IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	CIVIL ACTION NO. C 70-969
v.	
EXCLUSIVE MULTIPLE EXCHANGE, et al., Defendants.	BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND/OR TO DISMISS
	JUDGE THOMAS D. LAMBROS

INTRODUCTORY STATEMENT

Defendants have moved for summary judgment and, in the alternative, to dismiss this action on the grounds: (1) that 42 U.S.C. 3604(a) - (d), which prohibit discrimination in the sale and rental of housing, do not apply to defendant and (2) that allegations under 42 U.S.C. 3606, which prohibits discrimination by multiple listing services, are now moot since the defendant Exclusive Multiple Exchange has allegedly dissolved. Plaintiff opposes these motions.

ARGUMENT

I. 42 U.S.C. 3604, which prohibits discrimination in the sale or rental of dwellings, is applicable to all who discriminate, including real estate agents and brokers.

The complaint in this action alleges that defendants have violated Sections 804 and 806 of the Fair Housing Act of 1968, 42 U.S.C. 3604 and 3606. For purposes of the motion to dismiss, the allegations of the complaint must be accepted as true.*/ Accordingly, the issue is whether the Fair Housing Act prohibits racial discrimination by real estate agents and brokers with respect to the sale of homes. That the negative of that proposition is seriously argued today, five years after enactment of Title VIII, is astonishing.

42 U.S.C. 3604 provides that, subject to certain exemptions,**/

> [I]t shall be unlawful:
>
> (a) To refuse to sell or rent [a dwelling] . . . because of race, color, religion, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental . . . because of race, color, religion or national origin.
>
> (c) To . . . print or publish any . . . statement or advertisement . . . with respect to the sale or rental of a dwelling that indicates race, color, religion or national origin.
>
> (d) To represent to any person because of race, color, religion or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

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*/ Gardner v. Toilet Goods Association, 387 U.S. 167 (1967).

**/ For religious organizations, 42 U.S.C. 3607; for "Mrs. Murphy" owner occupied dwellings with no more than four units; 42 U.S.C. 3603(b)(2); and for single family homes sold without the aid of a broker, 42 U.S.C. 3603(b)(1). Since Congress was so specific about what exemptions from coverage were intended, it defies reason to suggest that a sweeping exemption for brokers was enacted without any explicit mention thereof in the statute.

(e) [Blockbusting provision not here applicable.]

The section of the statute which describes who is covered thereby does not provide that "It shall be unlawful for owners"*/ to do the prohibited acts. Rather, it states that those acts shall be unlawful without limiting the interdiction to any particular class of potential violators. Under these circumstances, it would be anomalous for the statute to be held not to apply to professional real estate organizations which have a far greater impact on housing and on the segregation thereof than individual homeowners. Moreover, the construction of the statute for which defendants now belatedly contend not only tortures the statutory language but also conflicts with the unanimous case law and legislative history.

In United States v. Hunter, 324 F. Supp. 529, 532 (D. Md. 1971), aff'd 459 F. 2d 205 (4th Cir. 1972), cert. den. 409 U.S. 934 (1972), the question was presented whether the words "It shall be unlawful" to advertise discriminatorily, as used in 42 U.S.C. 3604**/ apply to newspaper publishers who publish racially discriminatory advertisements as well as to the advertisers who place them. In the District Court, Chief Judge Thomsen -- the author of the opinion in United States v. Mintzes, 304 F. Supp.

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*/ Where Congress has intended to prohibit discrimination only by specified classes of persons it has expressly said so. See 42 U.S.C. 2000e-2(a) through (c), which prohibits discriminatory employment by employers, employment agencies, and labor organizations, and 42 U.S.C. 3605; which prohibits discrimination in lending only by banks and other organizations specified in the statute, which make real estate loans.

**/ The violation alleged was of 42 U.S.C. 3604(c), but the same words "It shall be unlawful" qualify the coverage of §3604(a) as well.

1305 (D. Md. 1969) on which defendants claim to rely -- held that newspapers were covered, noting that the statute on its face applied to anyone who violated its terms, and that Congress had made exemptions for other organizations but not for newspapers. On appeal, the Court of Appeals affirmed, observing that Congress used "precisely the language which would lead the ordinary reader to conclude that newspapers are to be brought within its purview." 459 F. 2d at 210. The Court further emphasized that:

> Unlike other sections of the Fair Housing title, §3604(c) does not provide any specific exemptions or designate the persons covered, but rather, as the court below noted, applies on its face to "anyone" printing or publishing illegal advertisements. Id. at 210.

