

HomeServices of America, Inc.

A Berkshire Hathaway Affiliate

RECEIVED

APR 19 2011

MEMBER POLICY

April 18, 2011

Mr. Ron Phipps
2011 President
National Association of Realtors
430 N Michigan Avenue
Chicago, IL 60611

RE: Franchisor IDX Rule Reconsideration

Dear Mr. Phipps:

HomeServices of America, Inc. respectfully requests that the Committee reconsider its adoption of the rule "Display of IDX Information by Real Estate Franchise Organizations" (the "Franchisor IDX Rule"). The effect of the Franchisor IDX Rule is far reaching, has unintended consequences for the industry, and creates serious liability issues for all parties.

A. The Franchisor Rule Raises Significant Antitrust Concerns

1. The Franchisor IDX Rule May Impermissibly Restrain Competition

In the United States of America vs. National Association of Realtors, the United States government alleged that NAR had engaged in anti-competitive behavior violating the Sherman Act by denying IDX feeds to those real estate brokers who operated virtual office websites ("VOWs"). It is difficult to imagine a more corollary set of facts than the one presented by the passage of a mandatory Franchisor IDX Rule which arbitrarily denies national IDX feeds to all competitors in the market place except for a favored two.

The stated basis for denying IDX data feeds to all other competitors is that the favored two operate under franchise documents in compliance with the rules of the Federal Trade Commission and have franchisees in each of the local MLS's. Franchisors are not real estate brokers. They do not hold the requisite real estate licenses, engage in providing brokerage services to consumers, and are not bound by the same state advertising law prohibitions as real estate licensees. Their business is franchising like McDonald's business is franchising.

Because franchisors are not real estate licensees and do not engage in the business of real estate brokerage, they are no more entitled to receive IDX data feeds than

McDonald's is. There is clearly no reason to exclude those competitors that actively own real estate brokerage companies in a parent-subsidary relationship or voluntary associations of real estate brokers, such as Leading Real Estate Companies of the World, The Realty Alliance, and others, from access to national IDX data feeds. That NAR would choose to deny IDX data feeds to real estate brokerage associations that are similarly situated to franchisors simply because they operate under FTC requirements, like McDonald's does, is a bizarre and arbitrary standard.

NAR has engaged in behavior that is arbitrary and anti-competitive. Either the Franchisor IDX Rule must be changed, to give database access to all competitors, or the Franchisor IDX Rule must be repealed to correct this egregious error.

2. The Franchisor IDX Rule Raises Significant Monopolization And Concentration of Market Power Issues

Until the time of the passage of the Franchisor IDX Rule, no single aggregator of listing data was able to aggregate the listing data in a single, national collection point. The dispersion of listing data across the market place and the need to obtain the consent and cooperation of each real estate broker responsible for the content of the listing data under various state laws was a substantial barrier to the concentration of market power in a single, national MLS website, especially given the local nature of real estate markets.

The passage of the Franchisor IDX Rule effectively removed this barrier to the concentration of market power. No longer is it necessary to obtain the consent or cooperation of the authors and owners of the listing data, the real estate brokers and agents, who are responsible for its supervision. By allowing two, potentially market-dominant franchisors to obtain the entire IDX feed for any particular MLS upon request, the consent and cooperation of each real estate broker to the collection of its data is no longer necessary. Rather, two franchisors can aggregate listing data by making a single request for it to each of the MLS's in which they have a franchisee.

It is our expectation that this request will ultimately take the form of a provision in their franchise agreements by which the franchisee consents to the franchisor's receipt of the franchisee's IDX feed. Franchise agreements will become IDX aggregation agreements. This will allow two, chosen franchisors who have a franchisee in every MLS market in the country to create a national MLS database by aggregating those listing data feeds and to develop a unique, NAR-legislated competitive advantage relating thereto.

By partnering with a technology provider, perhaps for example Yahoo! Real Estate, there will be a concentration of market power as those two franchisors which have the ability to aggregate all 900+ MLS's create the most searchable national MLS database in the country. A national MLS operated by a national

franchisor will not even be required to identify itself as the website of the franchisor because the Franchisor IDX Rule does not require it, further franchisors as non-licensees are not subject to the state law advertising requirements that real estate brokers and agents are subject to in every state in the nation. This gives one or two competitors in the market place that ability to be the next "AMAZON.COM," the single, national MLS website on the Internet while excluding their competitors. With more than 78% of consumers starting their search for a home on the Internet, according to NAR statistics, the Franchisor IDX Rule creates the potential for the concentration of market power heretofore unobtainable by any single competitor and raises the specter of potential NAR-legislated monopoly power.

