UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ON BEHALF OF TERRYL AND JANELLA HERRON,

Charging Party,

TERRYL AND JANELLA HERRON,

Complainants-Intervenors,

and

BRETT AND AUDREY COOPER,

Intervenors,

v.

GORDON G. BLACKWELL,

HUDALJ 04-89-0520-1

Decided December 21, 1989

Holly Cohen Cooper, Esq.
David H. Enzel, Esq.
for the Charging Party

Gordon L. Joyner, Esq.
for Complainants - Intervenors

Thomas J. Hughes, Jr., Esq.
for Intervenors

Edward W. Gadrix, Jr., Esq.
for Respondent

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed by Terryl and Janella Herron ("Complainants") alleging that they had been discriminated against because of their race, in violation of the Fair Housing Act, 42 U.S.C. sections 3601-19, as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1626 (1988)("Fair Housing Act" or "Act"). Following an investigation and a determination that reasonable cause existed to believe that a discriminatory act had taken place, on August 30, 1989, the General Counsel of the Department of Housing and Urban Development ("HUD" or "Charging Party") issued a charge against Gordon G. Blackwell ("Respondent") alleging that he had engaged in discriminatory practices in violation of sections 804 and 818 of the Act, and praying for appropriate relief under section 812 (g)(3) of the Act. By Order dated October 17, 1989, both Terryl and Janella Herron and Brett and Audrey Cooper ("Intervenors") were granted leave to intervene to participate as parties.

A hearing was held in Atlanta, Georgia, on November 6-8, 1989. The record was held open for the receipt of a posthearing deposition which was filed on November 21, 1989. Posthearing briefs were filed by all parties on December 1, 1989.

Findings of Fact

1. Respondent, Gordon G. Blackwell, is the sole owner of the property located at 4010 Indian Lakes Circle, Stone Mountain, Georgia. Mr. Blackwell is white. He has been a licensed real estate broker in Georgia since January 1, 1970. S. Exs. 36 and 46.[1] Prior to receiving his broker's license, he had been selling residential real estate for at least five years. S. Exs. 46; Tr. 556.

2. The house at 4010 Indian Lakes Circle ("the house") became vacant in August 1988. From January 1, 1989 to April 1, 1989, the house had been listed by broker Barbara Wexler who was unable to find any interested purchasers. Tr. 576. On April 8, 1989, Respondent entered into a 90-day exclusive listing of the house at $104,000 with Don Wainwright, a real estate agent with Coldwell Banker. In connection with the exclusive listing, Respondent executed a profile sheet which noted that he would consider paying closing costs and discount points, and that

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[1] The following reference abbreviations are used in this decision: "Tr." for "Transcript"; "S. Ex." for "Secretary's Exhibit"; and "R. Ex." for "Respondent's Exhibit."

possible methods of financing the purchase would be conventional as well as FHA. S. Exs. 2, 3, 4 and 5. The "Remarks" section of the profile sheet noted, "super motivated seller want's (sic) offer." On May 22, 1989, the listing was amended to reduce the offering price to $98,000. S. Exs. 6 and 7. At the same time Respondent reduced the offering price to $98,000, he told Mr. Wainwright, "Bring me an offer for 92 and I'll take it." Tr. 114.

3. In May 1989, the Complainants, Terryl and Janella Herron, and their two children, ages 5 and 8, were shown the house by their agent, Kay Newbern. Mr. and Mrs. Herron are black. The Herrons found the house to be suited to their needs and, on May 10, 1989, completed a written offer to buy it for $80,000, with blanks in the offer on lines 2.B.(2) and (3) filled in to state that the seller was to pay up to 3% of the loan amount toward closing costs and up to 3% for loan discount points. S. Ex. 35; Tr. 394, 399-400, 504. This offer, the first that Respondent had received, was rejected. Tr. 53, 400, 583.

4. After their offer was rejected, the Herrons looked at other houses, but made no offers since they "really liked the house" at 4010 Indian Lakes Circle. Tr. 400, 401. On June 8, 1989, Mr. Herron offered in writing to buy the house for $90,000, with the seller to pay up to 3% towards closing costs and up to 2% toward points. S. Exs. 8 and 20; Tr. 54-55, 401-402. Multiple copies of this offer were conveyed by Ms. Newbern to Mr. Wainwright. Tr. 57.

5. On June 9, 1989, after phoning Respondent to inform him of the offer, Mr. Wainwright brought the offer to Respondent's residence. Mr. Wainwright also brought a "net sheet" which he had prepared to show the amount of money Respondent would clear after the sale. However, since Mr. Wainwright had not been told by Respondent that he had refinanced the house, the figures on the net sheet were based on the profile (S. Ex. 5) that Respondent signed with the listing contract and, therefore, were not correct as of June 9. Accordingly, Respondent did his own net sheet.[2] Tr. 117, 173-74. After some discussion, Respondent agreed to make a counter-offer at $92,000 and initialled the

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[2] No party introduced copies of any net sheet prepared by either Respondent or Mr. Wainwright.

change in price.[3] Respondent signed three original contract forms and signed or initialled "four or five other blank pages." Tr. 588. He mistakenly signed the three contract forms on the line specified for a purchaser. Tr. 625. Respondent asked Mr. Wainwright whether the purchasers were a black or white couple. Mr. Wainwright responded that he did not know; he was dealing directly with Ms. Newbern and "never meet[s] the purchasers until closing."[4] Tr. 117, 171-72. Mr. Wainwright left a copy of the counter-offer with Respondent, and took six others to his office where Ms. Newbern picked up five of them. Tr. 117, 160.

6. On June 10, 1989, Ms. Newbern presented the counter-offer to the Herrons. Mr. Herron indicated his acceptance of the new price by initialling and dating the counter-offer. Tr. 58, 403. Having decided to apply for FHA financing rather than for a DeKalb County Bond Loan, he changed from 8.5% to 9.5% the interest rate which had been written on line 2.B.(1)(a), and he initialled that change.[5] He also initialled and dated the handwritten restatement of lines 2.B.(2) and (3) that the "Seller [was] to pay total 5% towards closing & points." Finally, although not initialled, he

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[3] From this point on in the chronology of events, two versions of the facts were presented at the hearing. The version supported by the documentary and testimonial evidence introduced by the government, the complainants and the intervenors is credible and is adopted in this decision. That evidence was consistent and takes into account the demeanor of the government's, the complainants' and the intervenors' witnesses, whose testimony was candid, forthright and unwavering. On the other hand, and as discussed more fully later in this decision, I did not find Respondent's version of the facts to be credible. His testimony was as inconsistent as his memory, and was often contradictory. Where it differed from the other parties', it was uncorroborated by any documentary evidence or testimony of any other witness. Looking beyond the nervousness which any witness is apt to show, his demeanor did not convey the impression of candor.

[4] Respondent testified that Mr. Wainwright told him that the purchasers were black. Tr. 251, 275. However, there is no evidence to show that Mr. Wainwright knew whether they were black. On the contrary, Ms. Newbern credibly testified that Mr. Wainwright never asked and that she never told him what race they were. Tr. 62.

[5] Respondent's testimony that at the time he initialled the counter-offer, line 2.B.(1)(a) was blank and that there was no notation that the financing was to be by DeKalb County Bond Loan (Tr. 586), is incredible and makes no sense. The terms of financing are material; they condition the contract. Even in the document which Respondent introduced as the contract, the initial 8.5% handwritten term appears on that line, and line 2.B.(1)(d) shows the handwritten notation that "This is to be a DeKalb County Bond Loan." R. Ex. 1. No document was introduced that shows those lines to be blank.

changed the maximum monthly payment of principal and interest to reflect the higher interest rate. S. Ex. 8; Tr. 58, 119.

7. On Sunday, June 11, 1989, Mr. Wainwright phoned Respondent, telling him that Mr. Herron had accepted the increase in the purchase price and that he wanted to proceed with FHA financing because he could not get DeKalb County Bond money. Mr. Wainwright also told Respondent that Mr. Herron had restated the provisions for the payment of closing costs and points. Finally, Mr. Wainwright asked if he could bring the agreement to Respondent's home for his signature. Mr. Blackwell declined to have Mr. Wainwright come to his home since he had "company" at that time. Mr. Blackwell then said that as far as he was concerned the parties had a contract, and he asked Mr. Wainwright to initial the agreement "on the left on his behalf."[6] Tr. 121, 174, 176. Mr. Wainwright did so and then filled in the "acceptance" block on the contract, signifying that all parties had agreed to it at 10:30 a.m. on June 11, 1989. Thereafter he delivered the contract to Ms. Newbern's office. S. Ex. 8; Tr. 121, 163, 178.

