MERCER BRATCHER, ET AL.,

Plaintiffs-Appellants,

v.

THE AKRON AREA BOARD OF REALTORS, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

Page

Interest of the United States 1
Statement 1
Argument 4
I. The Complaint Contains Sufficient Allegations that Defendants' Conspiracy Affects Interstate Commerce . 5
II. The Complaint Sufficiently Alleges that Defendants' Activities are Themselves in the Flow of Interstate Commerce 14
III. The District Court has Misconstrued Appellants' Complaint 15
IV. Appellants' Complaint States a Cause of Action Under Sherman Act § 1 17
Conclusion 22

CITATIONS

Cases:

Anderson v. Shipowners Association, 272 U.S. 359 21
Apex Hosiery Co. v. Leader, 310 U.S. 469 . . . . 5, 11
Associated Press v. United States, 326 U.S. 1 20
Atwood v. National Bank of Lima, 115 F. 2d 861 (6th Cir. 1940) 22
Beacon Theatres v. Westover, 359 U.S. 500 15
Board of Trade v. Olsen, 262 U.S. 1 14
Caminetti v. United States, 242 U.S. 470 8
Conley v. Gibson, 355 U.S. 41 15
De Loach v. Crowley's Inc., 128 F. 2d 378 (5th Cir. 1942) 16
Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959) 12
E. Spears Free Clinic v. Cleere, 197 F. 2d 125 (10th Cir. 1952) 12
Finn v. American Fire and Casualty Inc., Co., 207 F. 2d 113 (5th Cir. 1953) 22
Fitzpatrick v. Commonwealth Oil Co., 285 F. 2d 726 (5th Cir. 1960) 15
Gordon v. Illinois Bell Telephone Co., 330 F. 2d 103 (7th Cir. 1964) 12
Heart of Atlanta Motel v. United States, 379 U.S. 241 . . 5, 8, 14
ILGWU v. Donnelly Garment Co., 121 F. 2d 561 (8th Cir. 1941) 22
Katzenbach v. McClung, 379 U.S. 294 . . . . 10, 11
Las Vegas Merchant Plumbers Assn. v. United States, 210 F. 2d 732 (9th Cir. 1954) 4
Leiner v. State Mutual Life Assurance Co., 108 F. 2d 302 (8th Cir. 1940) 15

	Page
Liebenthal v. North Country Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964)	12
Machado v. McGrath, 193 F. 2d 706 (D.C. Cir. 1952)	16
Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219	5, 11
Nagler v. Admiral Corp., 248 F. 2d 319 (2d Cir. 1957)	17
National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1	5, 11
New Home Appliance Center v. Thompson, 250 F. 2d 881 (10th Cir. 1957)	16
Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 113 F. Supp. 737 (E.D. Penn. 1953)	16
Package Closure Corp. v. Sealright Co., 141 F. 2d 972 (2d Cir. 1944)	17
Page v. Work, 290 F. 2d 393	12
Paramount Famous Lasky Corp. v. United States, 282 U.S. 30	17, 18, 19
Radovich v. National Football League, 352 U.S. 444	21
Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F. 2d 86	18
Swift & Co. v. United States, 196 U.S. 375	14
Times Picayune v. United States, 345 U.S. 594	11
United States v. Employing Plasterers Ass'n., 347 U.S. 186	5, 7, 8
United States v. First National Pictures, 282 U.S. 44	17, 18, 19
United States v. Frank B. Killion, 269 F. 2d 491 (6th Cir. 1959)	15
United States v. Frankfort Distilleries, 324 U.S. 293	4, 5, 11
United States v. International Boxing Club, 348 U.S. 236	11
United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533	14
United States v. Terminal Railroad Association, 224 U.S. 383	19
United States v. Women's Sportswear Manufacturers Ass'n., 336 U.S. 460	5, 6, 11
United States v. Wrightwood Dairy Company, 315 U.S. 110	5, 11
United States v. Yellow Cab Co., 332 U.S. 218	5, 11
Wickard v. Filburn, 317 U.S. 111	5, 11

