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 Steve Ellis Times and Betty A. Brinson, Charging Party, v. Annette Banai, Janos Banai, Sylvia M. Arias, and Manhattan Group Real Estate, Inc., Respondents.	HUDALJ 04-93-2060-8 Decided: February 3, 1995

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Annette and Janos Banai

Richard O. Dansoh, Esq.
For Respondent
Sylvia Arias

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For Respondent
Manhattan Group Real Estate, Inc.

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For the Charging Party

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Steve Ellis Times on his own behalf and on behalf of Betty A. Brinson ("Complainants") alleging discrimination based on race and color in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On May 12, 1994, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a charge against Annette Banai, Janos Banai, Sylvia M. Arias, and Manhattan Group Real Estate, Inc. ("Respondents") alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. §§ 3604(a) and (c), and that Respondents Arias and Manhattan Group Real Estate, Inc. had violated 42 U.S.C. § 3605(a).

A hearing was held in Miami, Florida, on September 27-28, 1994. The parties' post-hearing briefs were to have been filed by November 19, 1994. I granted Respondent Arias' unopposed motion extending the date for submission of post-hearing briefs to December 5, 1994. The Charging Party and Respondent Arias timely filed post-hearing briefs on that date. Respondent Annette Banai had previously submitted a typed, undated closing statement which I received on October 26, 1994. Accordingly, this case is ripe for decision.

Statement of Facts

1. Complainants Steve Ellis Times and Betty A. Brinson are a black, unmarried couple who cohabited from May 1991 until they ended their relationship in May 1994. Tr. 2, p. 80.[1]

2. Complainants lived together from May 1991 until August 1992 in a three bedroom, two bathroom home owned by Ms. Brinson located in Princeton, Florida. Tr. 2, p. 65; Tr. 3, p. 8. On August 24, 1992, Ms. Brinson's home was destroyed by Hurricane Andrew. Complainants were in the home when the hurricane struck.

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[1]The following reference abbreviations are used in this decision: "Tr. 1," "Tr. 2," and "Tr. 3," followed by a page number for Transcript Volumes I, II, and III; and "C.P. Ex." for the Charging Party's Exhibit.

3. Respondents Janos and Annette Banai live in Lindenhurst, New York. They own a house located at 2438 Polk Street in Hollywood, Florida. They bought the house in 1986 and have rented it six times, always using the services of a rental agent. Tr. 3, pp. 89-93. Respondent Manhattan Group Real Estate, Inc. ("Manhattan") was at all material times herein, a real estate brokerage concern. On September 17, 1992, Manhattan employed Respondent Sylvia Arias as a rental agent. Tr. 3, pp. 107-08.

4. In September 1992, the Banais visited Manhattan's office, met with Ms. Arias, and listed the Polk Street residence with her. Because the Banais were aware of the hurricane's devastation which resulted in a housing shortage and a large number of homeless people, they wanted to rent the residence to hurricane disaster victims. Tr. 1, pp. 22-25; Tr. 3, pp. 10, 91.

5. After Complainants had spent a night in Ms. Brinson's roofless home and a few days in a temporary shelter, they moved in with friends, the Chappelles. Mr. and Mrs. Chappelle lived in a one bedroom condominium apartment with their 9 year old son. Tr. 2, pp. 5-6; Tr. 3, p. 9. Because Mrs. Chappelle was to undergo surgery that required at-home convalescence, Complainants left the Chappelles' home after two weeks. Unable to find a suitable rental, they moved to a Holiday Inn in Miami.

6. Mr. Times continued his search for housing. He called numbers listed in newspaper real estate ads and made in-person visits. Due to the acute shortage of housing south of Miami, he focused his search on the north Miami area. Tr. 2, p. 68; Tr. 3, pp. 10, 13.

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7. On September 20, 1992, Ms. Brinson slipped and fell in her hotel room shower, injuring her back and neck. She returned to the hotel after being treated in a hospital emergency room. However the next day she was hospitalized for ten days during which time she was medicated and in traction. Tr. 2, pp. 70, 75; Tr. 3, pp. 12-13, 79, 103.

8. Both Complainants continued their search during Ms. Brinson's hospital stay. She had a newspaper delivered to her room and made inquiries of hospital staff. Tr. 2, p. 71. They concentrated their continued search for suitable housing in the Hollywood, Florida, area because Ms. Brinson would require therapy treatments three times a week at the Hollywood Medical Center after her release from the hospital. Tr. 2, p. 68; Tr. 3, pp. 10, 13. On or about September 30, 1992, Mr. Times responded to an advertisement for Respondents' house that Ms. Arias had placed in the *Miami Herald.* The ad supplied Ms. Arias' telephone number, described the house, and listed a rental amount of $525 per month. C.P. Ex. 1. Ms. Arias provided Mr. Times with directions and he went to see it. He was accompanied by his sister Erica. Tr. 3, p.14. They were able to see the house immediately because Ms. Arias happened to be there when they arrived. She was

preparing it for an open house later that day. Tr. 1, pp. 27-28.

