IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

sent 9/8/70

UNITED STATES OF AMERICA, Plaintiff, v. TREASURE LAKE, INC., Defendant.	CIVIL ACTION NO. 70-805 PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE, THE DEMAND FOR A JURY TRIAL, AND TO DEFENSES RAISED IN THE ANSWER

This is a case involving alleged discrimination in housing. The complaint filed by the United States on July 8, 1970, alleges violations of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 et seq. Specifically, the complaint alleges that the defendant has discriminated against Negroes, on account of their race or color, among other ways, as follows:

(a) The defendant has not solicited Negroes to purchase vacant lots at Treasure Lake on the same basis as it solicits white persons;

(b) the defendant has inhibited and discouraged Negroes, by various means, from purchasing vacant lots at Treasure Lake;

(c) the defendant has instructed its employees to engage in various racially discriminatory practices, including the use of racial designations on records of prospective purchasers to assure that Negro purchasers will not be solicited; and

(d) the defendant has failed to take adequate affirmative steps to correct the continuing effects of their past and present discriminatory practices.

According to the Complaint, the defendant's discriminatory housing practices are supported by its activities with respect to employment. Paragraph 9 of the Complaint alleges that the defendant has employed only white persons as sales and other public contact employees at sales offices it has operated in Altoona, Erie, Johnstown, Harrisburg, Glenside, Pittsburgh, Scranton, and Sharon, Pennsylvania; Randallstown and Riverdale, Maryland; Cleveland, Kent, and Youngstown, Ohio; and Arlington, Virginia. It is further alleged that the defendant has not taken any steps to recruit black persons for these jobs or to change its racial image of not hiring black persons for such jobs. Finally, in paragraph 10 of the Complaint, the defendant's various practices described in earlier paragraphs are collectively

alleged to constitute a pattern or practice of resistance to the enjoyment of rights secured by the Fair Housing Act.

Paragraph (c) of the prayer for relief, which corresponds to the allegations of paragraph 9, seeks an order enjoining the defendant and those in privity with it from:

> (c) Failing or refusing to take adequate affirmative steps to correct the effects of its past and present racially discriminatory practices, including, but not limited to the solicitation of prospective Negro purchasers, the giving of notice to the general public that all persons will be afforded equal opportunities in housing without discrimination based on race or color, and the making of appropriate revisions in its employment practices. (emphasis added)

The defendant has filed an Answer asserting several constitutional and other defenses, denying discrimination both in housing and in employment, and demanding a jury trial. In addition, defendant has moved to strike as "impertinent" and "scandalous"*/ the allegations in the

*/ Defendant claims in its motion to strike that the allegation as to employment practices was at least in part, known by the Government lawyers to be false, and was included in the complaint to make the routine press release more exciting. Not one shred of evidence is advanced in support of this statement. In general, matter will be struck from a pleading as "scandalous" when it is couched in vituperative or intemperate language, Budget Dress Corp. v. ILGWU, 25 F.R.D. 506 (S.D. N.Y. 1959), as in cases when wild accusations are made against Government officials. Hohensee v. Watson, 188 F. Supp. 941 (M.D. Pa. 1959), aff'd 283 F. 2d 950 (3rd Cir. 1960). We think that the adjective "scandalous" might more appropriately be used with respect to defendant's unsupported accusations than with respect to our rather "low key" pleading. Perhaps, on reflection, defendant may wish to change the adjective to "immaterial," which would appear to synopsize its position without resort to inflammatory rhetoric.

complaint which deal with its employment practices.

This memorandum is addressed primarily to the motion to strike. We also comment briefly on some of the various defenses asserted by defendant in its Answer. We believe that these defenses are so demonstrably lacking in merit that they dilute defendant's entire litigating position, for there would be no reason to raise insubstantial defenses if substantial ones existed.

THE MOTION TO STRIKE

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 Regional 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, ¶12.21, 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 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 paragraph under attack possesses not only a possibility of relevance -- and that is all that is required to resist the motion successfully -- but is in fact demonstrably germane.

1. Defendant's Employment Practices are Relevant to Show Intent, Motive and Lack of Accident and to Shed Light on its Housing Practices.