In Mayers v. Ridley, 465 F. 2d 630 (D.C. Cir. 1972) (en banc), the question was whether the recorder of deeds violates 42 U.S.C. 3604 by filing racially restrictive covenants. The defendant, making the converse argument to that here presented by defendants, argued that the Fair Housing Act applied only to persons in the real estate business. The Court held, however, that the statute applies to anyone, whether engaged in the real estate business or not:

> Appellees argue that the statute is directed at the real estate industry, with which the Recorder has no connection. Real estate agents, they say, violate the statute by printing or publishing the racial covenants "with respect to the sale . . . of a dwelling," whereas the Recorder

> merely records the racial covenants in the public record. But there is, of course, nothing in the statute which limits its effectiveness to real estate agents. "Unlike other sections of the Fair Housing title, §3604(c) does not provide any specific exemptions or designate the persons covered, but rather . . . applies on its face to 'anyone' printing or publishing illegal advertisements." United States v. Hunter, 4 Cir., 459 F. 2d 205, 210 (1972) (footnote omitted).
> 465 F. 2d at 633.

The legislative history of the Act confirms that Congress intended the unambiguous language it employed to cover brokers in accordance with the natural meaning of the words. Former Attorney General Katzenbach testified that

> The title applies to all housing and prohibits discrimination on account of race, color, religion, or national origin by property owners, tract developers, real estate brokers, lending institutions, and all others engaged in the sale, rental, or financing of housing. */

Congressman Celler, one of the Act's sponsors, also confirmed that the Act was designed to reach brokers by the following comparison with an earlier fair housing proposal:

> The bill, H.R. 14765, the Civil Rights Act of 1966, which passed the House on August 9, 1966, prohibited almost the exact same type of conduct with respect to housing discrimination as would be prohibited by H.R. 2516, as amended by the Senate. One difference is that the 1966 bill banned discrimination by real estate brokers and other persons in the business of selling or renting dwellings, while H.R. 2516 applies its prohibitions, with certain exceptions, to sales by any person. However, since the definition of a "person in the business of building, developing, selling, renting, or leasing dwellings" contained in the 1966 bill

*/ Quoted in Mayers v. Ridley, supra, 465 F. 2d at 657.

> was broad, the difference in the reach of the prohibitions of the two bills is more apparent than real. Multiple sale or multiple rental transactions were covered by the 1966 bill and would also be covered by H.R. 2516. H.R. 2516 achieves essentially the same results as the 1966 bill by prohibiting discrimination in the sale of most types of housing whether or not the seller is "in the business," but at the same time exempts sales or rentals by single-family homeowners. */

The broad sweep of the Fair Housing Act is inherent in its first sentence, which provides that "it shall be the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. The statute is to be read expansively in order to fulfill its purpose. Mayers v. Ridley, supra, 465 F. 2d at 635; United States v. Real Estate Dev. Corp., 347 F. Supp 776 (N.D. Miss. 1972), see also Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1973) (broad interpretation of standing). The discriminatory practices of real estate companies, and particularly the practice of excluding blacks

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*/ Hearings on H. Res. 1100, agreeing to Senate Amendment to H.R. 2516, before the House Committee on Rules, 90th Cong., 1st Sess., Part 1, p. 6 (1968).

from "White" neighborhoods, was well known to be a major cause*/ of the pervasive residential segregation in our metropolitan areas**/ which the Act was designed to remedy.***/ Accordingly,

*/ See, generally, Helper, Racial Policies and Practices of Real Estate Brokers, University of Minnesota Press (1969). At page 201 of that work, the author states as follows:

> "A prominent idea of the racial real estate ideology of the institution is that property values decline when Negroes enter and take up residence in a white area. The most important source of this idea is Article 5 of Part I of the Code of Ethics, "A Realtor should not be instrumental in introducing into a neighborhood a character of property or use which will clearly be detrimental to property values in that neighborhood." In order to appreciate the full meaning of Article 5, it is necessary to take into account that it was amended to its present wording in 1950. From 1924 to 1950, as Article 34 of Part III, "Relations to Customers and the Public," it read: "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." In five interviews with officials of the Board and respondents, it was conceded that the meaning of Article 5 remains the same and that "a character of property or use" covers the introduction of Negroes."