8. The Herrons applied for a mortgage with Commonwealth Mortgage Company on June 13, 1989, the same date they tendered their earnest money deposit. S. Ex. 28; Tr. 301, 406. On Friday, June 16, 1989, Mr. Herron and Ms. Newbern conducted the walk-through inspection permitted by the contract, and they completed a repair addendum. S. Ex. 9. At some time between these two events, Respondent phoned Ms. Newbern and identified himself as the seller of the property on 4010 Indian Lakes Circle. He told her that her clients "got a great deal", and he said, "I know it's quite unusual for me to ask this question - I should not ask it - but are the purchasers black?" Tr. 61-62. She did not answer the question, but instead responded, "You're right, you're not supposed to ask that question." *Id*.[7]

9. On June 20, 1989, Mr. Wainwright brought the repair

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[6] Mr. Wainwright wrote the initials GGB on the left hand margin opposite Mr. Herron's initials which were in the right hand margin and next to the handwritten words "Seller to pay 5% toward closing and points." S. Ex. 8.

[7] I credit Ms. Newbern's testimony concerning the substance and timing of this conversation. Respondent acknowledged calling Ms. Newbern, but he placed the date of the call at some time around June 20. Tr. 594. He was not asked whether he inquired of Ms. Newbern as to the race of the purchasers, and she was not cross-examined on her version of the conversation.

addendum to Respondent's apartment. They went over the items and, after agreeing to them, Respondent initialled the addendum. S. Ex. 9; Tr. 123. Respondent also initialled a copy of the contract in the left-hand margin so that there would be an original of his initials at the restatement of lines 2.B.(2) and (3). At that time he also penned the date of June 11, 1989, the date Mr. Wainwright had first signed Respondent's initials. S. Ex. 20; Tr. 123-24, 176-79.

10. When Mr. Wainwright returned to his office on June 20, 1989, there was a message for him from Respondent stating that he wished to change the terms of the contract to require the buyer to pay closing costs. S. Ex. 30. Returning the call, Mr. Wainwright told Respondent that they already had a contract. Tr. 129. However, on June 22, 1989, Mr. Wainwright received a copy of the contract in which the word "Seller" in line 2.B.(2) (pertaining to the payment of closing costs) was crossed out and the word "Buyer" was written in. Across the top of the document appeared the type written words "I will honor only this contract. Buyer Pays Closing." S. Ex. 42 (emphasis in original). From that time forward, whenever Mr. Wainwright tried to talk to Respondent about the matter, Respondent would hang up the telephone. Tr. 133.

11. Some repairs had been made to the house after the repair addendum was signed on June 20, and Respondent agreed on July 10, 1989, to have a termite inspection performed. Tr. 68, 134, 136-37. However, on July 9, Respondent had the locks changed on the house and he removed Mr. Wainwright's lock box. S. Ex. 37 at 142; Tr. 137-139. On July 12, Respondent informed Mr. Wainwright that he would not go to the scheduled closing on July 27 with the Herrons. Tr. 135.

12. Brett Cooper came to Atlanta from Dallas to look for a house near the school in which his wife was to begin her first teaching job that Fall. To accomodate her new position, Mr. Cooper had arranged a transfer to Atlanta with his employer. Mr. and Mrs. Cooper are white. On July 12, he and his youngest son saw Interstate Realty's "open for inspection" signs in front of the house. Interstate Realty is solely owned by Respondent. The Coopers inspected the house and liked what they saw. Mr. Cooper took a copy of a flyer which contained information on the house. It was on Interstate Realty Co. letterhead, and stated that the house was for rent for $1150.00 per month. It also contained a typewritten notation of a right of first refusal to purchase the house for $92,000. However, that figure was

stricken and the figure $98,000 was written over it.[8] S. Ex. 24. Audrey Cooper flew to Atlanta from Dallas on Friday, the 14th; she and her family looked at the house and called Respondent on the 15th; and on Sunday, the 16th, Respondent showed them the house and presented them a lease with an option to purchase, dated July 14, 1989, which they signed. On that date, Respondent gave the Coopers the keys to the house, although the term of the lease was not to commence until July 25. They moved in on July 27, 1989. Respondent never mentioned anything to them about a contract with the Herrons. S. Ex. 10; Tr. 320-330.

13. On Tuesday, July 18, 1989, Mr. Wainwright saw Mr. Cooper at the house, and told him that there was a contract on the house, and that a closing had been scheduled for the 27th. Separately, Mr. Wainwright and Mr. Cooper then called Respondent. Respondent told Mr. Cooper that they had a good, binding contract, and he told Mr. Wainwright that the Coopers were his renters and that he was not going to closing with the Herrons. Tr. 141, 155, 331-32, 354. On the following day, Mr. Wainwright called Respondent to explain that the appraiser from the Herrons' mortgage company needed access to the house on the following day. Respondent replied that he was not going to closing and he hung up. Tr. 146. Nevertheless, Mr. Wainwright and the appraiser went to the house on the 20th, but it was locked and no one was there. S. Ex. 11; Tr. 145-146. Mr. Wainwright then phoned Ms. Newbern who, in turn, phoned Respondent. Respondent told Ms. Newbern that she was never to go into the house, that he was not going to go to closing with the Herrons, and that he had leased/purchased the house to "some really good white tenants." Tr. 63, 73. Respondent also left in the house a written note for Mr. Cooper, dated July 20, stating, "Please do not allow anyone to go inside this house, other than Yourselves & Friends or your service people....Move in as you can." S. Ex. 15; Tr. 335.

14. On July 24, 1989, the Herrons filed with HUD a verified complaint alleging that they had been discriminated against because of their race. On July 27, the date of the scheduled closing, the General Counsel of HUD authorized the Department of Justice to seek prompt judicial relief in Federal district court to prevent Respondent from interfering with

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[8] Respondent testified that the $92,000 figure was a typographical error and that he "wouldn't have given any thought whatsoever to selling it for 92,000." Tr. 255. However, he said to Mr. Wainwright, "Bring me an offer for 92 and I'll take it." Tr. 114.

Complainants' ability to close on the sales contract before HUD had an opportunity to resolve the complaint. S. Ex. 12. That same day, the Coopers moved into the house. Mr. Wainwright came by the house and again told the Coopers that there was a contract on the house and that a court hearing on the matter was pending. Mr. Cooper called Respondent, who later hand delivered a letter to the Coopers stating that he would hold them harmless "from any legal action that anyone might wish to bring against our contract." S. Ex. 15; Tr. 330, 336, 355.

15. The Federal district court issued an *ex parte* temporary restraining order on July 28, 1989, prohibiting Respondent from selling or leasing the house, or implementing any lease executed subsequent to the June 11 contract of sale with the Herrons. The Court set the hearing for a preliminary injunction on August 2. S. Ex. 13. Respondent was served with notice of the hearing but did not attend, and the district court, which had before it Respondent's *pro se* written answer to the government's complaint, issued a preliminary injunction. S. Ex. 14; Tr. 292-93. The preliminary injunction prohibited respondent, *inter alia*, from selling or leasing the property to anyone other than the Herrons, from taking further steps to implement the lease with the Coopers, and from interfering with the Herrons' efforts to obtain a mortgage loan to purchase the property. S. Ex. 14. The Coopers decided to retain an attorney and, on his advice, they did attend the hearing. On August 4, Respondent called the Coopers and stated:

> I mailed something to you today telling you people that you are my new lessees and our contract is good and I guarantee that. So I don't know that you have anything to worry about. I'll fight it from over here. I think that she [the district court judge] has reversed her ruling, what I understand, because she didn't have all the facts before her....

S. Ex. 43; Tr. 379-380. Concerned for their safety, and after having discussed the matter with their attorney, the Coopers changed the locks on the house on August 5 or 6. Tr. 339-340. On Sunday, August 6, Respondent left a message on the Coopers' answering machine asking them not to let anyone into the house to do an appraisal. S. Ex. 43. However, on August 7, 1989, the Coopers allowed the appraiser into the house to complete his appraisal for the Herrons' mortgage loan. S. Ex. 23.

16. On August 14, 1989, Respondent wrote to the Coopers the following:

> Please be advised that I have filed an appeal on the Judges (sic) Ruling pertaining to the original sale which was voided, legally....I have not discriminated, I simply voided their contract, legally, and I shall pursue this even to higher courts. Therefore, have no fear, because you will be my new lessee-purchaser regardless of how high I have to take them in the courts....