If the proof shows deliberate exclusion of blacks from jobs, this will tend to shed light on the nature of the defendant's housing practices, place such 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 defendant shows that it has long had a nondiscriminatory employment policy, and that it has recruited and hired Negroes at all levels without discrimination, such evidence would surely be pertinent on the issue whether particular conduct in housing was or was not racially tainted, and whether defendant should be enjoined.

It is not disputed that Treasure Lake engages in solicitation of purchasers. Such solicitation is done by its employees. A defendant might reasonably think it more difficult to persuade a thoroughly integrated work force to solicit discriminatorily than to induce an all-white group to do the same. Moreover, an ambiguous act, capable of being given both a discriminatory and a nondiscriminatory interpretation, would probably not be found to be a part of a general discriminatory pattern if the proof were to show extensive and enthusiastic nondiscriminatory hiring of blacks. The Court might

well hold otherwise, however if the ambiguous act were set in the context of discriminatory employment practices which produce an all-white work force and create an all-white image.

2. Defendant's Employment Practices and its All-White Work Force are Relevant to Show Defendant's "Image" in the Negro Community.

The maintenance of an all-white work force may facilitate the implementation of a discriminatory housing policy by discouraging Negroes from attempting to purchase lots. In the context of school desegregation cases involving challenges to so-called "freedom of choice" plans, it has been held

> that the presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters.

Brown v. County School Board of Frederick County, Va., 245 F. Supp. 549 (W.D. Va. 1965).*/ In other words, where there is faculty segregation, blacks are likely to choose the black school and whites the white school. By the same token, courts have held that it is discriminatory for labor unions**/ and hospitals***/ to maintain

*/ Quoted with approval in United States v. Jefferson County Board of Education, 372 F. 2d 836, 883 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967). See also, Bradley v. School Board of City of Richmond, 382 U.S. 103 (1965).

**/ United States v. Plumbers Local No. 73, 61 C.C.H. Lab Cases, Para. 9329 (S.D. Ind. 1969).

***/ United States v. Medical Society of South Carolina, 298 F. Supp. 145, 148, 152 (D. S.C. 1969).

an all-white image and to take no steps to correct it, since such conduct deters Negroes from becoming union members or patients.*/

The present situation is analogous. The employment of whites alone, together with the defendant's alleged discriminatory solicitation practices, may create an all-white image which deters blacks from trying to purchase lots at Treasure Lake. To undo that image, if the facts we allege are true, hiring practices as well as solicitation and related practices will have to be revised if the discriminatory image is to be eliminated.

3. Defendant's Employment Practices are Relevant to Show a "Pattern and Practice."

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 or 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. Essentially, the pattern or practice requirement means that the discrimination must be more

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*/ See also United States v. Sheetmetal Workers, 416 F. 2d 123 (8th Cir. 1969).

than just an a-typical, exceptional isolated incident which is unlikely to recur. United States v. Mayton, 335 F. 2d 153, 159 (5th Cir. 1964); United States v. Mintzes, 304 F. Supp. 1305, 1313-1314 (D. Md. 1969).

The decisions construing the pattern and practice provisions 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 predating the effective date of the appropriate legislation for purposes of establishing a pattern or practice (e.g., Kennedy v. Lynd, 306 F. 2d 222, 228 (5th Cir. 1962), cert. denied 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. Sheetmetal Workers, supra; United States v. Building & Construction Trades Council of St. Louis, 271 F. Supp. 447 (E.D. Mo. 1966) (employment)).

In United States v. Mintzes, supra 304 F. Supp. at 1310 (D. Md. 1969), a case under the "blockbusting" provisions of the Fair Housing Act, 42 U.S.C. 3604(e), Chief Judge Thomsen explicitly admitted evidence of racial representations made with respect to property not subject to the Act (even though he found such representations not to be unlawful), for the limited purpose of showing that similar representations as to "covered" property were not accidental, but purposeful and intentional. In the present case, discrimination

in employment is unlawful, 42 U.S.C. 2000e et seq., and the pleading and proof of facts relating to defendant's employment practices is therefore even more germane, and less subject to a motion to strike, than the evidence admitted in Mintzes.