**/ The City of Cleveland is a racially divided city." Banks v. Perk, 341 F. Supp 1175, 1178 (N.D. Ohio 1972).

***/ In Trafficante v. Metropolitan Life Ins. Co., supra, 409 U.S. at p. 211, the Supreme Court referred to the "enormity" of the task of achieving fair housing. Since real estate ideology such as that quoted supra was a prime contributor to so enormous a project, Congress would hardly have exempted from the Act the profession in which this ideology represented the Code of Ethics.

there are literally scores of cases in which real estate brokers have been held subject to the provisions of 42 U.S.C. 3604, */ and there is no case that even suggests a contrary result. In fact, in an earlier stage of one portion of the then separate case against one of the moving defendants, this Court denied defendant Smythe's motion to dismiss on the grounds that sales of vacant residential land by real estate brokers were covered by the 1968 Act even in 1969, before the full coverage of that statute was effective. United States v. A. B. Smythe Co., Inc., et al., C.A. No. 69-885 (N.D. Ohio, November 24, 1970). That holding would be meaningless if, as defendants contend, §3604(a) did not apply to real estate brokers and agents.

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*/ See e.g., United States v. Northside Realty Associates, 474 F. 2d 1164 (5th Cir. 1973); United States v. Alexander & Cloutier Realty Co., ______ F. Supp. ______, P.H. E.O.H. Rptr. Para. 13,570 (N.D. Ga. 1970); Allen v. Gifford, F. Supp. , P.H. E.O.H. Rptr. Para. 13,599 (E.D. Va. 1973); Du Bose v. Gorey Realty Co., ______ F. Supp. ______, C.A. No. 69-C-422 (N.D. Ill. June 17, 1969); Seaton v. Sky Realty Co. Inc., _____ F. Supp. _____, P.H. E.O.H. Rptr. Para. 13,530 (N.D. Ill. 1972). The courts have also entered a large number of consent decrees negotiated by the United States with real estate brokers, in suits alleging violations of 42 U.S.C. 3604, including e.g., United States v. Donald E. Grempler Realty Co., P.H. E.O.H. Rptr. Para. 18,002 (D. Md. 1972) (largest realtor in Baltimore).

The sole authority cited by defendants for the proposition that §3604(a) applies "only to owners" is _United States_ v. _Mintzes_, 304 F. Supp. 1305 (D. Md. 1969). Even the quickest perusal of that opinion demonstrates that it does not stand for the proposition for which defendants contend or any thing like it. At issue in _Mintzes_ was whether the exemption from coverage under §3604 of single family homes sold or rented by an owner applies to the "blockbusting" prohibition of 42 U.S.C. 3604(e). In holding that it does not, Chief Judge Thomsen observed that while Sections 3604(a), through (d), which prohibit racial discrimination, deal with conduct which may be engaged in by a homeowner, Section 3604(e) deals with unlawful conduct _against_ a homeowner, so that the underlying reason for the single-family exemption has no application. Judge Thomsen neither said nor implied that Sections 3604(a) through (d) apply _only_ to homeowners, or that persons other than homeowners were not subject to these provisions. In fact, that question was not before him in even the remotest way. The opinion in _Mintzes_ merely pointed out that a homeowner in a case under 3604(a) through (d) would be a defendant, whereas in a case under 3604(e) he would be a plaintiff. That Judge Thomsen meant no more than this is conclusively demonstrated by his later opinion in _United States_ v. _Hunter_, _supra_, in which he held that the words "it shall be unlawful" in the preface to §3604 apply to _anyone_.

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The instant action was brought by the Attorney General pursuant to 42 U.S.C. 3613, which authorizes him to sue where there has been a "pattern or practice" of discrimination or a denial of equal housing opportunity to a group of persons which raises an issue of general public importance. If 42 U.S.C. 3604(a) through (d) applied only to homeowners and not to agents or brokers, then the Attorney General's "pattern and practice" jurisdiction would be virtually meaningless vis-a-vis the sale of homes. Individual homeowners generally engage in individual sales, and it is brokers and agents who make numerous sales and who can engage in a "pattern or practice" of discrimination during the course of their conduct. Such a result would be incompatible with the general rule of statutory construction that effect is to be given to all parts of a statute and with the declared aim of Congress to provide for fair housing throughout the United States.*/

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*/ Jarecki v. A. D. Searle & Co., 367 U.S. 303 (1961); United States v. Menasche, 348 U.S. 528 (1955).