Statutes and Rules:

Civil Rights Act of 1964	10
Section 16, Clayton Act, 15 U.S.C. 26	1
Federal Rule 8(f)	16
Section 1, Sherman Act, 15 U.S.C. 1	1, 4, 5, 8, 11, 14, 17, 18, 19, 21, 22

	Page
Valentine Act	1
28 U.S.C. § 1653	22

Miscellaneous:

1960 Census of Housing, Vol. V, Part I, Residential Finance * Homeowner Properties	9
1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Lumber and Wood Products, Except Furniture (Group 11), Preliminary Report, Table 5, p. 7	9
1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Furniture, Fixtures, and Miscellaneous Manufactured Products (Group 12), Preliminary Report, Table 5, p. 8	9
1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Stone, Clay and Glass Products (Group 13), Preliminary Report, Table 5, p. 8	9
Grebler, "California's Dependence on Capital Imports for Mortgage Investment," California Management Review, Spring 1963, Vol. V., No. 3, pp. 47, 48-49	10
Taeuber & Taeuber, Negroes in Cities (1965)	10
United States Department of Commerce, Bureau of the Census, Americans at Mid-Decade, Series P-23, No. 16, January 1966	8
74 Yale L. J. 567, 575	21

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17,113

MERCER BRATCHER, ET AL., APPELLANTS

v.

THE AKRON AREA BOARD OF REALTORS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

INTEREST OF THE UNITED STATES

The United States wishes to file this brief *amicus curiae* in support of appellants because it believes that the decision of the District Court is erroneous and it fears that affirmance of the District Court's decision will interfere with the just and efficient enforcement of the antitrust laws.

STATEMENT

Appellants brought an action for injunctive relief in the District Court for the Northern District of Ohio under Section 1 of the Sherman Act (15 U.S.C. 1), Section 16 of the Clayton Act (15 U.S.C. 26), and under the Valentine Act, an antitrust law of

the State of Ohio. Appellants, representing Negro real estate dealers, Negroes who wish to buy or rent real estate in the Akron area, and Caucasians who wish to sell or lease real estate to Negroes, claim that defendants have conspired to prevent Negroes from buying or renting real estate in various parts of the Akron area. Appellants claimed that this conspiracy unreasonably interfered with interstate commerce. The allegations of the complaint concerning interstate commerce were as follows:

"VI

The Nature of Trade and Commerce Involved

"A. The real estate brokers and realtors participating in the conspiracy act as agents for the purchase or rental of real property by persons moving to the Akron area in interstate commerce from other states and for persons moving from the Akron area in interstate commerce to other states.

"B. A substantial portion of all materials, supplies, and machinery for the building of new houses in the Akron area is manufactured outside the State of Ohio and transported in interstate commerce to the Akron area. Many of the component parts of prefabricated houses built in the Akron area, which constitute a substantial portion of residential housing construction, are manufactured outside the State of Ohio and transported in interstate commerce to the Akron area.

"C. Real estate brokers and salesmen arrange mortgages and insurance for clients who are purchasing houses in the Akron area. The mortgages on such homes are financed by banks and savings and loans associations, which are substantially engaged in interstate commerce, many of which mortgages are, in turn, transported in interstate commerce for discounting. Insurance is secured from insurance companies, which are substantially engaged in interstate commerce, and many of which are located in states other than the State of Ohio.

"VII

Effects of the Combination and Conspiracy

"The aforesaid combination and conspiracy has had the following effects and damaged the plaintiffs in the following ways:

"A. The interstate commerce in building materials, supplies, and machines is affected and restrained because Negroes who ordinarily would be customers for such building materials, supplies, and machines, including components of new prefabricated homes, are barred from becoming customers of this interstate commerce.

"B. The interstate commerce in mortgage financing and insurance is affected and restricted because Negroes who would be customers for such mortgages and insurance are barred from buying the houses they would mortgage and insure, and hence are barred from becoming customers of this interstate commerce.