4. The Allegations as to Employment Practices are Relevant on the Issue of Relief.

The allegations contained in paragraph 9, together with other allegations of discrimination in the complaint, form the basis for the relief requested, including the making of appropriate revisions in employment practices. Relief in equity cases should be moulded to the necessities of the particular case. Hecht Co. v. Bowles, 321 U.S. 321, (1944). In Porter v. Warner Holding Co., 328 U.S. 395 (1945), the Court stated:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction, and since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . In addition, the court may go beyond matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

In Louisiana v. United States, 380 U.S. 145, 154 (1965) a voting discrimination case, the Supreme Court

applied these familiar principles of equity to affirm comprehensive relief. Affirming a wide-ranging decree which prohibited not only the use of a voting "test" held to be unconstitutional but also a more recent less extreme replacement, the Court said:

> 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 ban like discrimination in the future.

The Court's approach in Louisiana has been followed in all kinds of other civil rights cases. In actions to insure equal employment opportunity, for example, the court is "not limited to simply parroting the Act's prohibitions," but should order appropriate affirmative relief, carefully tailored to the factual situation presented. Local 53 v. Vogler, 407 F. 2d 1047, 1052 (5th Cir. 1969), affirming 294 F. Supp. 368 (E.D. La. 1968). Quarles v. Philip Morris, Incorporated, 279 F. Supp. 505 (E.D. Va. 1968). See also Green v. County School Board, 391 U.S. 430 (1968) (schools); United States v. Beach Associates, Inc., 286 F. Supp. 801 (D. Md. 1968) (public accommodations); United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D. S.C. 1969) (desegregation of patients and employees of private hospital). In the Fifth Circuit's prescribed standard school desegregation decree, applicable to pupil desegregation cases generally, the prescribed

relief includes a prohibition against discrimination in the employment, promotion, demotion, etc., of teachers, even though such a suit can be brought by the Government only upon complaint of the parent of a pupil. 42 U.S.C. 2000C-6 United States v. Jefferson County Board of Education, 380 F. 2d 385, 394 (5th Cir. 1967), cert. den. 389 U.S. 840 (1967).

42 U.S.C. 3613, on which this suit is grounded, likewise contemplates the entry of comprehensive relief where a pattern or practice of resistance has been shown. That section provides that:

> Whenever the Attorney General has reasonable cause to believe that any person . . . 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 . . . by filing (in the appropriate court) a complaint setting forth the facts and requesting such preventive relief . . . as he deems necessary to insure the full enjoyment of the rights granted by this title. (emphasis added)

In formulating the kind of relief required if the defendant is found to have violated the Fair Housing Act, the Court would not, we think, wish to ignore the defendant's employment practices, and in particular, the question whether revision of these practices would be helpful and appropriate in correcting the effects of any violation of the Fair Housing Act which plaintiff may prove upon the trial. Even if there were no showing of intentional employment discrimination, we believe that the recruitment of black employees would be an

appropriate step to correct the effects of past housing discrimination and would, at least, create an atmosphere in which a corrective program might effectively operate. In order to know what, if any, relief affecting employment should be granted the Court should be apprised of the composition of the defendant's work force and the character of its current employment practices. Without that information, it would be difficult, if not impossible, to fashion appropriate relief. Just as desegregation of faculties is an indispensable element of a black pupil's right to a desegregated education, Jefferson, supra, Bradley v. School Board, 382 U.S. 103 (1965); Wheeler v. Durham County Board of Education, 363 F. 2d 738 (4th Cir. 1966), so the desegregation of the work force is at least a potential element of relief due black would-be purchasers of lots at Treasure Lake.

On the basis of the foregoing reasoning, we have heretofore negotiated consent decrees in cases charging only housing discrimination which have included a requirement of affirmative steps to assure nondiscriminatory employment practices and to recruit minority employees. Courts all over the United States have entered such decrees. See, e.g. United States v. Weingart, et al., C. A. No. 70-530-CC (C. D. Calif., July 29, 1970) (owners and managers of more than 8000 units in Los Angeles); United States v. J & E Construction Co., C. A. No. C-70-232 (N.D. Ohio, June 19,1970) (large management company in Cleveland, Ohio); United States v. Charnita, Inc., C. A. No. 69-409 (M. D. Pa., June 8, 1970)