9. Mr. Times liked the house. It was a ten minute drive from the Hollywood Medical Center, and because it was a one story home, Ms. Brinson would not be required to climb steps. Tr. 3, p. 18. He agreed to pay the first and last month's rent together with a security deposit, for a total of $1,575. He told Ms. Arias that he had no problem paying this amount, because of insurance payments that Complainants were receiving for living expenses. He also explained that they were hurricane victims and desperately needed somewhere to stay. Tr. 3, pp. 15-16. Ms. Arias told him that he was the first to look at the house and that if he wanted the house, she "didn't see any problems renting it to him." Tr. 1, pp. 27-29; Tr. 3, p. 15. However, she explained that she first had to call the owner prior to finalizing the rental. Tr. 1, p. 29; Tr. 3, p. 17.

10. Mr. Times returned to the hospital to report his good fortune to Ms. Brinson. He said, "Thank God. . .I finally found somewhere for us to stay." Upon hearing the news, Ms. Brinson "was elated and overjoyed." Tr. 2, p. 73; Tr. 3, pp. 17-18.

11. Ms. Arias returned to her office and telephoned the Banais in New York. She told Ms. Banai she had "somebody very nice, a very nice couple to rent the house." Tr. 1, p. 30. She also told Ms. Banai that the couple had lost their home in the hurricane and were looking for a rental "in an emergency." Tr. 1, p. 31. Ms. Banai asked "what kind of people" they were. Tr. 1, p. 30. The rest of the conversation was substantially as follows:

> Ms. Arias: A very nice couple.
> Ms. Banai: Are they Hispanic?
> Ms. Arias: No.
> Ms. Banai: Are they black?
> Ms. Arias: Yes.
> Ms. Banai: No, I cannot rent the house to black people because I live in part of the house[2] and because of what the neighbors will say about something like that.
>
> Ms. Arias: We were not supposed to discriminate in that way.

[2]Respondents do not contend that they maintained the Polk Street home as a "residence" within the meaning of 42 U.S.C. § 3603(b).

Ms. Banai: Look for somebody else.

Tr. 1, pp. 30-31.[3]

12. After talking to Ms. Banai, Ms. Arias called Ms. Brinson at the hospital. The conversation was essentially as follows:

> Ms. Arias: I am very, very sorry to tell you that you are not going to be able to rent the house. . . I contacted the owners, and the owners said they didn't want persons of color in their house.
> Ms. Brinson: What does that mean, because we're black[?]
> Ms. Arias: Yes.
> Ms. Brinson: In [this] day and age, there are people that are sick, that [with] all the havoc of Hurricane Andrew, and because of my color, I can't rent this house. Not because I am not qualified. Because of my color.

Tr. 2, pp. 73-74. The conversation between Ms. Arias and Ms. Brinson occurred one day before Ms. Brinson's release from the hospital.

13. Ms. Brinson related her conversation with Ms. Arias to Mr. Times. He called Ms. Arias asking her what happened. She told him that the owner didn't want someone of a different race in the house. Tr. 3, p. 19. Ms. Arias offered to help the couple find another rental, and indeed, did show them a number of other dwellings. Unfortunately, these other dwellings were unacceptable because they had stairs. She also recommended to Mr. Times that he retain a lawyer. Tr. 1, p. 33; Tr. 2, p. 86; Tr. 3, pp. 49-50.

14. Ms. Arias reported the incident to Lynda O'Brien, her supervisor at Manhattan. She told Ms. O'Brien that she had called Ms. Banai with the news that she had found qualified tenants and that Ms. Banai had asked if they were black. Upon hearing that they were, Ms. Banai stated that she would not rent to black people. When asked why she identified the couple's race to Ms. Banai, Ms. Arias responded that Ms. Banai had asked her. Ms. O'Brien told Ms. Arias that she should have refused to respond to this question and should have stated that the race of the applicants is irrelevant to the transaction. Tr. 1, pp. 75-76.

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[3] I have quoted from Ms. Arias' testimony of her recollection of this conversation. Although Ms. Banai denied making the statement, I credit Ms. Arias' testimony. Her testimony was credible and consistent with that of her supervisor, Ms. O'Brien, Mr. Times, and Ms. Brinson. In addition, by admitting to having responded to Ms. Banai's question, Ms. Arias testified against her own interests.