S. Ex. 15 (emphasis in original); Tr. 337.

17. Mr. Wainwright's office called Respondent on August 15, 1989, to notify him that the closing with the Herrons had been rescheduled for August 16. Upon being so notified, Respondent hung up. In the meantime, the Coopers moved out of the house. On August 16, all necessary parties except Respondent appeared for the closing. Tr. 149-150. The Coopers completed their move on August 17, the same day Respondent wrote to them that he had "no intention of allowing anyone else to purchase the house." S. Ex. 15; Tr. 337, 342.

18. On August 30, 1989, another hearing was held in Federal district court which Respondent attended. Respondent was found by the Federal district court to be in contempt for having failed and refused to obey the preliminary injunction entered on August 2, 1989. Pursuant to the terms of the district court's August 30 Order, the following day Respondent removed all signs indicating that the property was for sale or rent. S. Ex. 19; Tr. 238-40, 292-93, 635.

Discussion

Section 804 of the Fair Housing Act makes it unlawful, *inter alia*,

> (a) To refuse to sell...after the making of a bona fide offer, or to refuse to negotiate for the sale... of, or otherwise make unavailable or deny, a dwelling to any person because of race....
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> * * *
>
> (c) To make, print, or publish...any...statement...with respect to the sale...of a dwelling that indicates any preference,

> limitation, or
> discrimination based on race...or an intention to make any such pre-
> ference, limitation, or discrimination.
>
> * * *
>
> (d) To represent to any person because of race...that any dwelling is not available for inspection [or] sale...when such dwelling is in fact so available.
>
> * * *

42 U.S.C. sec. 3604(a), (c) and (d). Section 818 of the Fair Housing Act makes it unlawful,

> to coerce, intimidate, threaten, or interfere with any person
> in the exercise or enjoyment of...any right granted or protected
> by section 3603, 3604, 3605 or 3606 of this title.

42. U.S.C. sec. 3617.

Concomitantly, in implementing the changes made in Title VIII of the Civil Rights Act of 1968 by the Fair Housing Amendments Act of 1988, HUD promulgated regulations which describe, *inter alia*, the nature of conduct made unlawful with respect to the sale of dwellings. *See* 54 Fed. Reg. 3232 (Jan. 23, 1989). Those regulations have been codified at 24 C.F.R. Part 100, and provide, in pertinent part, that prohibited actions include the following:

> 1. refusing to sell a dwelling to any person because of race. 24 C.F.R. sec. 100.60(b)(2);
>
> 2. using words that convey that dwellings are available or not available to a particular group of persons because of race; and expressing to an agent, broker or other person a preference for or limitation on any purchaser because of race. 24 C.F.R. sec. 100.75(c)(1), (2);
>
> 3. indicating through words or conduct that a dwelling which is available for inspection or sale has been sold or rented, because of race; and providing false or inaccurate

> information regarding the availability of a dwelling for sale or rental to any person, because of race. 24 C.F.R. sec. 100.80(b)(1),(5); and
>
> 4. interfering with persons in their enjoyment of a dwelling because of their race. 24 C.F.R. sec. 100.400(c)(2).

Although this is a case of first impression under the Fair Housing Amendments Act of 1988, it is well established in the Federal courts that the legal framework to be applied in a housing discrimination case brought under the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, is the same three-part test used in employment discrimination cases brought under Title VII of the Civil Rights Act, and as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See, e.g., Pollitt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987). *See also*, R. Schwemm, *Housing Discrimination Law*, 323, 405-10 & n.137 (1983). That burden of proof test provides that:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evdence.... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, undiscriminatory reason" for its action....Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate rea-sons asserted by the defendant are in fact mere pretext....

Pollitt, supra, at 175, citing *McDonnell Douglas, supra,* at 802, 804.

To establish a prima facie case in this matter, the government must prove that: (1) Complainants are members of a racial minority; (2) Complainants applied for and were qualified to purchase the property at issue; (3) Complainants were rejected by Respondent; and (4) after the rejection, the property remained available. *See, e.g., Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974); *Pollitt, supra,* at 175; *Davis v. Mansards,* 597 F. Supp. 334, 345 (N.D. Ind. 1984). If established, the prima facie case creates a rebuttable

presumption that unlawful discrimination has occurred. *See, e.g., Williams, supra,* at 826; *see also, Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Once a prima facie case is established, the burden of production shifts to Respondent to articulate a legitimate, nondiscriminatory reason for his actions. *See Burdine, supra,* at 253; *McDonnell Douglas*, *supra,* at 802; *Pollitt, supra,* at 175. To meet this burden, the evidence offered by Respondent must raise a "genuine issue of fact" as to whether he discriminated against Complainants. *See Burdine, supra,* at 254-55. Furthermore, that evidence must be admissible and must enable the trier of fact "rationally to conclude" that Respondent's actions have not been motivated by "discriminatory animus." *Id.* at 257.

If Respondent meets this shifting burden of production, the government must then demonstrate that the reason for Respondent's actions is pretextual and that race did in fact play a part in his decisional process. The government need not prove that race was the sole factor motivating Respondent. It need only show by a preponderance of the evidence that race is one of the factors that motivated Respondent in his dealings with Complainants. *See, e.g.*, *Robinson, supra,* at 1042; *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *Pollitt, supra,* at 176.

The facts clearly demonstrate that the government has established a prima facie case of racial discrimination. First, Complainants are black, and are thereby members of a racial minority. Second, Complainants made a bona fide offer to purchase the property owned by Respondent, and they are qualified to make the purchase. They tendered their earnest money deposit, and made a timely application for a mortgage loan which, once they were able to obtain an appraisal of the property, ripened into the mortgage loan commitment necessary to proceed with closing. Indeed, had the appraiser been able to conduct an appraisal prior to the closing scheduled for July 27, 1989, the mortgage company would have been prepared to go to that closing; and, had Respondent attended the closing held on August 16, 1989, the mortgage company was ready, willing and able to provide the Herrons with the mortgage money for which they had applied. Both Mr. and Mrs. Herron were ready, willing and able to close on August 16, 1989, and their desire to purchase the property at issue is continuing.

Third, Complainants' bona fide offer to purchase the property was rejected by Respondent. On June 20, 1989, after having initialled a copy of the contract in order to ratify his June 11 directions to Mr. Wainwright to initial for him, Respondent advised Mr. Wainwright that he wanted to change the terms of the contract relating to closing costs. On June 22, Mr. Wainwright received a copy of the contract memorializing Respondent's changes, and stating that it was the only contract Respondent would honor. Indeed, Respondent's conduct, from the time he unilaterally attempted to change the terms of the contract on June 20, demonstrates that he had no intention ever to consummate the sale of the property to the Complainants. He stated explicitly to both Mr. Wainwright and Ms. Newbern that he would not go to closing with the Herrons.

Finally, after Respondent's repudiation of the contract on June 20, 1989, the property remained available for others to lease or purchase. The property had been vacant since the end of August 1988, and remained vacant until July 27, 1989, when the Coopers moved in, pursuant to the lease/purchase agreement they executed with Respondent on July 16, 1989. Not only did he advise Mr. Wainwright that he would not close with the Herrons, but also, as soon as he concluded that Mr. Wainwright's exclusive listing contract on the house had expired, Respondent had the locks changed, removed Mr. Wainwright's lock box from the door, and left the house open for inspection.

To rebut the presumption of unlawful discrimination created by the establishment of a prima facie case, Respondent alleges that the only reason he "voided" the contract with the Herrons was that Mr. Wainwright "flim-flammed" him with a contract that required him to pay discount points and closing costs, something he had never done before. Tr. 589-90. He alleges that he orally conveyed to Mr. Wainwright his mental calculation that he would net "about $5600" from the transaction after deducting brokers' commissions, that he signed the contract on June 9, but that he did not realize until the next day that he would be paying closing costs and discount points. Finally, he alleges that on June 11, 1989, he changed the contract to provide that the buyer would pay closing costs - the seller would still pay discount points - and he sent the contract directly to the Herrons' agent for their acceptance.

The burden that shifts to Respondent to rebut the presumption of unlawful discrimination is to produce evidence that Complainants were rejected as buyers for a legitimate,

nondiscriminatory reason. This does not shift the burden of persuasion. Rather, as the Supreme Court stated:

> [i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

Burdine, supra at 254-55 (footnotes omitted).