II. <u>Plaintiff's claims under 42 U.S.C. 3606 have not become moot by the alleged disbandment of the Exclusive Multiple Exchange</u>.

In addition to seeking dismissal of the complaint against the broker defendants on the remarkable ground that the Fair Housing Act does not apply to persons in the business of selling houses, defendants seek dismissal of the remaining claim -- that under §3606 -- on the ground that the other defendant -- the Exclusive Multiple Exchange -- is said no longer to be in operation. This contention is premised on the proposition that §3606 has no application unless there exists a formal brokers' organization and that a case is mooted by a reversible change in conduct effected during the pendency of a lawsuit. Both premises are specious.

42 U.S.C. 3606 provides as follows:

> After December 31, 1968, it shall be unlawful to deny any person access to or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, or national origin.

This provision applies not only to formally structured multiple-listing services, but also to "any other service, organization, or facility relating to the business of selling or renting dwellings." Even if the Exclusive Multiple Exchange has been dissolved, as alleged by defendants, this does not preclude the application of the provision to covered activities carried out in a different form. The Courts look to the substance rather than to the form of transactions, United States v. Beach Associates, Inc., 286 F. Supp. 801 (D. Md. 1968) and cases there cited; United States v. Reddoch, _____ F. Supp. _____, P.H. E.O.H. Rptr. Para. 13,569; (S.D. Ala. 1972) aff'd 467 F. 2d 897 (5th Cir. 1972), and look into the operational realities of a situation before dismissing a lawsuit on the basis of a change in the form of operation.

Defendants' affidavits in support of their motion do not purport to show that defendants no longer exchange listings, nor is there any claim that they will not continue to exchange listings in the future among themselves and with other companies.*/ If the corporate defendants continue informally to do what they previously did formally through the Exclusive Multiple Exchange, there is nothing in §3606**/ to suggest that such activity is insulated from coverage.

Even if defendants were not now exchanging listings or engaged in any of the practices to which Section 3606 applies, plaintiff's claims under this section should not be dismissed.

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*/ Plaintiff is prepared to offer evidence that listings are still being exchanged by members of the allegedly disbanded Exclusive Multiple Exchange.

**/ Like other civil rights laws, this section must, of course, be liberally construed. Mayers v. Ridley, supra; United States v. Real Estate Dev. Corp., supra; and see Jones v. Mayer Co., 392 U.S. 409 (1968).

It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform. United States v. Oregon State Medical Society, 343 U.S. 326, 333 (1951). Actions designed to stymie litigation are not favored. United States v. W. T. Grant Co., 345 U.S. 629, 632-33 (1953). While the alleged disbandment of the Exclusive Multiple Exchange two years after the filing of this action may have some bearing on the scope or form of the relief to be awarded in this case, it does not control the determination whether relief should be granted if past violations are proved. United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 556 (W.D. N.C. 1971). This is particularly true in suits under the civil rights laws in which injunctive relief is the remedy provided by Congress, for, in such cases, injunctions should be issued freely rather than grudgingly where there has been a showing of substantial violations in the past. United States v. Hayes International Corp., 415 F. 2d 1038, 1044-45 (5th Cir. 1969); Hodgson v. First Savings & Loan Association of Broward County, 455 F. 2d 818 (5th Cir. 1972); United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972).

Suits will not be dismissed as moot where there is a possibility that discriminatory conduct, allegedly discontinued, may be resumed in the future. As the Supreme Court said in Gray v. Sanders, 372 U.S. 368, 376 (1962):

> "The voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For if the case were dismissed as moot appellants would be free to return to their old ways. United States v. W. T. Grant Co., 345 U.S. 629, 632."

Accord: United States v. Atkins, 323 F. 2d 733, 739 (5th Cir. 1963); Brooks v. County School Board, 324 F. 2d 303 (4th Cir. 1963).