15. Ms. O'Brien later called Ms. Banai asking her why she would not rent to individuals who were "ready, willing and able to rent." Tr. 1, p. 77. Ms. Banai replied that "it was her right to rent her property to anybody she wanted to." Tr. 1, pp. 77-78.[4] Ms. O'Brien then told Ms. Banai that she would have to terminate the listing agreement. Ms. O'Brien wrote a letter to Ms. Banai, dated October 1, 1992, which memorializes the conversation between Ms. Arias and Ms. Banai. The letter states:

> Today, one of our REALTOR associates, Ms. Sylvia Arias, showed your house to a Mr. Steve Times and Ms. Betty Brinson.[5] Mr. Times and Ms. Brinson appeared to her in every way to be very qualified and suitable tenants who wish to rent you house as per your terms and price. When Ms. Arias called you to tell you about these prospective tenants she happened to mention that both Mr. Times and Mr. Brinson were black, at which point Ms. Banai said that she "would not rent the home to black people."
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> When Ms. Arias relayed this conversation to me, as principal designated broker, I informed her that we could not be a party to any type of discriminatory practices. I then called Ms. Banai to inform her that we would be unable to continue representing your interests and that we would be obliged to withdraw completely from our listing contract with you.
>
> Therefore, I must notify you that effective immediately we are hereby terminating our listing agreement with you and no longer represent you in the attempt to rent your house.

C.P. Ex. 3. Ms. O'Brien called Ms. Banai the next day and confirmed that the letter had been received. Ms. Banai also confirmed that she would not rent the Polk street house to Complainants. Tr. 1, p. 81.

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[4] I have credited Ms. O'Brien's account of her conversation with Ms. Banai. She was a credible witness with no apparent interest in the outcome of this case, as she no longer is employed by Manhattan. In addition, her testimony was consistent both with Ms. Arias' testimony and with the contemporaneous letter terminating the listing. *See infra*.

[5] Erica was mistaken for Ms. Brinson.

16. Upon leaving the hospital, Ms. Brinson returned to the hotel. Complainants soon found the hotel to be unsuited to her convalescent needs. The hotel room lacked kitchen facilities. As a result, they were unable to cook, store food or ice, or heat water for drinks and the hot packs needed for Ms. Brinson's therapy. In addition, Ms. Brinson's doctor had placed her on a weight reduction regimen which was difficult to follow without a kitchen. As a result, they ate carryout meals. Because Ms. Brinson was bedridden, the daily interruption by the maids who wanted to change the sheets and clean the room was an added inconvenience. All of these conditions made Complainants' existence a "hectic" one at the hotel. Finally, Ms. Brinson was "petrified," that she might fall again in the hotel bathroom. Tr. 2, pp. 55, 75, 100-01; Tr. 3, pp. 11, 23, 51, 78.

17. Rather than remain in the hotel, Complainants elected to live with Mr. Times' mother, Ethel Times. Ms. Times' house is a two bedroom, one bathroom home located in Deerfield Beach, Florida, north of Miami. In addition to Ms. Times, Complainants shared the home with Steve Times' sister, Erica. Ms. Brinson took over Erica's bed and bedroom, and Erica and Steve Times slept, respectively, in the living room and on the den floor. Out of respect for Ethel Times' sense of propriety, Complainants did not share Erica's bedroom. Complainants' stay began to wear thin, and Erica became progressively resentful and hostile towards them. Erica would walk past them without speaking to them, slammed doors, and told Complainants that it was "time for [them] to go." At one point the situation deteriorated to the extent that Ethel Times required her daughter to leave home for a few days. Ms. Brinson blamed Erica's behavior on Mr. Times, believing that he should have been able to control his sister. Tr. 2, pp. 48-49, 80; Tr. 3, pp. 22, 24-26, 28.

18. While at his mother's house, Mr. Times drove Ms. Brinson to the Hollywood Medical Center, for physical therapy three to four times a week. The journey from Deerfield Beach to Hollywood took at least 40 minutes. Tr. 2. p. 43; Tr. 3, pp. 24, 27-28, 64. Steve Times continued his search for suitable housing. He spent approximately five to six hours per day searching for a residence on those days when he did not take Betty Brinson to therapy. Tr. 3, p. 80. Because Ms. Brinson could not negotiate stairs, he was forced to reject townhomes and houses with stairs.