(Pennsylvania land developer larger than but comparable to Treasure Lake; decree entered as to defendant not charged with employment discrimination). Copies of these decrees are attached hereto. */

Since those who discriminate against Negroes in one area of activity often do so in others, it is not uncommon to allege and to prove two kinds of civil rights violations in the same complaint. In United States v. Medical Society of South Carolina, supra, the Government alleged, and the Court enjoined, discrimination by a hospital both with respect to admission of patients and with respect to employment practices, and the decree required comprehensive affirmative corrective steps as to both patients and employees. In United States v. Lake Caroline, Inc., C. A. No. 432-69-R (E.D. Va.,

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*/ For the relevancy of the consent decrees in these cases, in which the defendants were large organizations represented by distinguished counsel, see the citation of such a decree -- Scott and United States v. Young -- in the dissenting opinion of Judge Heaney in Daniel v. Paul, 395 F. 2d 118, 128 (8th Cir. 1968). That dissent was in effect validated by the Supreme Court's reversal of the majority opinion, 395 U. S. 297 (1969) on grounds for which Judge Heaney argued in his opinion. Since, in cases affecting the public interest, the Court "will not accept legal concessions unless convinced that they are sound, and will not enter any judgment based on an unwarranted or improvident concession," Talley v. Stephens, 247 F. Supp. 683, 686, note 3 (E.D. Ark. 1965), and since these consent decree provisions are part of a pattern which has evolved during the first year and a half of the Fair Housing Act in cases litigated by the Attorney General, who is responsible for enforcement in pattern or practice cases, we think they are entitled to some weight. See Udall v. Tallman, 380 U. S. 1, 16 (1965).

February 5, 1970), (copy attached) the complaint alleged fair housing and fair employment violations by a developer of the same kind as Treasure Lake, and the consent decree likewise affirmatively treated both issues. The only difference between those cases and this one is that there is no formal allegation in this complaint that Treasure Lake has engaged in a pattern or practice of discrimination in employment. We think that to be only a formal distinction which did not affect the consent decrees in Weingart, J & E Construction and Charnita and should not be controlling here.

The complaint in this case does allege that those of defendant's employees who solicit and deal with the public are all white. Experience in other cases shows -- and we do not think that it can or will be disputed here -- that such jobs as telephone solicitor do not require a high level of education, training, or sophistication. There are numerous Negroes in the areas where Treasure Lake does business who are capable of doing this kind of work. The Complaint also alleged that Treasure Lake has not taken adequate steps to recruit blacks and to change its all-white employment image. */

*/ Defendant belittles the significance of statistics, but, as the Fifth Circuit has said, "In cases of racial discrimination, statistics tell much, and courts listen." State of Alabama v. United States, 304 F. 2d 583, 588 (5th Cir. 1962), aff'd 371 U. S. 37 (1963). Moreover, nothing is as emphatic as zero. United States v. Hinds County Board of Education, 417 F. 2d 852, 858 (5th Cir. 1969)

In a rather flamboyant section of its Answer, defendant says that the Housing Section has 13 attorneys, none of whom is Negro. Our twelve attorneys are in fact all white. Unfortunately, as a result of pervasive discrimination against blacks in this country, the number of black lawyers is relatively small in comparison to the Negro population generally. Even so, the Section Chief Emeritus of the predecessor section to the

(Continued on next page)

Arguably, such evidence would be sufficient to justify a specific allegation in the complaint of a pattern or practice of resistance to the enjoyment by Negroes of the right to equal employment opportunity, particularly since the statutory test is whether the Attorney General has "reasonable cause" to believe that such a pattern exists. See, e.g., United States v. Sheetmetal Workers, supra; United States v. Plumbers Local No. 73, supra; United States v. Medical Society of South Carolina, supra. Pleading conservatively, we have made no formal pattern or practice allegation as to employment, but, by paragraph 9 and by our prayer for relief, we put defendant on notice that the employment area is one as to which we propose to conduct discovery and offer proof. If appropriate, the complaint can eventually be amended either formally by submission of an Amended Complaint, or, alternatively, to conform to the evidence, in accordance with Rule 15(b) of the Federal Rules of Civil Procedure.