Through his testimony, Respondent has articulated a nondiscriminatory reason for rejecting the Herrons which, if taken in the light most favorable to him, would be legitimate. However, I conclude that his reason for rejecting the Herrons was pretextual and that the motivation for his actions was discriminatory animus. The only evidence which Respondent has produced is his own testimony and a purported copy of a contract of sale. The testimony and the document are not reliable; indeed they do not quite rise to the specious. Respondent's testimony is replete with contradictions, memory lapses and non sequitors. It is supported only by his own credibility, which eroded in direct proportion to the duration of his testimony.

Respondent's status as an experienced, licensed real estate broker, and his completion of courses in commercial law and mathematics at the college level (Tr. 552), belie his assertions that he was unaware of what he was signing, that he trusted someone else to fill in the blanks on a contract which he had signed, and that he didn't realize at the moment he first set eyes on the offer from the Herrons that he would be required to pay points and closing costs. The inconsistencies and contradictions in his testimony confirm the conclusion that his proffered rationale for his actions in dealing with the Herrons is merely a disguise for his true motives. For example, he testified that when he countered with a $92,000 price, the contract form was blank as to the interest rate the purchasers were to pay and that there was no notation that they were going to seek county bond financing. However, under further questioning from his counsel, he changed his testimony. His testimony was also contradictory when he testified that he had never paid discount points or closing costs, and that he intended to clear $5600 from the transaction; but then he

testified that he was willing to pay the points as long as the Herrons paid the closing costs. Later, he testified that he would have been satisfied if the Herrons paid part of the closing costs. Certainly, the profile sheets which he signed at the time he gave the exclusive listing to Mr. Wainwright clearly demonstrate that he considered paying both closing costs and discount points. However, there is no corroborating evidence whatsoever to show that Respondent communicated to anyone his willingness to negotiate over the payment of costs and points with the Herrons.

Respondent's claim that he would not have agreed to pay closing costs and points is further undermined when that claim is considered in light of the market conditions at the time he signed the contract with the Herrons. It is undisputed that Respondent was an anxious seller in a buyer's market. Tr. 44, 47-48, 102. In addition to his indication on the profile sheet that he would consider paying both closing costs and discount points, Respondent also indicated on that sheet that he was a "super motivated seller" who wanted an offer. At that time, he also reduced the offering price of the house from $104,000 to $98,000, and informed his real estate agent that he would take an offer of $92,000. Furthermore, it is beyond belief that an experienced real estate broker would not read material provisions of a contract for the sale of his own house and, nonetheless, sign it.

Although Respondent testified that he "fumed" about the contract on June 10, he nevertheless did not contact Mr. Wainwright immediately. Instead, Respondent alleges that he waited until Sunday, June 11, to send Ms. Newbern a copy of the contract, with the notation that the buyer was to pay closing costs. This testimony is simply not credible. He offered no explanation for the delay or for contacting the buyer's agent instead of his own. Moreover, there is no evidence to buttress his testimony, and Ms. Newbern denies ever receiving any such contract. To the contrary, the evidence shows that Respondent called Ms. Newbern three or four days after June 11 to tell her that her clients "got a great deal." That conversation demonstrates his conclusion that there was indeed a contract at that time.

Respondent wrote to the United States District Court that he "voided" the contract "on the 11th of June, as the law permits within 72 hours." However, and to the contrary, reliable testimonial and documentary evidence establishes that Respondent left a message on *June 20* at Mr. Wainwright's office

that Respondent wished to change the terms of the contract as of that date; not before. Mr. Wainwright made a written notation on the copy of the changed contract that he received from Respondent which shows that he received the copy on June 22, 1989. Moreover, the repair addendum to the contract recites, and I find that it was, signed by Respondent on June 20, well after Respondent's asserted voiding of the contract.

Respondent testified that eight or ten days after June 11, he called Mr. Wainwright who, for the first time, informed him that the Herrons were going to apply for an FHA loan instead of seeking county bond financing. However, the evidence shows that on June 10, Mr. Herron initialled the contract by the change in the interest rate which occurred as a result of the decision to go FHA, and he changed the monthly payment to correspond to the increase in that interest rate. Respondent admitted initialling the FHA form which was attached to the contract and which recited the changed interest rate.[9] That form had to

have accompanied the contract at the time the Herrons applied for the mortgage on June 13, 1989.

Finally, a comparison of three of the versions of the contract which are in evidence shows that Respondent has manufactured evidence and woven a story as an after-the-fact justification for rejecting the Herrons as buyers. Respondent introduced what has been marked as "Defendant's Exhibit 1", a copy of the contract which Respondent testified that he sent to Ms. Newbern on June 11, but which she has never received. If Respondent's
testimony is to be believed, he signed that copy of the contract on June 9, 1989, the same
date he testified he initialled the change in price from $90,000 to $92,000. He further testified that he again initialled this copy on June 11, when he struck out the word "seller" and wrote "buyer" in the provision for closing costs. He did not explain why he thought it necessary to initial that contract in three places on June 11 in the face of a single change made to it after June 9. The exhibit also shows that he wrote "FHA" on the front and on the back, consistent with his testimony that he did

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[9] Respondent first testified that he initialled several pages in blank on June 9. He later denied that the initials on the bottom of the FHA form were his, but that testimony contradicted his deposition which was consistent with his earlier testimony, and in which he admitted that his initials did, in fact, appear on the bottom of the form.

so after speaking with Mr. Wainwright on the 20th of June. The exhibit does not show any changes initialled by Mr. Herron. However, two other exhibits conclusively show that Respondent did in fact know that Mr. Herron had initialled changes before Respondent ratified those changes by initialling the contract on June 20 and writing the date, "6-11-89", under those initials. Both S. Ex. 20 and S. Ex. 42 show Mr. Herron's initials by the change in purchase price to $92,000 and by the provisions for the payment of points and closing costs. S. Ex. 20 (substituted) shows the initials in ink of Respondent on a photocopy of the contract. That exhibit is consistent with Mr. Wainwright's testimony that Respondent ratified the changes that he assented to orally on June 11. However, S. Ex. 42 (substituted) shows that *after* he initialled the contract in Mr. Wainwright's presence, Respondent struck out the word "seller" on that copy of the contract, inserted the word "buyer," and typed at the top, "I will honor only this contract. Buyer Pays Closing." A comparison of Defendant's Exhibit 1 with S. Ex. 42 (substituted) reveals obvious differences in the handwriting, the location of that handwriting, and the number of sets of initials which appear on them. Nevertheless, in sworn testimony, and in a case where it is crucial that out of multiple originals, the controlling original be identified, this real estate broker, with 25 years of experience in the real estate business, identified both versions as the one he sent to the Herrons' agent on June 11, 1989! Tr. 585, 590, 622.

The government and Complainants also introduced affirmative evidence to demonstrate that Respondent considered the Herrons' race in the real estate transaction. He asked both agents the race of the purchasers, although he testified that it really didn't matter, but that it was just his practice to know with whom he was dealing. It was his "standard procedure...Just as I asked of Ms. Judge Evans [the Federal district court judge who heard the government's request for prompt judicial action] is she black or white." Tr. 663. Obviously, there is no reason to ask, if there is no reason to know.

The evidence shows that Respondent was concerned with the race of whomever purchased the property at 4010 Indian Lakes Circle. He was so concerned about the reaction that he might receive from white property owners in that neigborhood that he wrote to his last tenant in that house (who was white) that he did not want to evict him because "negros (sic) will be the next lessee (sic)...but I do not want to see this area go black for

the sake of the other residents of the area." S. Ex. 32.[10] Not only did he tell Ms. Newbern that "he had found some really good white tenants," but also, he told a newspaper reporter that the Coopers were "very fine white people" (S. Ex. 25), and he has "said that on a number of occasions, that I feel them to be very fine white -- very fine people." Tr. 634. When the Coopers did express an interest in renting the house with an option to buy it later, Respondent entered into the lease agreement immediately, without asking about their rent or credit histories (Tr. 328) or having them fill out an information sheet.[11]

I find that the government proved by preponderant evidence that Respondent's purported reason for repudiating the contract to sell his house to the Herrons was pretextual, and that the real reason was based on their race. Moreover, his actions following the issuance of a preliminary injunction, including his repeated statements that he would not go to closing with the Herrons, his importuning of the Coopers not to allow an appraiser access to the house, and his unfounded assertion to the Coopers that the Federal district court reversed its ruling, taken in context, all show his determination to flout the Herrons' civil rights.