19. Shortly before Thanksgiving 1992, Complainants used insurance money to purchase a trailer which was placed on the site of Ms. Brinson's destroyed home in Princeton. While the couple enjoyed privacy, the trailer was far from an ideal place to live. During storms, it shook, and Mr. Times noticed rats living below the trailer. Tr. 3, pp. 29-30, 52.

20. Complainants ended their relationship and separated in May 1994. Steve Times moved back with his mother and Ms. Brinson moved back into her now reconstructed house in Princeton. Tr. 2, p. 80; Tr. 3, p. 5.

21. Approximately four or five days after refusing to rent to Complainants, the Banais rented the Polk Street property to a white couple, who were also displaced by the hurricane and were friends of Sylvia Arias' husband. Ms. Arias' husband arranged the rental with Ms. Banai. Tr. 1, pp. 36, 56. Ms. Arias did not receive a commission for this rental. By late 1992 the business relationship between Manhattan and Ms. Arias had ceased. However, Ms. Arias, now working for another broker, continued to act as the Banai's agent and successfully obtained a buyer for the Polk Street residence toward the end of 1993. Tr. 1, p. 37.

Discussion

Governing Legal Framework

Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [in housing] when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 465 U.S. 926 (1982); *see also United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

The Act makes it unlawful, inter alia,

> (a) To refuse to. . . rent. . . or to refuse to negotiate for the. . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or] color. . . .
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> * * *
>
> (c) To make. . . any. . . statement. . . with respect to the . . . rental of a dwelling that indicates any preference, limitation, or discrimination based on race [or] color. . . or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. §§ 3604(a) and (c); *see also* 24 C.F.R. §§ 100.60, 100.75. Section 805(a) of the Act further provides:

> (a) In General - - It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction . . . because of race [or] color. . . .

42 U.S.C. § 3605(a); *see also* 24 C.F.R. § 100.135(a).

The legal framework to be applied in a case under 42 U.S.C. §§ 3604(a) and 3605(a) depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. *See, e.g., TWA v. Thurston,* 469 U.S. 111, 121-22 (1985); *HUD v. Morgan,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,008, 25,134

(HUDALJ July 25, 1991), *aff'd*, 985 F.2d 1451 (10th Cir. 1993); *HUD v. Jerrard,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,087 (HUDALJ Sept. 28, 1990).

Statements by "a person engaged in the sale or rental of a dwelling" that (1) convey that housing is unavailable because of race or color or (2) express a preference for or limitation on renters because of race or color also violate the Act. 24 C.F.R. § 100.75(b); *see also* 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a) and (c); s*ee, e.g., Soules v. HUD,* 967 F.2d 817 (2d Cir. 1992); *Ragin v. New York Times Co*., 923 F.2d 995 (2d Cir.), *cert. denied*, 112 U.S. 81 (1991). Moreover, 24 C.F.R.§100.75 (c)(2) prohibits discriminatory statements "[e]xpressing to agents [or] brokers, . . . a preference for or limitation on any . . . renter because of [the] race [or] color . . . of such persons."

The Banais

A preponderance of evidence directly and unambiguously establishes that Ms. Banai refused to rent to Complainants solely because they were black. I credit both Ms. Arias' and Ms. O'Brien's testimony that Ms. Banai stated to each of them that she wouldn't rent to Complainants because they were black. *See supra* notes 3 and 4. Further direct evidence consists of Ms. O'Brien's letter terminating Manhattan's relationship with the Banais, and the contemporaneous statements of Ms. Arias to both Mr. Times and Ms. Brinson that the Banais had refused to rent to them because they were black.

Ms. Banai denies making any statements concerning race. Rather, she claims that she refused to rent to Complainants because she was unsure of their financial circumstances. Tr. 3, pp. 90-91. I do not find her testimony credible. First, her testimony is inconsistent with her prior deposition testimony. Second, I conclude that her claim that she lacked sufficient knowledge concerning Complainants' financial circumstances is implausible.

Ms. Banai's outright denial that she and Ms. Arias discussed Complainants' race is inconsistent with her deposition in which she states "I do not *recall* any [discussion of race]." *Compare* Tr. 3, pp. 90-91 *with* Tr. 3, p. 108 (emphasis added). In addition, Ms. Banai testified at the hearing that she told Ms. Arias that she did not want to rent to

Complainants. However, in her deposition she stated that she had left the matter unsettled. *Compare* Tr. 3, pp. 96-97 *with* Tr. 3, p. 101.