Since, from the outset of the case, the defendant has been put on notice that its employment practices are deemed relevant to the suit and to the relief we seek, no question of prejudice or surprise can arise. Accordingly, the fact that we have pleaded conservatively should not affect our right to make discovery and proof with respect to our allegations

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*/ Continued from page 15.

Housing Section is a Negro; one of our five subject matter Section Chiefs is black, the Executive Assistant (office manager) of the Civil Rights Division is black, a number of our attorneys are black, and a majority of our secretaries, both supervisory and nonsupervisory, are black. The breezy inclusion of the sentence about the Housing Section in defendant's Answer hardly presents any defense.

concerning employment.

5. Defendant has Raised an Issue of Fact With Respect to the Allegations as to its Employment Practices

Paragraph 4 of defendant's Motion to Strike reads as follows:

> 4. Paragraph 9 of the complaint charges plaintiff [sic] with employment of only white people and that it has not taken steps to recruit black persons. This is not true as defendant in its employment ads admits */ it is an equal opportunity employer.

In addition, the defendant's Answer denies the allegations of paragraph 9 and makes affirmative allegations with respect thereto. Defendant has thus raised an issue of fact, the issue being whether the allegations in paragraph 9 of the Complaint are true. A disputed question of fact cannot be decided on a motion to strike, Augustus v. Board of Public Instruction, 306 F. 2d 862 (5th Cir. 1962).

There is no suggestion in defendant's motion to strike that the denial of our allegation is simply in the alternative to the motion to strike. It is apparently advanced as a reason to strike our paragraph 9 -- it should be struck, defendant says, in part because it is not true. **/ The defendant has alleged -- or "admitted" -- that it advertises nondiscriminatorily because it believes that such an allegation may

*/ We wonder why the defendant selected the word "admits" in this sentence, rather than a more enthusiastic verb.

**/ The accusation that we included the "employment" allegation for press release purposes is unsupported by any facts, and untrue, and attacks the ethics of the pleaders for no apparent reason.

help it to avoid the entry of injunctive relief against it. If defendant really believed nondiscriminatory employment practices were irrelevant to the subject matter of this case, it would have found it unnecessary to respond in its Motion to the allegation or to claim a policy of nondiscriminatory recruitment.

Defendant cannot have it both ways. If fair employment practices are relevant to show a nondiscriminatory disposition which might make the reasons for injunctive relief less compelling, then unfair employment practices must be relevant in that the opposite inference may be drawn. Since defendant itself has in its pleadings put the truthfulness of our allegations in issue, it cannot be heard to claim that the facts which it has denied have no potential for relevance, or that the extraordinary motion to strike is appropriate here.

THE OTHER DEFENSES

While the various defenses presented by defendant are not raised by motion, we comment on them briefly. We believe that each of these defenses is so plainly without merit that, collectively, they seriously impair the authority of defendant's entire pleading.

1. Constitutionality

The second defense in defendant's Answer asserts that the Fair Housing Act is unconstitutional. In view of the Supreme Court's holding in Jones v. Mayer, 392 U.S. 409, 413 (1968), that a parallel fair housing law, 42 U.S.C. 1982,

> bars all racial discrimination, in private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power to enforce the Thirteenth Amendment,

this contention is frivolous. */

2. Failure to State a Claim

Defendant's third defense is that the complaint allegedly fails to state a claim upon which relief may be granted, apparently on the grounds that it is said to be grounded solely on discrimination in solicitation activities, to which, so defendant says, the Fair Housing Act does not apply. This defense does not survive a reading of the complaint.

42 U.S.C. 3604(a) makes it unlawful to refuse to sell or rent or "otherwise make unavailable or deny" a dwelling to any person on account of race. Paragraph 8 of our complaint alleges among other things, that the defendant has made dwellings unavailable because of race. Much of the language of that paragraph tracks the statute, so that if the defendant has done what is alleged, he has necessarily violated the Act. Paragraph 7, which is more specific, alleges that the policy of making lots unavailable to blacks is effectuated not only (as defendant claims) by refusal to solicit black purchasers, but also by inhibiting and discouraging Negroes from purchasing lots on account of race. If these allegations are true -- and for "failure to state a claim" purposes they must be so considered -- then it is difficult to perceive the basis for the argument that no violation is alleged.