* * *

"D. Negro persons from without the State of Ohio have been discouraged from moving to the Akron area because they have been unable to buy or rent property within the Akron area."

* * *

The District Court dismissed plaintiffs' Federal claim on the ground that the complaint did not show subject matter jurisdiction. The Court ruled that the complaint did not show either that defendants' activities occurred within the flow of interstate commerce or that their activities substantially affected interstate commerce. The Court also dismissed the State claim on the ground that judicial economy would not be served in hearing the State claim when the Federal claim, to which it was pendant, was plainly unsubstantial.

The Court did not pass upon defendants' contention that Sherman Act jurisdiction was not shown because any restraints of trade in which they may have been involved were not commercially motivated.

ARGUMENT

The complaint in this case charged that white real estate dealers combined to deny Negro brokers the benefits of membership in the white dealers' association and to prevent the sale of houses in white neighborhoods to Negroes. Appellants are required to show either that the activities of the defendants were in the "flow" of interstate commerce or that their restrictive agreements "affected" the flow of interstate commerce. United States v. Frankfort Distilleries, 324 U.S. 293, 298; Las Vegas Merchant Plumbers Assn. v. United States, 210 F. 2d 732, 739 n. 3 (9th Cir. 1954). We believe that the complaint contained sufficient allegations that interstate commerce is involved under either theory, and that the complaint sufficiently alleged violations of the Sherman Act.

I. The Complaint Contains Sufficient Allegations that Defendants' Conspiracy Affects Interstate Commerce.

The Supreme Court has repeatedly stated that in enacting the Sherman Act, Congress "left no area of its constitutional power unoccupied; 'it exercised all of the power it possessed.'" Apex Hosiery Co. v. Leader, 310 U.S. 469, 495; United States v. Frankfort Distilleries, 324 U.S. 293, 298. And, the commerce power is fully adequate to deal with any activities, however local in inception, which have an impact upon interstate commerce. National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1; United States v. Wrightwood Dairy Company, 315 U.S. 110; Wickard v. Filburn, 317 U.S. 111; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219; Heart of Atlanta Motel v. United States, 379 U.S. 241. Thus, the Sherman Act applies not only to restraints on commodities in the flow of interstate commerce, but also extends to local acts which appreciably affect such commerce, regardless of whether the local transactions precede shipment of the commodities in interstate commerce, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, occur between such shipments, United States v. Women's Sportswear Manufacturers Ass'n., 336 U.S. 460, or follow such shipments, United States v. Employing Plasterers Ass'n., 347 U.S. 186. See also United States v. Yellow Cab Co., 332 U.S. 218, 225. "If it is interstate commerce that

feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Manufacturers Ass'n., 336 U.S. at 464.

Assuming *arguendo* that the activities of the real estate dealers here involved were not directly in the "flow" of interstate commerce, nonetheless it was clearly erroneous to dismiss appellants' claim since it contained sufficient allegations of an "effect" on interstate commerce. The complaint alleges that real estate brokers act as agents for persons moving to Akron from outside the State and that Negroes from outside Ohio have been discouraged from moving to Akron because they cannot buy or rent property there. It alleges that a substantial portion of all materials, supplies and machinery for the building of new houses in Akron is manufactured outside Ohio and that interstate commerce in building materials, supplies and machines "is affected and restrained" because Negroes are often barred from buying new houses. Finally, it claims that real estate brokers and salesmen arrange for financing from outside the State for clients who buy houses in Akron and that, since Negroes are barred from buying houses in certain areas, this interstate financing "is affected and restrained." In sum, the complaint, when fairly read, charges that restrictions imposed by defendants on the sale of houses to Negroes substantially restrains the flow in interstate commerce of persons, mortgage financing, and building materials.

This case is governed by United States v. Employing Plasterers Ass'n., supra. In Plasterers the Government charged that "an agreement to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area, and to bar entry of new local contractors without approval of a private examining board . . . [created] an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry." The district court "considered these allegations to be 'wholly a charge of local restraint and monopoly' not reached by the Sherman Act and the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois." 347 U.S. at 188. The Supreme Court disagreed. It held that "the complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' we hold they must be taken into account in deciding whether the Government is entitled to have its case tried." 347 U.S. at 188.