Ms. Banai asserted that the reason she refused to rent to Complainants was because she did not know their "financial status." Tr. 3, p. 90. However, both Ms. Arias and Ms. O'Brien testified that Complainants were financially qualified, and Ms. O'Brien specifically recollects advising Ms. Banai of this fact. The letter terminating the listing also contains a statement that Complainants were qualified. C.P. Ex. 3; Tr. 1, pp. 63, 77. Accordingly, there would have been no reason for Ms. Banai to doubt Complainants' financial ability to pay the rent. Moreover, the record reflects no attempt by Ms. Banai to determine Complainants' financial qualifications, nor did she ask Ms. Arias to do so. Finally, if Complainants' financial condition had truly been a concern, she would presumably have mentioned this to Ms. Arias. Ms. Banai admitted that she did not do so. Tr. 3, p. 95.

Ms. Banai's statements to Ms. Arias and Ms. O'Brien that she would not rent to blacks violate Section 804(c) of the Act and 24 C.F.R. § 100.75(a), (b), and (c)(1). Because she was attempting to rent the Polk Street property, Ms. Banai was a "person engaged in the sale or rental of a dwelling." 24 C.F.R. § 100.75(b). Her statement conveyed that housing was unavailable to Complainants because of their race and color. *See* 42 U.S.C. § 3604(c); 24 C.F.R. §100.75 (a), (b) and (c) (1). Moreover, because Ms. Arias and Manhattan were "agents" and/or "brokers," her discriminatory statements to Ms. Arias and Ms. O'Brien violated 24 C.F.R. § 100.75(c)(2).

Although Mr. Banai had no apparent role in his wife's discriminatory denial of the Polk Street residence, as co-owner of the property, he is vicariously liable for her discrimination. *See, e.g., Walker v. Crigler*, 976 F.2d 901, 904 (4th Cir. 1992); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975).

Sylvia Arias and Manhattan

By answering Ms. Banai's inquiry concerning Complainants' race and/or color, Ms. Arias violated 42 U.S.C. §§ 3604(a) and 3605(a).[6] She facilitated and participated in Ms. Banai's refusal to rent to Complainants and thereby made a dwelling "unavailable. . . because of race [and] color." 42 U.S.C. § 3604(a). Moreover, Ms. Arias, as a person whose business includes engaging in real estate transactions, facilitated and participated in discriminating against Complainants by "making [un]available such a transaction" because

[6]The Charge also alleges that Ms. Arias' response to Ms. Banai's question violated 42 U.S.C. § 3604(c). The Charging Party has withdrawn this allegation. C.P. Post-hearing Brief, p. 2 n.1.

of their race and color. 42 U.S.C. § 3605(a). I adopt the reasoning set forth in *Zuch v. Hussey*, 394 F.Supp. 1028 (E.D. Mich 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977), a case involving blockbusting by real estate agents. In that case the court held that it made no difference that the owner, not the agent, had initially broached the subject of race. The court stated that "any action by a real estate agent which in any way impedes,

delays, or discourages on a racial basis a prospective home buyer from purchasing housing is unlawful." *Id*. at 1047.[7]

Because Ms. Arias was employed as Manhattan's sales agent at the time she violated the Act, Manhattan is vicariously liable for Ms. Arias' actions. *See, e.g., Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied sub nom., Ernst v. Leadership Council for Metropolitan Open Communities*, 113 S.Ct. 2961 (1993); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974).

Remedies

Damages for Emotional Distress, Inconvenience, and Lost Housing Opportunity

[7]In reaching this conclusion the *Zuch* court expressly rejected the contrary conclusion reached by another district court in *United States v. Saroff*, 377 F.Supp. 352, 361 (E.D. Tenn. 1974), *aff'd*, 516 F.2d 902 (6th Cir. 1975). *Zuch*, 394 F. Supp. at 1051 n.11.

The Charging Party seeks $50,000 each for Ms. Brinson and Mr. Times as compensation for the embarrassment, humiliation, and inconvenience they suffered as a result of Respondents' unlawful discrimination.[8] "Although 'courts do not demand precise proof to support a reasonable award of damages [for emotional distress],' *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983), such damages may be inferred from the circumstances of the discrimination, as well as established by testimony." *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, 25,350 (HUDALJ Aug. 24, 1992), *submission of appeal vacated*, No. 92-70697 (9th Cir. July 18, 1994) (unpublished order); *see also Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974); *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,011-13 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864, 872-73 (11th Cir. 1990). The key factor in determining the size of an award is the victim's reaction to the discriminatory conduct. Guages of the reasonableness and extent of a victim's reaction to the discriminatory conduct are the egregiousness of the discriminatory conduct and the susceptibility of the victim.[9] *See generally*, Robert G. Schwemm, *Housing Discrimination Law and Litigation*, § 25.3(2)(c) (1994); Alan W. Heifetz & Thomas Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. Marshall L. Rev. 3, 21-22 (Fall 1992). The record demonstrates that Complainants suffered extensive emotional damage and inconvenience in three respects. First, they suffered humiliation, embarrassment, and anger as a result of being denied housing because of their race and skin color. Second, Complainants were inconvenienced and forced to endure less than satisfactory housing conditions. Finally, their relationship as a couple was negatively affected as a direct result of Respondents' discrimination.