In United States v. Beach Associates, Inc., 286 F. Supp. 801 (D. Md. 1968), defendant had rented beach apartments to transients. Action by public authorities had prevented such continued use; county inspectors had refused to license the apartments for occupancy, and defendant used them for storage instead. Rejecting a comparable claim of mootness, the Court issued an injunction:

> The discontinuance, since this action was instituted, of the use of the beach apartments as a place of lodging for summer guests does not defeat plaintiff's right to relief. While five of the apartments are now being used for storage, there are no plans to tear the building down, and it can be used for its original purpose if the defendants comply with local ordinances. Under these circumstances, the Court is compelled to issue an injunction enjoining the operation of the lodging facility on a racial discriminatory basis. As stated in Gray v. Sanders, 372 U.S. 368, 376, 83 S.Ct. 801, 9 L.Ed. 2d 821 (1962); " . . . the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing. For is the case were dismissed as moot, appellants would be 'free to return to . . . (their) old ways.'" United States v. All Star Triangle Bowl, Inc., 283 F. Supp. 300 (1968) (No. 68-111 D. S.C. February 23, 1968); see also, Cypress v. Newport News Gen., etc., Mem. Hosp., 375 F. 2d 648, 657-658 (4th Cir. 1967). 286 F. Supp at 808.

In _United States_ v. _All Star Triangle Bowl_, 283 F. Supp. (D. S.C. 1968), the United States sued the operator of a bowling alley for violation of the federal public accommodations law, 42 U.S.C. 2000a _et seq_. The bowling alley was alleged to be subject to the Act by reason of the presence on the premises of an eating facility. On the day before suit was brought, the defendant "permanently and unconditionally" closed the eating facility and showed by affidavit that "food service will not be resumed in the future." Nevertheless, the Court held that it was "compelled" to enter an injunction. Citing _Gray_ v. _Sanders_, _supra_, Chief Judge Martin held that if the case were dismissed, the defendant would be free to return to its discriminatory practices.

Finally, this is a case involving an important public interest. _Trafficante_ v. _Metropolitan Life Ins. Co._, 409 U.S. 205 (1973); _Mayers_ v. _Ridley_, 465 F. 2d 630 (D.C. Cir. 1972); _United States_ v. _Real Estate Dev. Corp._, 347 F. Supp. 776 (N.D. Miss. 1972); Cf. _United States_ v. _Raines_, 362 U.S. 17 (1959). While disputes between private parties may properly be settled more simply, suits by the Attorney General in the public interest are not to be dismissed as moot where the public interest, and the interests of non-parties would be affected. _United States_ v. _Freight Association_, 166 U.S. 290, 308-9 (1896); _So. Pac. Terminal Co._ v. _ICC_, 219 U.S. 498, 515 (1910); _United States_ v. _W. T. Grant Co._, _supra_, at 632-3.

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CONCLUSION

In this case injunctive relief is being sought by the United States to prevent racially discriminatory housing practices by a group of real estate companies and their agents. The acts complained of take several forms, all affecting the limitation of or access to free choice of housing location by minority citizens. The forms of discriminatory behavior include: individual acts by brokers and their agents, both with respect to prospective purchasers (racial steering and refusals to sell) and with respect to persons seeking listings (refusal to cooperate with nonwhite brokers and white brokers with nonwhite clients); transactions between brokers and agents of one defendant company and brokers and agents of one or more of the other defendant companies (restriction of listings made available to nonwhite prospects); and actions by all the defendant companies acting with a cumulative effect.*/ Section 3604 prohibits each of these categories of discrimination as they relate to homeseekers.**/ Section 3606 makes unlawful those aspects of broker behavior relating to access to listings, whether or not the defendants are formally organized into a group called "Exclusive Multiple Exchange."

*/ Cf. United States v. Bob Lawrence Realty Co., 474 F. 2d 115 (5th Cir. 1973). In this case, however, we propose to prove concerted action even though under Lawrence concerted action is unnecessary.

**/ See, e.g., United States v. City of Parma, C.A. No. C-73-469, (N.D. Ohio) (motion to dismiss denied, September 6, 1973) and United States v. Youritan Construction Corp., ______ F. Supp. ____, P.H. E.O.H. Rptr. Para. 13,582 (N.D. Cal. February 8, 1973) where the Court stated that the language of Section 3604(a) "appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." (Conclusions of Law No. 5).

Because both alternatives sought by the defendants would require a restriction or coverage of the Fair Housing Act not intended by Congress, the United States respectfully requests that the defendants' motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael L. Barrett, hereby certify that I have served defendants with a copy of the attached Brief in Opposition to Defendants' Motion for Summary Judgment and/or to Dismiss by mailing a copy, postage prepaid, to their attorneys at the following addresses:

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This 7th day of September, 1973.

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