In effect, the Court in Plasterers held that a federal antitrust complaint is adequate if it simply alleges that local restraints appreciably restrain interstate commerce and if it is reasonable to believe that the complainant will be able to show at trial that the local restraint appreciably affects interstate commerce. In fact,

the Court stated that the Government's complaint in Plasterers was probably "too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading." 347 U.S. at 189. Defendants here allege that local restraints have an effect upon the flow of persons, building materials, and finance, that is sufficient for the Sherman Act to apply. It is highly reasonable to believe that a conspiracy among brokers to keep neighborhoods in Akron white will confine Negroes to ghettos. It is thus reasonable to believe that Negroes from other States hesitate to move to Akron because they fear that they will be able to find homes only in Negro neighborhoods. (The movement of persons between States constitutes "interstate commerce." Caminetti v. United States, 242 U.S. 470; Heart of Atlanta Motel v. United States, 379 U.S. 241, 256.) It is surely possible that realtors in Akron have significant numbers of interstate clients who wish to move there.[1/] Moreover, if Negroes cannot buy houses

1/ Each year about 1 out of every 5, or about 38 million, people change their place of residence. Of that 38 million, about 6.5 million move to a different state. Thus, about 1 out of 30 people each year move to a different state. United States Department of Commerce, Bureau of the Census, Americans at Mid-Decade, Series P-23, No. 16, January 1966, pages 17-18. In 1965 nonwhites constituted 11.9% of the population and thus should account for about the same proportion of those who changed their residence from one state to another. Id., at 4-7. In fact, nonwhites probably account for a larger proportion of those who migrate to different states than they do of the population as a whole, because the data shows that the regional distribution of nonwhites is changing more rapidly than the regional distribution of the entire population. For example, whereas from 1960 to 1965 the population of the South increased at an annual rate of 1.77 and the West 2.6%, the Negro population of the South dropped 0.2% per year and in the West increased 11.4% per year. Id., at 10-11.

outside of crowded ghettos, this may well keep out of Akron substantial amounts of building materials and financing from other States that otherwise would have entered Ohio to provide homes for Negroes.[2/] In sum, appellants' allegations of an effect upon

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2/ Families that rent or buy new houses usually have moved out of older dwellings in order to do so and have been replaced there by other families. Thus, when members of minority groups are denied the opportunity to rent or to buy old houses or new houses, the natural flow of families from older to newer dwellings is retarded and the market for new buildings, household furniture, and other goods is distorted. The home construction industry is a major consumer of building tools and materials, a substantial portion of which move across state lines. Forty-one million tons of lumber and dimension stocks were shipped in 1963, and 43% of it was shipped 500 miles or more. Nine million tons of millwork and prefabricated wood products were shipped in 1963, 51% of which travelled 500 miles or more. 1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Lumber and Wood Products, Except Furniture (Group 11), Preliminary Report, Table 5, p. 7. Seven per cent of all brick shipped travelled 500 miles or more. 1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Stone, Clay and Glass Products (Group 13), Preliminary Report, Table 5, p. 8. Thirty per cent of all household and office furniture that was shipped travelled 500 miles or more. 1963 Census of Transportation, Commodity Transportation Survey, Shipper Series, Furniture, Fixtures, and Miscellaneous Manufactured Products (Group 12), Preliminary Report, Table 5, p. 8.