Ultimate Conclusions

1. By refusing to sell the dwelling at 4010 Indian Lakes Circle, Stone Mountain, Georgia to Terryl and Janella Herron because of their race, Gordon G. Blackwell has violated section 804(a) of the Fair Housing Act and the regulations codified at

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[10] Respondent's protestations that his note to this tenant merely signified his willingness to lease to blacks should he evict the white tenant are as unconvincing as his denial of ever using the word "nigger." He testified that had he ever used that word his "mother would have spanked [his] tail good." Tr. 661. However, in an interview regarding the charges filed against him, Respondent told an investigator for the Georgia Real Estate Commission that "he belonged to a club [where] he could take anybody to lunch that he wanted to as long as you weren't a nigger." Tr. Gloer Deposition, p.6 at lines 1-5.

[11] Respondent eventually asked the Coopers to complete an information sheet, but not until after he had signed the lease, the Coopers had moved in, a preliminary injunction hearing had been held, and he had been ordered to inform the Coopers that they would have to vacate the premises.

24 C.F.R. sec. 100.60(b)(2).

2. By asking brokers the race of the Herrons as potential buyers, Gordon G. Blackwell has violated section 804(c) of the Fair Housing Act and the regulations codified at 24 C.F.R. sec. 100.75(c)(1) and (2).

3. By his statements that he would not sell to the Herrons, that the dwelling was not available to the Herrons because he had rented it to the Coopers, and that the Federal district court's order of injunctive relief had been reversed, and by his actions attempting to lease or sell the dwelling after contracting with the Herrons, including his attempts to enter into a lease with a white family, and his refusal to allow an appraiser for the Herrons access to the dwelling, Gordon G. Blackwell has violated section 804(d) of the Fair Housing Act and the regulations codified at 24 C.F.R. sec. 100.80(b)(1) and (5).

4. By interfering with the Herrons' exercise and enjoyment of their rights under section 804 of the Fair Housing Act, Gordon G. Blackwell has violated section 818 of the Fair Housing Act and the regulations codified at 24 C.F.R. sec. 100.400(c)(2).

Relief

Respondent having violated sections 804(a), (c) and (d) and 818 of the Fair Housing Act, Complainants and Intervenors are entitled to appropriate relief under that Act. Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in a discriminatory practice, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. sec. 3612(g)(3).[12] Section 104.910(b)(1) of Title 24, Code of Federal Regulations provides that such damages include "damages caused by humiliation and embarrassment".

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[12] The Herrons and the Coopers come within the definition of "aggrieved person" which is set forth in section 802(i)(1) of the Act and includes "any person who...claims to have been injured by a discriminatory housing practice...." 42 U.S.C. sec. 3602(i)(1).

Section 812(g)(3) further provides that the "order may, to vindicate the public interest, assess a civil penalty against the respondent". *Id.* The maximum amount of such civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory housing practices. *Id.* Where, as in this case, the respondent has not been adjudged to have committed any prior discriminatory housing practice, the civil money penalty assessed against that respondent cannot exceed $10,000.00. *Id.; see also* 24 C.F.R. sec. 104.910(b)(3).

The government, on behalf of Complainants, has prayed for: (1) damages totalling $7871.60 to compensate Complainants for the economic losses they have incurred as a result of Respondent's actions;[13] (2) $50,000.00 in damages to compensate Complainants for the humiliation, embarrassment and emotional distress they have suffered as a result of Respondent's actions; (3) $575.00 in lost rental income for each month Complainants are unable, despite reasonable efforts, to rent their current home after they move into the property at issue; (4) payment of all loan discount points in excess of two points in the event such points are required to obtain an interest rate of 9.5%; (5) injunctive and equitable relief requiring that Respondent, *inter alia*, sell the property at issue to the Herrons at the contract price of $92,000.00 and on the contract terms, including, *inter alia*, that Respondent pay the real estate commission and 5% of the loan amount toward closing costs and points; and (6) the imposition of the maximum civil money penalty of $10,000.00 against Respondent. *See* Secretary's Post-Hearing Brief at 25-36 and Proposed Order attached thereto. The relief requested by Complainants on their own behalf is consistent with that requested by the government, except that they have requested an award of $75,000.00 as compensation for the embarrassment, humiliation and emotional distress they have suffered. *See* Brief on Behalf of Intervenors Terry and Janella Herron at 9.

Intervenors, the Coopers, have similarly prayed for damages. The Coopers have requested that they be compensated

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[13] The amount of $7871.60 includes damages assessed as follows: $2801.32 for the days Mr. and Mrs. Herrons missed work; $800.00 in lost profits on Mrs. Herron's side-business; $4,100.00 for the inconvenience of having to do without a second car; $125.28 for Mr. Herron's longer commute to work; and $45.00 for an updated credit report required for closing. *See* Secretary's Post-Hearing Brief at 6. The government has computed automobile and commuting costs through December 1, 1989, the date on which the parties' post-hearing briefs were filed. *Id*.

for the relocation expenses they have incurred as a result of Respondent's actions. In that regard, the Coopers have requested $ 1,796.21 actual damages. *See* Brief of Intervenors Brett and Audrey Cooper at 9. The Coopers have also requested that they be compensated in the amount of $25,000 for the humiliation, embarrassment and emotional distress they have suffered as a result of Respondent's actions. *Id.* at 10.[14]

Respondent made no meaningful attempt either at the hearing or in his post-hearing brief to refute the evidence on the issue of damages. Nonetheless, the relief granted is based upon an independent assessment of the evidence provided by the government, Complainants and Intervenors.

1. **Relief for the Economic Losses Suffered by the Herrons**

As actual damages, Complainants are entitled to any wages they lost as a result of Respondent's actions. Complainants missed work due to their attendance at the aborted August 16, 1989 closing; their consultations with their own and government counsel; their attendance at the hearings in Federal district court and before this tribunal; and, with regard to Mrs. Herron, her inability to discharge her job responsibilities on nine and one-half days because of the stress caused by Respondent's actions. Complainants, therefore, are entitled to $1,482.00 for the 13 days Mr. Herron missed work, compensated at his employment pay rate of $114.00 per day; and $1,319.32 for the 24 and one-half days Mrs. Herron missed work, at her employment pay rate of $53.85 per day. Tr. 416-17, 515-20.

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[14] In their post-hearing brief, Complainants further requested that Respondent be ordered to pay their attorney fees and costs. The Coopers, in their post-hearing brief, stated that they "reserve[d] the right to apply to the Chief Administrative Law Judge for attorney's fees and costs pursuant to 24 CFR [sec.] 104.940." Section 812(p) of the Fair Housing Act provides that it is within this tribunal's discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. sec. 3612(p). The applicable regulation, 24 C.F.R. sec. 104.940, provides that "[f]ollowing the issuance of the final decision under [sec.] 104.930, any prevailing party, except HUD, may apply for attorney's fees and costs. The administrative law judge will issue an initial decision awarding or denying such fees and costs." Accordingly, until a final decision has been issued pursuant to 24.C.F.R. sec. 104.930, and until Complainants and/or Intervenors have had the opportunity to apply for attorney's fees pursuant to 24 C.F.R. sec. 104.940, consideration of a request for attorney's fees and costs would be premature.

Complainants are further entitled to compensation for the $800.00 in lost profits sustained by Mrs. Herron due to her inability to apply for an inventory loan necessary for her side-business as a cosmetics representative. Tr. 521. This loss resulted from the advice by Commonwealth Mortgage that any significant change in their credit status, *e.g.*, incurring any other significant indebtedness, could adversely affect their outstanding mortgage commitment. Tr. 417-19, 520-21.

The Herrons, however, are not entitled to the full $4,100.00 in damages they seek as compensation for their inability to apply for a loan to replace a car, totally damaged on June 19, 1989, which had been used by one of them for commuting to work. Tr. 419, 521. An award of $4,100.00, calculated at the rental car rate of $25.00 per day for 164 days, is not justified since the Herrons did not actually rent a car, but rather, they seek compensation for the "inconvenience and hassle" of not having a second car. *See* Secretary's Post-Hearing Brief at 28. The Herrons, however, are entitled to some nominal compensation for that inconvenience. Accordingly, Complainants are awarded $820.00, calculated at a rate of $5.00 per day for 164 days.[15]

Had Complainants moved into the property at issue, Mr. Herron's commute to work would have been shorter. Complainants are therefore entitled to $125.28, calculated at the government rate of $.24 per mile, as compensation for the extra round-trip commute to work of six miles each day which Mr. Herron incurred for the 87 work days which followed the July 27, 1989 closing. Tr. 444. Complainants are further awarded $45.00 as compensation for the fee Commonwealth Mortgage will charge for preparation of another credit report required to close on the property at issue. Tr. 312.