Broadening this rule to include parent-subsidiary relationships or trade associations will not avoid the concentration of market power as long as access to local MLS IDX data feeds is governed by the arbitrary standard set forth in the Franchisor IDX Rule. Except for one or two competitors in the market place, no other competitor has the market presence to aggregate more than ten percent (10%) of national IDX data feeds. The only alternative available to avoid an unacceptable concentration of market power is to allow all potential competitors to access all MLS's in the country irrespective of whether they have a franchise brand or company in the local MLS. As set forth above, therefore, if NAR continues to offer national access to a select couple of competitors in the market place, then it must expand national IDX feed access to all competitors in the market place.

It is one thing for a competitor to achieve market power on its own merit, it is quite another when an organization such as NAR, which ostensibly exists to benefit its members, colludes with non-members to impose an arbitrary mandatory rule upon its membership to force the delivery of member data to non-members without their consent thereby legislating a concentration of competitive advantage and, presumably, market power. No other single change in the industry has so facilitated the concentration of market power as the Franchisor IDX Rule has. As such, it raises significant antitrust concerns.

Accordingly, the Franchisor IDX Rule must be repealed or expanded to allow all competitors access to national IDX feeds without arbitrary restrictions that favor two competitors against all others.

B. Copyright Liability

NAR has created liability for itself and its MLS's in passing a mandatory rule that requires MLS's to violate copyright law on pain of losing NAR-provided insurance coverage. Under the federal Copyright Act of 1976, individual real estate brokers are the authors and the owners of the listing content they create, including but not limited to listing photographs. Some real estate brokers currently register their photographic database with the United States Patent and Trademark Office perfecting their rights in

this data set. Other real estate brokers have entered into licensing agreements with their MLS's and the other third parties that display listing data to protect their listing data from misuse and unauthorized distribution. Some of these agreements require the real estate broker's own local MLS to take all necessary action to prevent or stop any infringing activity by third parties. These agreements not only protect the intellectual property rights of real estate brokers in their listing data, but create privity of contract with those third parties that display their listing data. It is this privity of contract that enables real estate brokers to comply with state advertising laws.

NAR's mandated Franchisor IDX Rule creates liability for local MLS's by mandating that they violate the intellectual property rights of their members and, in many cases, that they breach their contractual obligations with their members on pain of losing their NAR-provided insurance coverage if they are not complicit with this illegal mandate.

NAR does not have the legal right or authority to vitiate federal copyright law by fiat. Where such rules violate federal or state law, they are illegal and unenforceable. Any MLS that is complicit in pirating protected listing data in violation of the federal copyright law creates potential legal liability under the Copyright Act for such violations.

The Franchisor IDX Rule must be repealed as illegal and unenforceable.

C. The Franchisor IDX Rule Violates State Laws

Although NAR may choose to exempt "Initial search results that provide minimal information" from required MLS disclosures, such search results are not exempt from state advertising law requirements as the very brief survey of state advertising law set forth below makes abundantly clear. NAR, it seems, has overlooked that real estate brokers and agents are responsible for actively supervising their advertising materials on pain of license suspension or revocation.

As it stands, real estate agents and brokers currently make a conscious choice as to where to send their listing data for advertising purposes. Those choices, when made, come with extensive agreements concerning the advertisers' use of the listing data. Moreover, those agreements create privity of contract among real estate agents, brokers and their advertisers in the event that the advertisers fail to adhere to the terms of the contract. This allows real estate agents and brokers to take legal action against advertisers when necessary to protect the use of the listing data and ensure compliance with their state law obligations.

NAR in passing the Franchisor IDX Rule has forgotten, or is ignorant of, the legal compliance requirements placed on real estate agents and brokers when advertising listings. This oversight creates significant legal liability for real estate agents and brokers. Whereas prior to the passage of the Franchisor IDX Rule real estate agents and brokers designated the recipients of their listing data, under the Franchisor IDX

Rule a local MLS does not even have to go so far as to notify real estate agents and brokers where their listing data has been sent. How are real estate agents and brokers to meet their state law requirement to supervise their listing data when they do not even know where or when it is being sent?