Moreover, when members of minority groups are denied the opportunity to rent or to buy old houses or new houses, the market for financing the purchase of houses, which involves a substantial interstate flow of funds, is distorted. The home construction and home financing industries are major uses of funds that move in interstate commerce. In 1965 the mortgage debt on nonfarm one to four family homes was $204.8 billion. Memo from Arthur F. Young, Chief, Housing Division, Bureau of the Census, to David Slawson, Office of Legal Counsel, Department of Justice, March 7, 1966. In 1960, 2.4 million out of a total of 14.5 million one-family occupant-owned mortgaged dwellings were located in a census division other than that of the mortgage lender. (A census division normally includes several states). And, more than half of the residential mortgages held by insurance companies involved a lender and borrower in different census divisions. (2.5 million of the 14.5 million mortgages were held by insurance companies.) 1960 Census of Housing, Vol. V, Part I, Residential Finance * Homeowner Properties. To take a particular example, almost 40% of all nonfarm mortgages on property located in California were given to secure loans
(Footnote continued on page 10)

interstate commerce are sufficient. Appellants should have the opportunity to substantiate these allegations at trial.

Numerous other cases show that this complaint contains sufficient allegations of interstate commerce. In Katzenbach v. McClung, 379 U.S. 294, the Court held that the Civil Rights Act of 1964 can constitutionally be applied to Ollie's Barbecue, a small restaurant located at some distance from an interstate highway which buys a large portion of its food from a local supplier who has procured it from outside the State. The Court held that testimony before Congress provided ample basis for the conclusion that restaurants in such areas sold less goods because of the discrimination and that interstate travel was obstructed directly by it. 379 U.S. at 300. Just as less food from outside the State was sold because Ollie's owner discriminated against Negroes, so it is likely that less building materials from outside the State are sold in Akron if real estate brokers discriminate against Negroes. In the same way that discrimination by Ollie's Barbecue discourages interstate travel, so discrimination by real estate brokers may prevent Negroes from out-of-state from moving to Akron. Evidence was presented before Congress that showed that enough restaurant owners practiced discrimination so that the effect of their discrimination on interstate commerce was significant. Similarly appellants should be allowed to present to the District Court evidence substantiating their allegations that defendants' conspiracy is sufficiently broad in scope so that its effect upon interstate commerce is significant.

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2 / (Continued)
the funds for which came from outside the state. Grebler, "California's Dependence on Capital Imports for Mortgage Investment," California Management Review, Spring 1963, Vol. V., No. 3, pp. 47, 48-49. See also Taeuber & Taeuber, Negroes in Cities (1965).

McClung clearly shows that if appellants substantiate the allegations of their complaint, these allegations would form a sufficient basis for Congress to legislate in the exercise of its commerce power. See National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U.S. 1; United States v. Wrightwood Dairy Company, 315 U.S. 110; Wickard v. Filburn, 317 U.S. 111; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219. It is therefore clear that if appellants substantiate their allegations, defendants' conduct falls within the scope of the Sherman Act. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 495; United States v. Frankfort Distilleries, 342 U.S. 293, 298. See also Women's Sportswear Manufacturers Ass'n. v. United States, 336 U.S. 460, 464; Times Picayune v. United States, 345 U.S. 594, 602; United States v. International Boxing Club, 348 U.S. 236, 241; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 232.

There is no authority that adequately supports the decision of the District Court. In United States v. Yellow Cab Co., 332 U.S. 218, the Court held that taxi cabs were not involved in interstate commerce when used to transport local passengers to and from interstate railroad stations and bus terminals. There is, however, a world of difference between the restraint on interstate commerce involved in Yellow Cab and that alleged here. No one is likely to be deterred from traveling interstate on train or bus because taxi fares are increased as a result of a local monopoly. On the other hand, the

interstate movement of a Negro from Louisiana is likely to be affected significantly by the fact that he cannot buy a house in Akron, Ohio. Moreover, the interstate movement of building materials is likely to be affected significantly by an agreement that prevents a Negro from buying a house that would otherwise be built. Finally, the interstate flow of money is likely to be deflected by an agreement that prevents a Negro from buying the house for the financing of which it would otherwise be used.