The destruction caused by Hurricane Andrew vastly decreased the supply of south Florida housing, while it simultaneously increased the number of those in need of housing. The hurricane not only devastated Complainants' home, it disrupted their lives, rendering them uncomfortable and insecure. They depended on others for help. Prior to their contact with Ms. Arias, their search for housing had been relentless, but unsuccessful. It is understandable that Ms. Brinson was "elated" and "overjoyed" and that Mr. Times' hopes were very high when they heard about the availability of the Polk Street house. It would have afforded them the security, privacy and amenities they needed while they reconstructed their lives. They would have ended the effort and aggravation of searching for a place to live. Because the house had no stairs, it was a short ten minute drive from the medical center, and had a kitchen, it was conducive to Ms. Brinson's medical needs.

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[8]The Charging Party does not seek compensatory damages from either Sylvia Arias or Manhattan. C.P. Post-hearing Brief, p. 34.

[9]"[D]iscriminators must take their victims as they find them." *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, 25,362 (HUDALJ Aug. 26, 1992), *rev'd and remanded on other grounds*, 3 F.3d 951 (6th Cir. 1993).

Complainants' hope for an end to their troubles was abruptly and painfully dashed. On the day before she was to be released from the hospital, Ms. Brinson was told that, although they were the first applicants and were qualified to rent the Polk Street home, they could not rent it. Ms. Brinson was astonished to learn that "in th[is] day and age . . .because of my color I can't rent this house. Not because I am not qualified. Because of my color." Tr. 2, p. 74.

Both these Complainants credibly testified that they were "devastated" and "angry." Ms. Brinson stated that "I am still hurt. Because I am black, I am not good enough to be on your property. That hurts." Indeed, she "still hurts." Tr. 2, pp. 95-96. When he heard the news, Mr. Times "cursed" the owners saying, "Bastard, how could they do this?" Tr. 3, p. 21. Mr. Times had heard about discrimination "happening out there," but he had never experienced it. Two years later, he is "still angry deep down inside." Now he worries about repeating this experience when he again looks for a place to live. Tr. 3, p. 31. I conclude that these reactions were reasonable given the egregiousness of Ms. Banai's discrimination.

As a result of Respondents' violation of the Act, Complainants were also inconvenienced. The lack of kitchen facilities in the hotel room affected Ms. Brinson's adherence to her weight reduction regimen. In addition, she was unable to prepare hot packs. Because she was bedridden, her privacy was interrupted daily by the maids. Finally, she was afraid of another fall in the hotel bathroom. After Complainants moved in with Mr. Times' mother, Mr. Times had to sleep on the den floor. He also drove Ms. Brinson to her therapy three or four times per week. The drive was a 40 minute ordeal for the otherwise bedridden Ms. Brinson. Finally, Mr. Times continued his long search for a residence without stairs that was close to the medical center.

Respondents' refusal to rent the Polk Street property to Complainants affected their relationship as a couple. Respondents are not responsible for what took place before denying Complainants the Polk Street rental. However, they are responsible for any deterioration in the couple's relationship resulting from their discrimination. Prior to the hurricane, the couple had a normal loving relationship. Their relationship reached a high plateau when the hurricane caused both to realize how close to death they had come and how close together they had become. However, while they lived with Ethel Times the lack of space and privacy negatively impacted their relationship. They could no longer share the same bedroom; they were hesitant to express affection in the presence of family members; and they were forced to endure Erica's resentment. Finally, Ms. Brinson blamed Erica's behavior on Mr. Times' inability to control her.

In November 1992, Complainants purchased a trailer and placed it on the site of

Ms. Brinson's original home. The trailer was an improvement over the living conditions at Mr. Times' mother's house. They had privacy. However, their new situation was not ideal. The trailer shook in the wind, and Mr. Times discovered rats underneath it.

Eventually, they broke up as a couple. While the record establishes that Complainants' relationship suffered considerable stress during the period they lived with Ethel Times, it does not establish that their relationship continued to suffer after they moved into the trailer. Nor does the record demonstrate that Respondents' actions were the proximate cause of the actual break up of their relationship.[10] Indeed, their relationship lasted until approximately May 1994. Ms. Brinson declined to indicate the reason for their break up and she did not attribute it to the discrimination. Tr. 2, p. 86.