Complainants are not entitled to compensation for the loss in rental income they *may* experience as a result of not being able to rent their current home when, as intended, they move into the property at issue,[16] or for the loan discount points in

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[15] As discussed *supra*, the cut-off date used by the government for the assessment of this, and other aspects of the requested damage award was December 1, 1989.

[16] In anticipation of their move to the property at issue, the Herrons executed a lease, pursuant to which they rented their current home to another family for $575.00 per month for one year beginning September 1, 1989.

excess of two points Commonwealth *may* require under the terms of the mortgage loan they *may* obtain from Commonwealth in the event the closing occurs after January 7, 1990, the date on which Complainants' mortgage commitment will expire. Tr. 309-10, 313, 414-16; S.Ex. 45. An award of such damages, which are speculative as to their existence and amount, is inappropriate.

2. **Relief for the Economic Losses Suffered by the Coopers**

As compensation for their economic losses resulting from Respondent's actions, the Coopers have requested reimbursement for relocation expenses incurred within three weeks of "moving in," as a result of the Federal district court's August 2 Order requiring them to vacate the house. Specifically, they have requested: (1) $540.00 as compensation for the time, estimated at 30 hours, which Mr. Cooper expended repacking and relocating, calculated at his salary rate of $18.00 per hour; (2) $510.00 as compensation for the time, estimated at 30 hours, that Mrs. Cooper expended repacking and relocating, calculated at her salary rate of $17.00 per hour; (3) $56.21 as reimbursement for the U-Haul trailer the Coopers rented in order to relocate; and (4) $690 as compensation for the initial deposit the Coopers gave to Respondent when they executed the lease for the property at issue, but which was not refunded. Tr. 344-46, 389; Brief of Intervenors Brett and Audrey Cooper at 9.

The amount requested by the Coopers as compensation for the time they expended in repacking and relocating was not supported by sufficient evidence. Their hourly salaries and the time it took them to accomplish the move do not necessarily bear any relationship to either the cost they would otherwise have incurred or the time the move would have taken had they hired professional movers. Moreover, Mrs. Cooper did not miss any work while repacking because her new employment had not yet begun, and did not participate in the actual move during work hours. Tr. 345, 389-90. Mr. Cooper did miss two days of work, and therefore the Coopers are entitled to $288.00 for lost wages calculated at his salary rate of $18.00 per hour. Tr. 345. The Coopers are, however, also entitled to compensation for the inconvenience of repacking and relocating. That inconvenience

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Because of their inability to close on the property at issue, the Herrons lost those tenants and have been unable to find replacements. Tr. 414-16; S.Ex. 45. Because no evidence was introduced as to whether the monthly rental income Complainants would have received since September 1, 1989, exceeds their current mortgage payment, no determination of lost rental income for the three month period of September 1, 1989 to December 1, 1989, can be made.

is compensable by a nominal award of damages in the amount of $250.00.

The Coopers are further entitled to $56.21 as compensation for the U-Haul rental fee, but are not entitled to any of the $690.00 which they tendered to Respondent at the time they executed the lease. At the hearing, Mr. Cooper testified that "[w]hen we signed the contract on [August] 16th, we paid a check for $690.00 I believe it is. That was for the initial deposit of $500.00 and the rent from July 25 through July 31." Tr. 346. The lease itself provides that the monthly rent was $1150.00 per month, and that "[l]essee to Deposit $500.00 as Security Deposit & Clean-Up Fee." S. Ex.10. Mr. Cooper further testified that he and his family moved into the property on July 27, and moved out of the property on August 17, but did not pay Respondent any of the August rent on the advice of their attorney, and because they were faced with moving as a result of the August 2 hearing in Federal district court. Tr. 330, 341-42, 358-59. Thus, the amount they tendered Respondent is somewhat less than the amount of rent due, prorated for the number of days they actually occupied the house.

3. **Relief for the Embarrassment, Humiliation and Emotional Distress Suffered by the Herrons and the Coopers**

It is well established that the amount of compensatory damages which may be awarded in a Civil Rights Act case is not limited to out-of-pocket losses, but includes damages for the embarrassment, humiliation and emotional distress caused by the discrimination. *See, e.g., Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Such damages can be inferred from the circumstances of the case, as well as proved by testimony. *See Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159,164 (5th Cir. 1977).

Moreover, "[b]ecause of the difficulty of evaluating the emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983). Thus, in *Marable, supra*, where the defendant challenged the plaintiff's claim for compensatory damages on the basis that it was based solely on mental injuries and that there was no evidence of "pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms", the court stated:

> It strikes us that these arguments may go more to the amount, rather than the fact, of damage. That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered.
>
> The plaintiff need not prove a specific loss to recover general,
> compensatory damages, as opposed to actual or special damages.

704 F.2d at 1220-21.

The most significant damage suffered by Complainants and Intervenors as a result of Respondent's actions, and that for which Complainants and Intervenors are entitled to compensation, is embarrassment, humiliation and emotional distress.

The emotional rollercoaster ride the Herrons have been forced to endure began on July 20, one week before the first scheduled closing, when their loan officer advised Mr. Herron that the appraiser had been unable to conduct an appraisal of the property. Mr. Herron had been concerned when Ms. Newbern previously told him that Respondent had inquired as to the Herrons' race, but "[a]t that time...[he] felt like we had a binding contract, so [he] did not dwell on that issue...." However, Mr. Herron did have "a feeling at that time that there was a problem with the seller, the fact that I was black." The delay in the appraisal confirmed those suspicions. Tr. 409-11, 458-60, 510.

From that point in time forward, Complainants have been faced with the devastating emotional and psychological consequences of being the subjects of race discrimination. Complainants had been excited about moving into a house that met the needs of their family and had begun packing and making plans for fixing-up the house. They had shown the house to several relatives; and their own young children, ages 5 and 8, who were looking forward to the move, had even chosen their bedrooms. Tr. 398-99, 412-14, 452-61, 505-06, 510, 514-15, 538. Mr. Herron poignantly described how dejected and humiliated he felt when he testified that:

> I feel that I was discriminated against when I had what I felt was a valid contract and the fact that someone would ask my race when I'm trying to purchase a home, I could see no other reason in the world that he would want to ask my race if it

> doesn't matter. That was the worst thing of it, someone trying to tell me where I can live and where I can't live. I would say that was the worst thing for me.

Tr. 446.

Mrs. Herron's testimony was equally moving, almost alternating between the mordant and the melancholic:

> I feel that everything that has been fought for over the last 30 years and being involved in this particular case, that it was a waste of lives, a waste of time on the part of all those people who worked so hard for equal justice for all men....I feel that in using [the] term ["whole ordeal"], I'm stating that our lives have been an open book. Our lives have been put on hold because we are not allowed to live where we can afford and choose to live. Our work schedules, our day-to-day routines have been disrupted. Our children have been asking us questions. We can't answer their questions like we would normally answer their questions.

Tr. 535-36.

Both Mr. and Mrs. Herron are very private people. Their soft spoken and reserved manner in testifying gave credence to their description of how deeply they have been affected by the prominent media attention and publicity their plight has received, as well as the reaction of their co-workers and friends to that attention and publicity. Tr. 404, 419-44, 523-27, S. Exs. 25, 26, 27, and 44. A paradigm of the television, radio and newspaper coverage this matter has received was a newspaper article which appeared in the *Atlanta Constitution* on August 3, 1989, the day following the preliminary injunction hearing in Federal district court, which included a map indicating the exact location of the property at issue. S. Ex. 26; Tr. 427-28, 526.

The nature of their testimony and the manner in which it was given make it obvious that this entire ordeal has deeply affected the Herrons and their children. The stress which Mr. and Mrs. Herron have experienced has resulted in their loss of sleep. Mrs. Herron has had to take time off from work, and Mr. Herron has suffered from headaches. Tr. 450-51, 515-16, 520, 529-31. Since the closing was not consummated according to schedule, the children were unable to begin the school year in

what was to be their new school, nor were the Herrons able to enjoy the holidays they anticipated celebrating in their new home. Tr. 445, 528-29, 536-38.

The Coopers also suffered significant emotional harm as a result of Respondent's actions. The Coopers and their three children, a set of twins age 13 and another child age 11, had just moved to the Atlanta area from Dallas that week, when a HUD investigator visited their home and advised them that the property they had leased and hoped to someday purchase was the subject of discrimination action.[17] Although the Coopers were assured by the HUD investigator that they were not the subjects of the action, they nonetheless were involved from that point forward since they unwittingly had leased and moved into the property. Tr. 198-99, 320, 332-34. After the HUD investigator's visit, the Coopers felt "emotionally torn", that they "had been the victims, besides the Herrons being victims". Tr. 334. Indeed, the Coopers found it necessary to retain counsel after the August 2 hearing in federal district court "to defend ourselves and make sure that we were not indicated in this disagreement." Tr. 338.