The complaint in Liebenthal v. North Country Lanes, Inc., 332 F. 2d 269 (2d Cir. 1964), cited by the District Court as support, alleged an effect upon interstate commerce far less significant than that involved here. The plaintiff in Liebenthal alleged a conspiracy to destroy the business of a single bowling alley some of whose equipment came from out-of-state. Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959); E. Spears Free Clinic v. Cleere, 197 F. 2d 125 (10th Cir. 1952) and Gordon v. Illinois Bell Telephone Co., 330 F. 2d 103 (7th Cir. 1964) similarly all involved restraints affecting only a single local businessman. Page v. Work, 290 F. 2d 393, also involved effects on interstate commerce clearly less significant than those here alleged. It may be reasonable to hold that when the business of a single doctor, some of whose patients come from out-of-state, is destroyed, the effect on interstate commerce is unappreciable, see E. Spears Free Clinic v. Cleere, supra; but it is highly unreasonable to hold that a restraint barring Negroes from buying houses in white areas of Akron would have an unappreciable effect on interstate commerce.

In sum, appellants clearly allege that defendants' restraint significantly affects the flow of persons, building materials, and financing in interstate commerce. It is error to deprive appellants of the opportunity of proving this effect.

II. The Complaint Sufficiently Alleges that Defendants' Activities are Themselves in the Flow of Interstate Commerce.

Defendants allege that in selling and renting houses, real estate dealers often act as agents for persons outside the state and they arrange for financing that comes from out-of-state sources. While the house that they sell is itself located in the Akron area, the entire transaction may involve some local and some interstate elements. As Justice Black, concurring in Heart of Atlanta Motel v. United States, 379 U.S. 241, 271, said on the issue of congressional power to legislate: "Commerce . . . includes not only . . . 'travel, trade, traffic, commerce, transportation or communication' but also other unitary transactions and activities that take place in more States than one. That some parts or segments of such unitary transactions may take place only in one State cannot, of course, take from Congress its plenary power to regulate them in the national interest." Cf. United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 546-47; Board of Trade v. Olsen, 262 U.S. 1, 33-36; Swift & Co. v. United States, 196 U.S. 375, 398-99. As has been pointed out, if Congress may validly legislate under the commerce power, activity concerning which it may legislate also falls within the scope of the Sherman Act. Appellants' complaint, then, adequately alleges that some parts of the unitary transactions undertaken by defendant real estate dealers may take place in more than one state, and appellants should be given the opportunity to prove this at trial.

III. The District Court has Misconstrued Appellants' Complaint

The District Court held that allegations of an effect upon interstate commerce are insufficient because "the area in which defendants allegedly discriminated is not defined or described, thus the substantiality of the effect upon interstate commerce is not sufficiently indicated by the complaint." This conclusion is based upon the District Court's judgment that appellants' allegations may be interpreted to mean that defendants' conspiracy affects only a small portion of the Akron area occupied solely or primarily by white persons.

It is, however, "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46; Beacon Theatres v. Westover, 359 U.S. 500, 506; United States v. Frank B. Killion, 269 F.2d 491 (6th Cir. 1959); Fitzpatrick v. Commonwealth Oil Co., 285 F. 2d 726 (5th Cir. 1960); Leimer v. State Mutual Life Assurance Co., 108 F. 2d 302, 305-06 (8th Cir. 1940). It is clear, as the District Court itself recognized, that the complaint might also be read to mean that the conspiracy affects all parts of the Akron area occupied solely or primarily by white persons. The District Court itself implied that if this were the case, the interstate commerce allegations would be sufficient.

Clearly then, appellants might introduce a set of facts in support of their claim that would entitle them to relief.

Moreover, "for purposes of a motion to dismiss, a complaint should be viewed in the light most favorable to the plaintiff. Complaints should be tested by their substance and by the reasonable inferences that can be drawn from them rather than the nicety of their expression." Machado v. McGrath, 193 F.2d 706, 708 (D.C. Cir. 1952). Federal Rule 8(f), which states that "all pleadings shall be so construed as to do substantial justice," excludes "requiring technical exactness or the making of refined inferences against the pleader and requires an effort fairly to understand what he attempts to set forth." DeLoach v. Crowley's Inc., 128 F.2d 378, 380 (5th Cir. 1942)(allegations of "interstate commerce" sufficient); New Home Appliance Center v. Thompson, 250 F.2d 881, 883 (10th Cir. 1957) (allegations of "interstate commerce" sufficient). The District Court clearly understood that plaintiffs intended to allege a substantial effect upon interstate commerce, for the Court said "as a practical matter the plaintiffs perhaps intended that the complaint allege that defendants' discrimination is directed towards a substantial portion of the Akron area." The complaint then, when fairly read, adequately makes out a federal claim, for in antitrust cases, just as in other cases, plaintiff must be given liberal latitude in the pleadings. See Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 113 F. Supp. 737, 742 (E.D. Penn. 1953);