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*/ See also United States v. Mintzes, 304 F. Supp. 1305, 1312-1313 (D. Md. 1969); Brown v. State Realty, 304 F. Supp. 1236, 1240 (N.D. Ga. 1969); United States v. Bob Lawrence Realty Co., F. Supp. (No. 13468, N.D. Ga., May 19, 1970) (copy attached)

The fact that the complaint does not plead evidentiary detail does not make it legally inadequate, so long as the defendants are generally apprised as to what violations we charge. See Conley v. Gibson, 355 U.S. 41 (1957); United States v. Building & Construction Trades Council of St. Louis, 271 F. Supp. 447 (E.D. Mo. 1966); United States v. IBEW Local 683, 270 F. Supp. 233 (S.D. Ohio 1967); United States v. Bob Lawrence Realty Co., ____ F. Supp. ____, (No. 13468, N.D. Ga., May 19, 1970) (copy attached) */

3. The Attorney General's Certification

Defendant's fourth defense asserts a lack of subject matter jurisdiction. Defendant alleges that the Attorney General does not have reason to believe that the defendant is engaged in a pattern or practice of resistance or that the denial of rights raises an issue of general public importance. It is well settled, however, that the Attorney General's certification as to these matters is not reviewable. United States v. Building & Construction Trades Council, 271 F. Supp. 447, 453 (E.D. Mo. 1966); United States v. Mitchell Realty Corp., ____ F. Supp. ____ (No. 13467, N.D. Ga., June 4, 1970) (copy attached) see also United States v. Greenwood Municipal Sep. School District, 406 F. 2d 1086 (5th Cir. 1969).

4. Statute of Limitations

On some unexplained and, for all that appears, inexplicable ground, defendant asserts in its Fifth Defense that our claim

*/Similar defenses have also been rejected in a number of unreported fair housing cases, and we will make the pleadings and orders available to the Court if this aspect of the case is pressed by defendant, or if the Court wishes to see them.

is barred by an unspecified statute of limitations. 42 U.S.C. 3613, on which the suit is grounded, contains no limitation, and it is well settled that evidence of a pattern or practice may go back "many many years." Kennedy v. Lynd, 306 F. 2d 222, 228 (5th Cir. 1962), cert. den. 371 U.S. 952 (1963). Evidence of discrimination is admissible even during periods when such conduct was not prohibited. United States v. Sheetmetal Workers, supra. While there is indeed a 180 day limitation for suits by private individuals, 42 U.S.C. 3612(a) this is not such a suit. The Government's interest is a separate and significant one, not to be confused with the rights of individual victims of discrimination. Moreover, a simple reading of the complaint discloses that we allege a continuing pattern of discrimination. United States v. Raines, 362 U.S. 1 (1959); United States v. Hayes International Corp., 415 F. 2d 1038 (5th Cir. 1969).

THE DEMAND FOR A JURY TRIAL

The defendant, in its Answer, demands a jury trial. This is, however, a suit in equity, and it is well settled that there is no right to a jury trial in such an action. United States v. Louisiana, 339 U. S. 699, 706 (1950); United States v. Bob Lawrence Realty Co., supra; Damsky v. Zavatt, 289 F. 2d 46 (2d Cir. 1961).

CONCLUSION

For the foregoing reasons, plaintiff respectfully prays that defendant's motion to strike be denied, that its demand for a jury trial be denied, and that the Court rule adversely at an appropriate time to the various defenses asserted in the Answer.

Respectfully submitted

Frank E. Schwelb

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CERTIFICATE OF SERVICE

I, Carl Gabel, attorney for the plaintiff hereby certify that I have served a copy of the attached Plaintiff's Memorandum in Opposition to Defendant's Motion to Strike, the Demand for a Jury Trial, and to Defenses Raised in the Answer on the defendant by mailing a copy, postage prepaid, to defendant's attorney at the following address:

James D. Morton, Esquire
Buchanan, Ingersoll, Rodewald,
Kyle and Buerger
1800 Oliver Building
Pittsburgh, Pennsylvania 15222

This, the 8th day of September, 1970.

Carl Gabel

CARL W. GABEL, Attorney
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