompasses the continuing effects of past discrimination as well as present and prospective discrimination:

This leaves for consideration the District Court's decree. We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Id. at 154.

The Court of Appeals for the Eighth Circuit has recently applied this principle in an employment discrimination case to require comprehensive affirmative relief, United States v. Sheetmetal Workers Local No. 36, 416 F. 2d 123 (1969), and numerous other federal courts have done likewise. */

Since relief of the character requested by the prayer would be not only appropriate but even mandatory if the United States proves the allegations of the Complaint, Louisiana v. United States, supra, defendants' contention that such relief is "beyond the power of this Court to grant" **/ is without merit.

*/ See, e.g., United States v. Papermakers Local 189, 416 F. 2d 980 (5th Cir. 1969), cert den. U.S. (1970) (employment), Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968) (same), Green v. New Kent County, 391 U.S. 430 (1969) (schools), United States v. Beach Associates, Inc., 286 F. Supp. 301 (D. Md. 1968) (public accommodations).

**/ Defendant Howe's Motion to Strike, paragraph 5.

E. Other Paragraphs of the Complaint Attacked by Defendant Howe Only.

1. Paragraphs 4(a) and 4(b) -- Racially Motivated Steering of Prospective Purchasers.

Defendant Howe asserts that these subparagraphs, which allege that the defendants make listings of houses for sale in predominantly white areas available to whites but not blacks, and make listings of houses in integrated areas available to blacks but not whites, do not contain allegations of conduct "declared to be unlawful under 42 U.S.C. 3601 et seq. [Title VIII]." It is difficult to ascertain the basis for this assertion.

While no subsection of 42 U.S.C. 3604 is expressly referred to in these subparagraphs themselves, taken together they allege a policy of steering whites and blacks along separate and distinct racial lines to predominantly white or integrated neighborhoods respectively and making unavailable listings which are cross-racial, as it were. As an example of how the alleged conduct is a violation of Title VIII, consider Section 804(a) of the Act, 42 U.S.C. 3604(a), which is specifically mentioned at the conclusion of paragraph 4 as among the statutes defendants are alleged to violate. This subsection renders it unlawful to "make unavailable . . . a dwelling to any person because of race." The channeling of whites in one direction and blacks in another, if proved, would be a violation of Section 804(a) since

it would make dwellings unavailable to blacks in some areas and whites in others, because of race. Accordingly, defendant Howe's contention is without merit.

2. Paragraph 5 -- Multiple Listing Service.

This paragraph, which alleges, among other things, that seven of the defendants have denied "black persons access to [a] multiple-listing service . . . on account of race, in violation of 42 U.S.C. 3606," is attacked by defendant Howe on the ground that it "fails to allege any control of the multiple-listing service" by him.

(Defendant Howe's Motion to Strike, page 1).

The statute, in pertinent part, makes it unlawful

to deny any person access to or membership or participation in any multiple-listing service . . . on account of race 42 U.S.C. 3606.

If defendant Howe is contending that an allegation of "control" in haec verba is a necessary part of an allegation under 42 U.S.C. 3606, this is based on a misreading of the statute -- an allegation of a denial of "access to" is sufficient. If he contends that "control" must be alleged for some other reason, and the motion to strike does not indicate what such a reason might be -- the allegations are nevertheless not "immaterial and impertinent." Rather they raise potential issues of fact and law which warrant a hearing on the merits. If there is a substantial question of fact,

it should be determined only after hearing evidence.
If there is a substantial question of law, it should
not be.

determined summarily upon a motion
to strike. The authorities . . .
cited indicate that courts are
generally unwilling to decide such
question on a motion to strike . . .
Tivoli v. Paramount Pictures, 80
F. Supp. 800, 807 (D. Del. 1948).

F. Defendant Howe's Motion to Dismiss.

On what are basically the same grounds as are
put forward in his Motion to Strike, defendant Howe
has moved to dismiss the entire complaint, claiming,
among other things, that Title VIII "is invalid and
unconstitutional as applied to [him]" under the First
and Fifth Amendments to the United States Constitution
(Defendant Howe's Motion to Dismiss, paragraph 1).

In light of the presumption of constitutional
validity of congressional enactments,^{*/} the canon of
statutory construction favoring constitutionally valid
reading of statutes,^{**/} the sustaining of a comparable
portion of Title VIII (also involving speech) by at
least two District Courts,^{***/} and the decision of the

^{*/} E.g., Flemming v. Nestor, 363 U.S. 603, 617 (1960).

^{**/} E.g., American Communications Ass'n. v. Dowds, 339
U.S. 382, 406-408 (1950).

^{***/} Brown v. State Realty, 304 F. Supp. 1236 (N.D. Ga.
1969); United States v. Mintzes, 304 F. Supp. 1305 (D. Md.
1969).

United States Supreme Court in Jones v. Mayer, 392 U.S. 409 (1968), upholding the constitutionality of the Civil Rights Act of 1866, 42 U.S.C. 1982, itself construed as a fair housing law, we respectfully suggest that this motion to dismiss is wholly without merit. */

CONCLUSION

For the reasons stated above, we respectfully request this Court to enter an Order denying all Motions to Strike and the Motion to Dismiss.

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*/ See also the recent Order in United States v. Management Clearing, Inc., No. 70-23 PHX-CAM, ___ F. Supp. ___ (D. Ariz., April 8, 1970) sustaining the general validity of the Act (copy attached).



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MANAGEMENT CLEARING, INC.,
a corporation,

Defendant.

NO. CIV. 70-23-PHX. (CAM)

ORDER

The defendant's Motion to Dismiss based on the argument that 42 U.S.C. 3613 is an unconstitutional delegation of legislative authority, that the Court lacks jurisdiction because the complaint fails to allege or show any facts or circumstances under which the Attorney General is authorized to file suit and that the complaint fails to state a claim upon which relief can be granted, having been fully heard in oral argument and the Court being fully advised in the matter,

IT IS HEREBY ORDERED that the Motion to Dismiss is denied.

DATED this 8th day of April, 1970.

E. A. MUECKE

United States District Judge

CERTIFICATE OF SERVICE

I, Walter W. Barnett, hereby certify that I have served copies of the attached Plaintiff's Response to the Motions to Strike of Defendants Armbruster, Howe, Cornet, Zeibig, McMahon, Gorman and Drain and the Motion to Dismiss of Defendant Howe, and the supporting Memorandum, on counsel for all defendants, by placing copies of the same in the United States mail, postage prepaid, addressed to them as follows:

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This 15th day of April, 1970.

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