Package Closure Corp. v. Sealright Co., 141 F.2d 972, 979 (2d Cir. 1944); Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957).

IV. Appellants' Complaint States a Cause of Action Under Sherman Act § 1

If Appellants' complaint adequately alleges interference with interstate commerce -- as we believe it does -- it clearly states a cause of action under Sherman Act § 1. The complaint alleges at least two types of Sherman Act violation.

First, the complaint charges that defendants have agreed not to show houses in white neighborhoods to Negro customers. 3/ Since real estate dealers, in effect, are in the business of finding house buyers for house sellers, in making such an agreement they prevent one or more of their number from competing by offering to provide Negro buyers, as well as white buyers, to home owners in white neighborhoods. Such an agreement is illegal, for it is, in essence, an agreement not to compete; and, agreements not to compete in any respect -- not just in respect of price -- are illegal under fundamental principles of antitrust law. See Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, and United States v. First National Pictures, 282 U.S. 44.

3/ Each active and associate member of the defendant Board adheres to the conspiracy and combination in order to maintain membership with the Board and to retain the benefits of Board membership, thereby avoiding a reduction in business and income. The individual members have used the Board as an instrumentality for enforcing and furthering the conspiracy to restrain interstate commerce as herein alleged.

In Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, the Supreme Court struck down an agreement among movie distributors, the terms of which required distributors to give their films only to exhibitors who would agree to include an arbitration clause in the exhibitors' contract. The Court argued that regardless of whether good reason might be shown for including an arbitration clause in such a contract, an agreement among distributors to insist upon such a clause was illegal. Such an agreement restricted competition by preventing a distributor from competing in the respect of being willing to offer a contract without an arbitration clause. In United States v. First National Pictures, 282 U.S. 44, the Court struck down an agreement among movie distributors, the terms of which would require them to deal only on a cash basis with certain exhibitors who had been determined to be bad credit risks. Again the Court reasoned that this agreement prevented competition among distributors in the respect of being willing to offer credit terms to those exhibitors. Whether or not dealing with exhibitors who were bad credit risks on a cash basis only was reasonable was viewed by the Court as irrelevant. 4/

4/ But see Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., 195 F.2d 86, where the Court held (as an alternative holding) that an agreement among fire insurance companies not to insure a person who was a serious risk did not violate § 1. This holding seems contrary to Paramount Famous Lasky and First National Pictures.

First National Pictures and Paramount Famous Lasky both stand for the simple and fundamental proposition that horizontal conspiracies suppressing the freedom of competitors to deal with whom they want on the terms that they want are prohibited by Sherman Act Section 1. According to the complaint in this case, defendants have entered into just such a conspiracy. In removing the real estate dealers' freedom to agree with homeowners to supply Negro customers, the alleged conspiratorial agreement prevents buyers and sellers of the brokerage service from freely agreeing upon their terms of trade. Moreover, the agreement insulates brokers unwilling to produce Negro buyers from the competition of those brokers who may be willing to supply Negro customers. Further, the agreement prevents willing buyers and sellers of houses from reaching each other, and it thereby interferes with the free market mechanism in the housing market. Such a conspiracy is illegal.

Second, the complaint alleges that Negro real estate brokers are not allowed to join the Akron Board of Realtors. If a significant burden is imposed upon Negro real estate brokers wishing to sell houses in white neighborhoods due to the fact that they cannot become members of this white brokers' association, the Akron association's refusal to admit them violates the antitrust laws, for the courts have held that such an agreement illegally restrains competition.