Upon consideration of the above matters, Complainants are entitled to compensation for emotional distress for humiliation, embarrassment, anger, inconvenience, and lost housing opportunity from on or about October 1, 1992, until the date of the hearing. In addition, Complainants are entitled to compensation for the effect their living conditions had upon their relationship from October 1, 1992, until they moved into their trailer in late November 1992.

Accordingly, Complainants Betty Brinson and Steve Times are each entitled to compensation in the amount of $35,000 for emotional distress, inconvenience and lost housing opportunity. Accordingly, damages in the total amount of $70,000 are assessed against Respondents Annette and Janos Banai, jointly and severally.

Civil Penalties

To vindicate the public interest, the Act also authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612 (g)(3)(A); 24 C.F.R. § 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the degree of a respondent's culpability; (3) the goal of deterrence; (4) whether a respondent has previously been adjudged to have committed unlawful housing discrimination; and (5) a respondent's financial resources. *See, e.g., Jerrard*, 2 Fair Housing-Fair Lending at 25,092; *Blackwell*, 2 Fair Housing-Fair Lending at 25,014-15; House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988*, H.R. Rep. No. 711, 100th Cong., 2d

[10] Except for the lack of evidence that the couple's breakup was caused by Respondents' discrimination, this case presents many similarities to *Tucker*, 2 Fair Housing-Fair Lending at 25,350-51 ($50,000 awarded to each complainant included compensation for the effect undesirable living conditions had upon their relationship as a couple). The *Tucker* complainants were compelled by their discriminatorily based eviction to live in a motel. There they lacked privacy and space. Their living conditions, in part, strained their relationship and eventually the couple separated. *Id.*

Sess. at 37 (1988). The Charging Party seeks imposition of the maximum $10,000 civil penalty each against Annette Banai and Janos Banai and $2,500 each against Sylvia Arias and Manhattan.

Nature and Circumstances of the Violation and Culpability

The nature and circumstances of this violation merit the maximum civil penalty against the Banais jointly and severally. Ms. Banai's discrimination based upon Complainants' race and color was blatant and intentional. Her actions caused Ms. Brinson and Mr. Times considerable inconvenience, justifiable anger, frustration, humiliation, and unhappiness. Ms. Banai was primarily responsible for renting the apartment and committing the discriminatory acts in this case. Although Janos Banai had no apparent role in causing this situation, the relationship of husband and wife with joint ownership of the property in question is an appropriate one for the imposition of a civil penalty against husband and wife jointly and severally. *See, e.g., HUD v. Ross,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,075, 25,702 (HUDALJ July 7, 1994).

By answering Ms. Banai's question as to whether the applicants were black, Ms. Arias shared responsibility with Ms. Banai for the resulting discrimination. However, there is no evidence that she was a willing accomplice. She informed her supervisor and did what she could to dissuade Ms. Banai. Finally, she continued to help Complainants in their continuing search for a new residence.

Manhattan was even less culpable than Ms. Arias. Ms. O'Brien attempted to dissuade Ms. Banai from denying the Polk Street property to qualified applicants because they were black. Having failed in her attempt, she terminated Manhattan's agency relationship with Ms. Banai. There is nothing else Manhattan could have done.

Deterrence

The imposition of a civil penalty against the Banais will serve the goal of deterring others inclined to commit similar violations. Substantial penalties send the message to violators that housing discrimination is not only unlawful, it is expensive. *See Jerrard,* 2 Fair Housing-Fair Lending at 25,092. Because of the blatant, unmitigated nature of these violations, a substantial civil penalty is appropriate to deter the Banais and other housing providers from committing similar acts.

Under the circumstances of this case, the imposition of a small civil penalty against Ms. Arias serves the goal of deterrence. Ms. Arias was not a willing confederate.[11] She

[11]In its Post-hearing brief, the Charging Party contends that Ms. Arias' subsequent employment

attempted to encourage Ms. Banai to rent to Complainants and informed her supervisor of Ms. Banai's refusal to rent to them. Realtors should be encouraged to do what they can to prevent owners from committing acts of discrimination. However, the imposition of a small civil penalty will demonstrate to
Ms. Arias, as well as other realtors and owners that questions concerning the race and color of applicants must remain unanswered.

Because Manhattan immediately took all appropriate steps to disassociate itself from Ms. Banai, the imposition of a civil penalty against it would not serve the goal of deterrence.

Lack of Previous Violations

There is no evidence that Respondents have previously committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against each Respondent is $10,000, pursuant to 42 U.S.C.§ 3612 (g)(3)(A) and 24 C.F.R. § 104.910 (b)(3)(i)(A).