As a further result of the events surrounding the August 2 hearing, the Coopers changed the locks on the property because they feared for the safety of their children. Tr. 339-40. Their concern was justified since the dispute received much media attention and, as stated above, a newspaper article appeared on August 3 which included a map showing the exact location of the property. S. Ex. 26. Indeed, Mrs. Cooper testified that on August 3, "we had a news camera team pull into our driveway or in front of our house, that was a little unusual....I wasn't happy about that at all, I was extremely uncomfortable and nervous and I wanted to be away from the whole situation." Tr. 386.

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[17] Prior to the HUD investigator's visit and prior to moving into the house, Mr. Wainwright had advised Mr. Cooper that there was a contract for sale on the house; but Mr. Cooper "was not extremely concerned with it at that time," and contacted Respondent who advised Mr. Cooper "not to worry about it, that it was simply a previous contract that had been voided [by] him." Tr. 332. Indeed, even after the Federal district court issued its order on August 2, Respondent continued to assure Complainants that he would honor their lease, thus making the Coopers feel that they "were in the middle of a tug-of-war" and that "it was very difficult to make a decision [about moving] at that point in time." Tr. 342.

The publicity which this case has received was particularly traumatic for Mrs. Cooper since she had just begun her first teaching position in the elementary school located in the same neighborhood as the property. Mrs. Cooper testified that the school is racially mixed, and as a result of being involved in this dispute and being the new person on the faculty, she felt that at first she was "treated with suspicion" and as a result was "uncomfortable with the whole situation." Tr. 386-87, 390-91.

Perhaps most unfortunately, the Coopers were faced with the very difficult situation of "explain[ing] to our kids after uprooting them from another area and a lot of the culture that goes with bringing them here, that we would have to uproot them again in a very short time." Tr. 334; *see also id*. at 388-90. As stated by Mr. Cooper, "[it] was a very distressful and very emotional time for our family. It was extremely difficult to keep a family unity there, the boys were very on edge with one another. It created a lot of hardship for everyone." Tr. 334; *see also id*. at 346.

Clearly, the facts and circumstances warrant an award of damages for the embarrassment, humiliation and emotional distress suffered by both the Herrons and the Coopers. The more difficult task in this case is the assessment of the amount of those damages. As noted in *Shaw v. Cassar*, 558 F. Supp. 303, 315 (E.D. Mich. 1983), there is no formula to determine with precision such compensatory damages, and consequently, that determination is left to the discretion and judgment of the fact finder, guided by the facts of that particular case.[18] However, the amount of damages awarded should compensate for the injury suffered so as to make the injured party whole, and should not provide the injured party with a windfall. *See Albemarle Paper*

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[18] As stated in R. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.C.L. Law Rev. 83 (1981),

> The federal fair housing laws became effective in 1968. Since then, courts have often awarded damages to victims of housing discrimination, but their decisions have provided little guidance for assessing the amount of such awards. There is a great range of awards, with some courts awarding only nominal damages of $1 and others setting awards of over $20,000.

(Footnotes omitted).

Co. v. Moody, 422 U.S. 405, 418 (1975)(Title VII case).

The government, on behalf of Complainants, seeks $50,000.00 as compensation for their embarrassment, humiliation and emotional distress. Complainants themselves seek $75,000.00, but offer no explanation as to how they calculated an amount substantially greater than that sought by the government. Intervenors seek $25,000.00. Based on the facts and circumstances of this case, and a review of the relevant case law,[19] I conclude that Complainants are entitled to an award of $40,000.00 and Intervenors are entitled to an award of $20,000.00 as compensation for the embarrassment, humiliation and emotional distress they suffered as a result of Respondent's actions.

4. **Injunctive and Equitable Relief**

In light of Respondent's continued refusal to sell the property at issue to Complainants, as well as his conduct in conjunction with the prior proceedings in Federal district court, the full panoply of injunctive and equitable relief requested by the government, which would prohibit or direct certain actions by Respondent and includes a reporting requirement,[20] is appropriate. As stated by the court in *Marable, supra* at 1221,

> Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not

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[19] *See, e.g., Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983)($12,402.00 award for plaintiff's mental anguish, humiliation, embarrassment and stress); *Grayson v. S. Rotundi & Sons Realty Co.*, 1 Fair Hous.-Fair Lending (P-H) para. 15,516 (E.D.N.Y. Sept. 5, 1984)(compensatory damage awards of $40,000.00 and $25,000.00 for two plaintiffs' embarrassment and humiliation); *Parker v. Shonfeld*, 409 F. Supp. 876 (N.D. Ca. 1976)($10,000.00 compensatory award for embarrassment, humiliation and anguish suffered by plaintiff). *Cf. Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303 (7th Cir. 1985)(in employment discrimination case, jury award of $75,000.00 as compensatory damages for plaintiff's mental distress found excessive, and $35,000.00 awarded based on the record).

[20] The government also requested inclusion of a provision requiring the Secretary of Housing and Urban Development, pursuant to section 812(g)(5) of the Act, to provide copies of this Initial Decision and accompanying Order to the Georgia Real Estate Commission and to recommend appropriate disciplinary action. The Act contemplates that the Secretary "shall" take such action, and it is therefore unnecessary to issue an order requiring the Secretary to do so.

> violated in the future and removing any lingering effects of past discrimination....The relief must be tailored in each instance to the needs of the particular situation, a matter peculiarly within the discretion of the district judge.

The specific provisions of that relief, as adopted by this Decision, are set forth in the Order, below, and include: injunctions prohibiting Respondent from interfering in any way with Complainants' ability to meet the terms of the contract and from damaging the property at issue; an injunction ordering Respondent to take all necessary steps required by the contract in order to enable Complainants to purchase the property pursuant to the contract; an injunction ordering Respondent to sell the property to Complainants, at the contract price and pursuant to the contract's other terms, at the earliest possible time and to attend the scheduled closing and sign the necessary documents. Additionally, the Order permanently enjoins Respondent, either directly or through another individual or entity, from discriminating against Complainants or any other persons with respect to housing because of race, color, religion, sex, familial status, national origin, or handicap. Finally, because Respondent complied with the Federal district court's preliminary injunction only after being held in contempt, the Order below includes a reporting requirement which will facilitate full and timely compliance by Respondent.

5. **Imposition of the Maximum Civil Penalty**

Finally, it is appropriate in this case, in order to vindicate the public interest, to impose upon Respondent the maximum civil penalty available under section 812(g)(3) of the Act. In addressing the factors to be considered when imposing a civil penalty, the House Report on the Fair Housing Amendment Acts of 1988 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against a respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

H. Rep. No. 100-711, 100th Cong., 2d Sess. 37 (1988).

As stated above, because Respondent has not been adjudged to have committed any prior discriminatory housing practice, Respondent is subject to a maximum civil penalty under section 812(g)(3)(A) of $10,000.00. Based upon a consideration of the factors suggested in the House Report, imposition of that amount is appropriate in this case.

First, the nature and circumstances of this case are particularly egregious in that after inquiring as to

Complainants' race, Respondent proceeded to disavow his contractual obligation to sell the property to Complainants at the price he wanted, and actively to pursue and obtain white tenants or buyers for the property who unwittingly dealt with him. Respondent's reprehensible conduct towards Complainants was exacerbated by the fabricated rationale he pressed throughout this proceeding.

Second, Respondent bears the full weight of responsibility for his actions and their effects on both the Herrons and the Coopers, since as a former real estate salesman with five years experience, and as a licensed real estate broker with nearly 20 years experience, he knew or should have known that his actions were not only wrongful, but also, were unlawful. In order to obtain his real estate licenses, Respondent studied real estate law and, by virtue of that licensure is presumed to know that law. Tr. 555-56, 651-52. Moreover, the Georgia Real Estate Manual, to which Respondent is held accountable as a state-licensed broker, sets forth not only the federal Fair Housing Act and regulations, but also that state's Fair Housing Law and Rules and Regulations which prohibit discrimination in housing transactions on the basis of race, and specifically prohibit such conduct by licensed brokers. S. Ex. 47 (Ga. Real Estate Manual at 108-110 (Civil Rights Act of 1968, Title VIII-Fair Housing and related regulations), at 50-51 (Substantive Regulation 520-1-.22), and at 98-101 (Ga. Fair Housing Law, Ga. Code Ann. sec. 8-3-202)). Indeed, under Georgia law, as set forth in the Real Estate Manual, a broker's license is subject to revocation if the broker refuses, on the basis of race, to show, sell or rent any real estate to prospective purchasers or renters. *Id.* (Ga. Real Estate Manual at 25-26 (Ga. Code Ann. sec. 43-40-25(a)(1)).