The Franchisor IDX Rule provides,

Initial search results that provide minimal information (e.g., "thumbnails") are exempt from MLS-required disclosures (e.g., listing firm, listing agent, source of information, notice that information is deemed reliable but not guaranteed accurate) provided that a direct link to a detailed ("full view") display that includes all required disclosure is provided. (Emphasis added)

State laws require,

All advertisements placed by a broker must indicate that the advertiser is a broker or give the name of the broker and his telephone number.

NEW YORK CODE, RULES AND REGULATIONS §175.25

A licensee shall identify himself or herself as either a broker or an agent salesperson in any advertising for the purchase, sale, lease, exchange, mortgaging, transfer, or other disposition of real property, whether the advertising pertains to the licensee's own property or the property of others.

MINN. STAT. §82.69

No advertising, whether in print, via the Internet, or through any other media, shall be fraudulent, deceptive, inherently misleading, or proven to be misleading in practice. ...

No blind advertisements may be used by any licensee, in any media, except as provided for in this Section.

"Blind advertisement" means any real estate advertisement that does not include the sponsoring broker's business name and that is used by any licensee regarding the sale or lease of real estate, including his or her own, licensed activities, or the hiring of any licensee under this Act.

ILLINOIS REAL ESTATE LICENSURE ACT OF 2000 §§10-30, 1-10

"Advertising" means all forms of representation, promotion and solicitation disseminated in any manner and by any means of communication to consumers for any purpose related to licensed real estate activity. *All advertising must be under the direct supervision of the principal broker or supervising broker, in the name of the firm ... The firm's licensed name must be clearly and legibly displayed on all advertising.*

All online listings advertised must be kept current and consistent as follows:

Online listing information must be consistent with the property description and actual status of the listing. The licensee shall update in a timely manner material changes to the listing status authorized by the seller or property description when the licensee controls the online site.

The licensee shall make timely written requests for updates reflecting material changes to the listing status or property descriptions when a third party online listing service controls the website displaying the listing information.

All listing information shall indicate in a readily visible manner the date that the listing information shown was last updated.

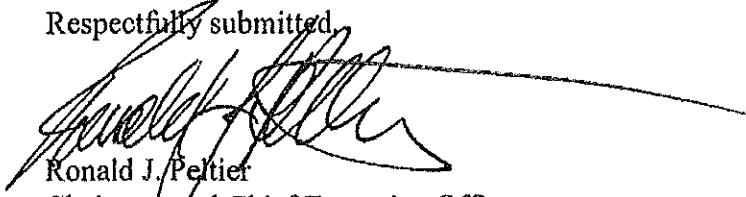
18 VIRGINIA ADMINISTRATIVE CODE §135-20-190 (emphasis added)

Unless otherwise set forth herein, subsections (b) through (o) below shall apply to all categories of advertising including all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationery, business cards, business and legal forms and documents, and signs and billboards. ... All advertising by a salesperson or broker-salesperson shall include the name in which they are licensed and the regular business name of the individual, partnership, firm or corporate broker through whom they are licensed. ... With regard to information on listings disseminated through the Internet by licensees other than the listing broker, listing brokers shall be deemed to have given the consent referred to in (n) above with the knowledge of the owner where: A written listing agreement contains the seller's authorization for information on the listing to be posted on the website of the broker, or of a multiple listing service to which the broker belongs, or of another party to which the broker or such an MLS submits information on listings; and the website on which the listing information shall initially appear has instituted no measures to prevent other parties with websites from utilizing an electronic link to enable consumers to view that information while remaining in the website of the other party.

NEW JERSEY ADMINISTRATIVE CODE §11:5-6.1

The Franchisor IDX Rule creates significant legal liability for real estate agents and brokers under the various state laws regulating the advertising of listings by disregarding those laws and mandating the forced distribution of regulated listing data to un-licensed advertisers that have no privity of contract with or obligation to the real estate agents and brokers who are personally liable for its use. The Franchisor IDX Rule must be repealed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald J. Peltier", with a long horizontal flourish extending to the right.

Ronald J. Peltier
Chairman and Chief Executive Officer
HomeServices of America, Inc.