Respondents' Financial Circumstances

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of their financial circumstances. *See Campbell v.*

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as a real estate agent by Ms. Banai, a person known by her to engage in racial discrimination, warrants the imposition of a civil penalty. A civil penalty would, it is argued, deter Ms. Arias from continuing to represent housing providers who are known to discriminate. C.P. Post-hearing Brief, p. 39. This contention is not set forth in the Charge of Discrimination, nor was it articulated during the course of the hearing. There was no motion to amend the Charge to claim that a civil penalty should be awarded against Ms. Arias because of the assistance she provided Ms. Banai, subsequent to Ms. Banai's refusal to rent the property to Complainants. Despite not having formally amended the Charge, HUD regulations provide that *de facto* amendments can result where an issue is fairly within the scope of the Charge and has been tried by mutual consent. *See* 24 C.F.R. § 104.440(a)(3). Having reviewed the record, I conclude that this issue neither was framed by the Charge nor tried by mutual consent. Indeed, evidence concerning Ms. Arias' continued employment by Ms. Banai was arguably relevant to the Charging Party's theory that Ms. Arias was a willing participant in the Banais' refusal to rent the property to Complainants. Accordingly, Respondents were not put on notice that this evidence was also being adduced for the purpose of justifying the imposition of a civil penalty against Ms. Arias. Therefore, I do not consider the Charging Party's contention.

United States, 365 U.S. 85, 96 (1961); *Jerrard*, 2 Fair Housing-Fair Lending at 25,092; *Blackwell*, 2 Fair Housing-Fair Lending at 25,015. There is no evidence that the imposition of a substantial civil penalty would cause an undue hardship. After consideration of the five factors, I determine that imposition of a penalty is warranted against Annette and Janos Banai in the amount of $10,000, jointly and severally. A civil penalty of $100 is warranted against Sylvia Arias.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612 (g)(3). The purposes of injunctive relief include the following: eliminating the effects of past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); *see also Blackwell*, 908 F.2d at 874. Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to 'use any available remedy to make good the wrong done.'" *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence shows that Respondents Annette and Janos Banai discriminated against Complainants on the basis of race and color in violation of 42 U.S.C. §§ 3604(a) and (c) and 24 C.F.R. §§100.50(b)(1) and (b)(4), 100.60(a), 100.75(a) and (c)(2); and Respondents Sylvia Arias and Manhattan Group Real Estate, Inc. discriminated against Complainants in violation of 42 U.S.C. §§ 3604(a) and 3605(a) and 24 C.F.R. §§ 100.50(b)(1), 100.60(a), and 100.135(a). Complainants Betty A. Brinson and Steve Ellis Times suffered actual damages for which they will receive compensatory awards. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondents Annette and Janos Banai jointly and severally, and against Sylvia Arias.

ORDER

It is hereby ORDERED that:

1. Respondents Annette and Janos Banai, Sylvia Arias, and Manhattan Group Real Estate, Inc. are permanently enjoined from discriminating with respect to housing because of race or color. Prohibited actions include, but are not limited to:

a. refusing to rent a dwelling, or refusing to negotiate for the rental of a dwelling because of race or color;

b. otherwise making unavailable or denying a dwelling to any person because of race or color;

c. making, printing, or publishing, or causing to be made, printed, or published, any notice or statement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race or color;

d. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act;

e. retaliating against Complainants Betty A. Brinson or Steve Ellis Times or anyone else for their participation in this case or for any matter related thereto.

2. Respondent Sylvia Arias shall attend suitable HUD approved fair housing training, at a time and location mutually agreed upon by HUD and Ms. Arias. However, in any event, such training shall occur no later than three months from the date that this decision becomes final.

3. Within forty-five (45) days of the date on which this Order becomes final, Respondents Annette and Janos Banai shall pay compensatory damages in the amount of $35,000 to Complainant Betty A. Brinson, and in the amount of $35,000 to Complainant Steve Ellis Times.

4. Within forty-five (45) days of the date on which this Order becomes final, Respondents Annette and Janos Banai shall pay a civil penalty of $10,000 to the Secretary of HUD.

5. Within forty-five (45) days of the date on which this Order becomes final, Respondent Sylvia Arias shall pay a civil penalty of $100 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612 (g)(3) and 24 C.F.R. § 104.910, and will become final upon the expiration of 30 days or the affirmance, in whole

or in part, by the Secretary of HUD within that time.

_____/s/_____
WILLIAM C. CREGAR
Administrative Law Judge

Dated: February 3, 1995.