Respondent should have known of these provisions, especially since he testified that he is "reasonably" familiar with the Real Estate Manual, that he has "read it a couple of times and gone back and studied it", and that "[r]eal estate agents and brokers are supposed to know what's in there and they're supposed to abide by it...." Tr. 204-05. However, Respondent's culpability is magnified by his acknowledgements that he "never had too much concern for [the federal fair housing law]", that he "wasn't aware" that by 1975, that law had been in place for seven years, and that "to this day" he has not read the law. Tr. 652, 655-56. In fact, although he told the Herrons' agent that he knew it was "quite unusual" for him to inquire as to the Herrons' race and that he "should not ask"

such a question, he testified that such an inquiry is his "standard procedure" because he "like[s] to know with whom [he's] dealing." Tr. 62, 663.

Third, there is no evidence concerning Respondent's financial circumstances that would militate against imposition of the maximum civil penalty available. Not only did Respondent fail to introduce any such evidence, but he gave inconsistent explanations as to why that evidence was unavailable. In response to the government's discovery request for potentially relevant financial information, Respondent stated:

> I have moved two times in the past five years, & in so doing, have destroyed all documents dating past 1987, as I felt they were bulky & would never be needed....I keep all Bank Statements, Real Estate Transactions, etc., in my Home Office File. Am enclosing Closing Statements on Melvin Carter, on sale in Newnan, Ga. This is the only record that I still have in my possession, pertaining to Closings.

S. Ex. 48.

However, at the hearing, Respondent testified:

> I didn't necessarily destroy them, I moved...going into nicer and larger quarters and in so moving, they were discarded somewhere. I had nothing to do with it....I had them packed in boxes, they just didn't get in my new quarters, that's all....These boxes didn't get there because I don't have any records of it. I've given the Court all the records that I have.

Tr. 637.

If he destroyed the documents, that conduct violates the applicable Georgia Real Estate Manual provision which requires that copies of "all sales contracts, closing statements, and other documents relating to real estate closings" be kept for three years. S. Ex. 47 (Ga. Real Estate Manual at 28 (Ga. Code. Ann. sec. 43-40-25(a)(27))); Tr. 205. If some unknown person merely "discarded" them in the process of a local move, Respondent has apparently made no effort to reconstruct or find those records. In any event, he has made consideration of his financial status impossible on this record.

Finally, the goal of deterrence, as well as the interests of justice, will be served by the imposition of the maximum civil penalty available in this case. In light of (1) Respondent's lack of familiarity with both federal and state fair housing laws, (2) his cavalier attitude towards his responsibility to know and abide by that law, and (3) the fact that it was not until he was held in contempt that he complied with the Federal district court's August 2 Order (it was not "imprinted on [his] mind" (Tr. 635-36)), imposition of a civil penalty in the maximum amount of $10,000.00 is appropriate to ensure that Respondent and all others who might otherwise act similarly will be discouraged from doing so.

Order

Having concluded that Respondent, Gordon G. Blackwell, violated sections 804(a), (c) and (d) and 818 of the Fair Housing Act, as amended, and the regulations codified at 24 C.F.R. sections 100.60(b)(2), 100.75(c)(1) and (2), 100.80(b)(1) and (5), and 100.400(c)(2), it is hereby

ORDERED that,

1. Respondent shall refrain from interfering in any way with the Herrons' ability to meet the terms of their contract of sale with Respondent and to purchase the property at 4010 Indian Lakes Circle, Stone Mountain, Georgia.

2. Respondent shall take any and all steps required by the contract to enable the Herrons to purchase the property at 4010 Indian Lakes Circle, Stone Mountain, Georgia, on the contract terms, including, but not limited to, permitting appraisers and inspectors to enter the house and conduct their appraisals or inspections, and paying any fees or charges required by the contract.

3. Respondent shall refrain from damaging the property at 4010 Indian Lakes Circle, Stone Mountain, Georgia, in any way.

4. At the earliest possible time, Respondent shall sell the property at 4010 Indian Lakes Circle, Stone Mountain, Georgia, to the Herrons at the contract price of $92,000.00 and on the contract terms, including that the seller shall pay the real estate commission and 5% of the loan amount toward closing costs and points and that the refrigerator and all other appliances and light fixtures shall be included in the sale.

5. Respondent shall attend the scheduled closing, shall sign the necessary documents at the closing and, if the settlement agent determines that Respondent must contribute money at closing, shall bring to the closing a certified or cashier's check payable to the settlement agent designated by the Herrons' lender for the amount determined by the settlement agent.

6. Respondent and his agents, employees, businesses (including Interstate Realty), and those in active concert or participation with any of them be, and each of them is, hereby permanently enjoined from discriminating against the Herrons or anyone else with respect to housing because of race, color, religion, sex, familial status, national origin, or handicap. Prohibited actions include, but are not limited to:

a. refusing or failing to show, sell, or rent a dwelling to any person because of race, color, religion, sex, familial status, national origin, or handicap;

b. otherwise making a dwelling unavailable or denying a dwelling to any person because of race, color, religion, sex, familial status, national origin, or handicap;

c. discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in

the provision of services in connection therewith, including services relating to the financing of such dwelling and the provision of information regarding the dwelling, because of race, color, religion, sex, familial status, national origin, or handicap;

d. making, printing, or publishing, or causing 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, sex, familial status, national origin, or handicap;

e. representing to any person, because of race, color, religion, sex, familial status, national origin, or handicap, that any dwelling is not available for inspection, sale, or rental when the dwelling is in fact available;

f. for profit, inducing or attempting to induce, any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, familial status, national origin, or handicap;

g. discriminating against any person in making available residential real estaterelated transactions, including the selling, brokering, or appraising of real estate, because of race, color, religion, sex, familial status, national origin, or handicap;

h. interfering, coercing, threatening, or intimidating any person in the exercise of enjoyment of, or on account of that person's having exercised or enjoyed, or on account of that person's having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections 803 through 806 of the Fair Housing Act; and

i. retaliating against the Herrons or the Coopers for their participation in this matter or for any matter related thereto.

7. Respondent shall pay actual damages to the Herrons in the amount of $44,591.60, to compensate for the following injuries:

Amount		Description of Injury
$1,482.00	——	13 days of lost wages at 114.00/day (Mr. Herron)
$1,319.32	——	24 and 1/2 days of lost wages at $53.85/day (Mrs. Herron)
$800.00	——	Lost profits (Mrs. Herron's side-business as a cosmetics representative)
$820.00	——	Inconvenience of automobile loss of use at $5.00/day for 164 days
$125.28		Opportunity cost of extra commute of six miles/day at $.24/mile for 87 days (Mr. Herron)
$45.00	——	Fee for updated credit report
$40,000.00	——	Embarrassment, humiliation and emotional distress (Mr. and Mrs. Herron)
$44,591.60	——	Total

8. Respondent shall pay actual damages to the Coopers in the amount of $20,594.21, to compensate for the following injuries:

Amount		Description of Injury
$288.00	——	2 days of lost wages at $18.00/hour (Mr. Cooper)
$250.00	——	Inconvenience of repacking and relocating (Mr. and Mrs. Cooper)
$56.21	——	U-Haul rental fee
$20,000.00	——	Embarrassment, humiliation and emotional distress (Mr. and Mrs. Cooper)
$20,594.21	——	Total

9. Respondent shall pay a civil penalty of $10,000.00 to the Secretary, United States Department of Housing and Urban Development.

10. Within 15 calendar days from the date this Order becomes final Respondent shall submit a report on the anticipated date for settlement. Within that same time period, Respondent shall submit a report to the Chief Docket Clerk, Office of Administrative Law Judges, and to all parties of record, on any and all matters pertinent to the implementation of this Order. If settlement does not occur within 30 days of this Order becoming final, Respondent shall submit additional reports every 15 days.

11. This Order is entered pursuant to section 812(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. section 104.910, and will become final upon the expiration of 30 days or affirmance, in whole or in part, by the Secretary within that time. *See* section 812(h) of the Fair Housing Act; 24 C.F.R. section 104.930.

/s/

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Alan W. Heifetz
Chief Administrative Law Judge