In United States v. Terminal Railroad Association, 224 U.S. 383, the Court required an association of railroads to make available to

a competitor the use of its jointly owned terminal in St. Louis, for a non-member railroad could not compete effectively in St. Louis unless it was allowed to use the terminal. In Associated Press v. United States, 326 U.S. 1, the Court required the Associated Press, an organization of newspapers, to make membership available to competing newspapers so that they might have access to the news gathered by the Association. The Court pointed out that membership in the Associated Press was not an absolute necessity for a competitor to survive. However, it stated, "a newspaper without AP service is more than likely to be at a competitive disadvantage." Moreover, "the Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitors' opportunity to buy or sell the things in which the group compete."

A refusal to admit Negro brokers into a white brokers' association may well constitute a significant restraint, as the complaint alleges, for, if Negro brokers are deprived of an opportunity to use multiple listing services or other benefits accompanying membership in the white association, they will find selling houses in white neighborhoods considerably more difficult than will white brokers. Such a restraint may have serious anticompetitive effects.

If exclusion from the association prevents Negro dealers from competing successfully with white brokers in the business of selling

houses in white neighborhoods, white brokers will be able to make higher profits than they would if competition in their field were unrestricted. And, Negroes will be discouraged from entering the business of real estate brokering. This clearly misallocates resources. Moreover, Negro brokers already in the business may find their economic and competitive opportunities restricted -- at least if they wish to sell houses in white neighborhoods. Yet, the Sherman Act, it has been said, was designed in part to protect the right of every man to follow the trade of his choice unhampered by restrictions that are not imposed either by government or by the market mechanism. See Anderson v. Shipowners Association, 272 U.S. 359; 74 Yale L. J. 567, 575. See also Radovich v. National Football League, 352 U.S. 444. In sum, Appellants' complaint clearly alleges Sherman Act violations. Appellants should be given an opportunity to prove their allegations at trial.

Appellees have additionally contended, however, that the District Court did not have jurisdiction under the Sherman Act because any restraints of trade in which they may have been involved were not commercially motivated. The District Court did not pass upon this contention, and this Court should not pass upon it either, for it raises a question of fact that should be resolved at trial. The complaint clearly alleges a commercial conspiracy. The object of the alleged conspiracy was to prevent Negro persons from purchasing houses in white neighborhoods in Akron. All of the methods used to achieve this object took place in the ordinary course of business. One would

ordinarily infer from the complaint that defendants simply believed that they might make less money if they did not maintain segregated neighborhoods. Since the complaint charges ordinary, commercially motivated restraints of trade, and since the proper place to resolve any dispute as to motivation is the trial court, there is no need for this Court to reach the very difficult question of whether the Sherman Act applies to noncommercially motivated restraints of trade. 5/

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the judgment of the District Court.

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MAY 1966

5/ If this Court believes that the District Court was correct in holding that appellants did not show subject matter jurisdiction because they did not allege that defendants' restraints were commercially motivated or that they had a "substantial" effect upon interstate commerce, it should remand this case to the District Court with instructions to allow appellants to amend the complaint to allege such a substantial effect, for "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. See *ILGWU* v. *Donnely Garment Co.*, 121 F.2d 561 (8th Cir. 1941); *Atwood* v. *National Bank of Lima*, 115 F.2d 861 (6th Cir. 1940); *Finn* v. *American Fire and Casualty Ins. Co.*, 207 F.2d 113 (5th Cir. 1953). In fact, however, there is no need to amend the complaint, for its allegations are perfectly adequate. The judgment of the District Court should simply be reversed.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Brief *Amicus Curiae* to be served upon all parties by causing a copy thereof to be mailed, postage prepaid and properly addressed, to each of the following:

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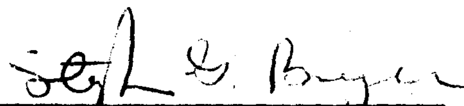

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MAY , 1966