THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX – REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., et al.

Defendants.

Case No. 2:21-cv-00312-TSZ

THE NATIONAL ASSOCIATION OF REALTORS'® RESPONSE TO THE STATEMENT OF INTEREST ON BEHALF OF THE UNITED STATES OF AMERICA

QUINN EMANUEL URQUHART & SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
(206) 905-7000

NAR respectfully submits this response to the statement the United States filed in this case pursuant to 28 U.S.C. § 517, *see* ECF 95—which ignores the history of the rule at issue here and the simple fact that the rule was *required* by a consent decree the United States approved and told a federal court was "in the public interest." In short, the United States' statement is irrelevant to NAR's motion to dismiss and represents the ironic view that the United States would ever approve and require that NAR and its members adopt a rule that might be anticompetitive or illegal.

In its statement, the United States concedes, as it must, that the 2008 decree required NAR to adopt the rule at issue here. *See* ECF 95 at 5 (stating that "[t]he government 'approved' the search policy cited by NAR" and "permitt[ed] it as part of the Modified VOW Policy required by the 2008 consent decree"). But the United States now suggests there is some open question as to whether this fact means the rule is pro-competitive.

First, that question, even if open, is not relevant to NAR's motion to dismiss. NAR has not claimed that the decree's required conduct provision makes the rule pro-competitive. Instead, in its opening brief, NAR simply described the history of the rule. *See* ECF 84 at 3-4 ("NAR has maintained a materially similar rule since at least 2008," when NAR and the United States agreed to a decree, which an Illinois federal court entered as a judgment.). And in its reply, NAR simply responded to the incorrect assertions in REX's opposition brief. *Compare* ECF 90 at 7 n.1 (claiming that "the 2008 Consent Decree concluding a case between NAR and the Department of Justice in no way 'approved' the segregation rule") *with* ECF 93 at 7 ("Not only was the 2008 Consent Decree approved by the Department of Justice and the presiding court, the decree required NAR to adopt the rule at issue here."). The United States now has confirmed that NAR's reply is right, that REX's opposition is wrong, and that the United States approved the consent decree that required the policy at issue. *See* ECF 95 at 5 ("The government 'approved' the search policy cited by NAR . . . ."). Where the United States errs is to incorrectly claim that the United States' approval of the rule was the basis for NAR's motion. But that is not something NAR has said, as the United States acknowledged in its carefully worded statement. *See id*. at 4-7 (using words like "implies" and "inference").

QUINN EMANUEL URQUHART & SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
(206) 905-7000

Second, now that the United States has brought to the Court the consequences of the United States agreeing to the decree that required the rule at issue, that fact does show the rule is at least competition neutral (and legal). The rule was required by a 2008 decree the United States agreed to, described as in the public interest, and moved a federal court to enter. And as requested, the court entered the decree requiring NAR to adopt the rule at issue. The meaning of this is clear: the United States and the Illinois federal court both agreed that the rule at issue is not illegal or anticompetitive; otherwise, they would not have found the decree to be in the public interest or agreed to the decree's requirement that NAR adopt the rule at issue. Simply stated, the United States and the Illinois federal court would not require NAR to adopt a policy that was anticompetitive or violated the law.

On this point, the history of the rule is clear in the public court filings. To obtain the required court approval, under 15 U.S.C. § 16, of the settlement of its antitrust lawsuit against NAR, the United States filed: (a) a stipulation in which it agreed the decree "may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion," Ex. A at 1; (b) a Competitive Impact Statement in which it argued that the decree would "end the [alleged] competitive harm resulting from NAR's Challenged Policies," Ex. B at 16; and (c) a motion to enter the consent decree, stating that "the Court should find that the amended proposed Final Judgment is in the public interest," Ex. C at 6. The Illinois federal court then entered the decree as a judgment, without modification, exactly as agreed to by the United States, including the requirement that NAR and its members adopt the Modified VOW Policy that contained the rule at issue in this case. Ex. D § V.C. In entering the decree as requested by the United States, the court held it was in the public interest to require NAR to adopt all rules in the decree, including the one at issue here. *Id.* § XI; *see also* 15 U.S.C. § 16(e) ("Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest."). There can be no dispute that the United States and a federal court approved the decree, and that the decree required the rule at issue here.

In an effort to rewrite this history, the United States argues that NAR agreed any rule the decree required might be challenged in the future. But that argument is baseless. The United States,

QUINN EMANUEL URQUHART & SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
(206) 905-7000

in fact, only quotes its own response to public comments on the consent decree to support this argument. *See* ECF 95 at 4 (using the word "agreeing" in a parenthetical about the United States' response to public comments); Ex. E at 35. NAR did not contribute to or approve the United States' response to public comments, and the document was created *after* NAR and the United States agreed to the terms of the decree and filed it with the court. *See* Ex. E at 1. Moreover, nothing in that filing shows that NAR was "agreeing" the United States and a federal court could require a rule, and then the United States could claim years later that the rule could be illegal. *See id.* at 1-37. NAR did not agree that the United States could require a rule and then investigate it.

Finally, in its statement, the United States erects an irrelevant strawman argument about decrees and the reservation of rights clause generally: "A consent decree that does not expressly prohibit certain aspects of a defendant's conduct, and merely permits the defendant to continue such conduct that was neither investigated nor challenged, does not imply that the conduct is, or has been determined to be, lawful." ECF 95 at 5. But here the United States did not simply ignore the rule and leave it for another day, as its argument suggests; it expressly approved of and required NAR to adopt the rule at issue. And the case that the United States cites shows this exact distinction. In *Penne v. Greater Minneapolis Area Board of Realtors*, the defendant relied on a statement that "[n]othing in this injunction shall be deemed to prohibit" certain conduct to argue that the injunction endorsed that conduct. 604 F.2d 1143, 1150 (8th Cir. 1979). Unlike here, the injunction in *Penne* did not expressly approve of or require the defendant to engage in the conduct at issue. For these same reasons the United States' citations to *Moehrl v. National Association of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020), and *Sitzer v. National Association of Realtors*, 420 F. Supp. 3d 903 (W.D. Mo. 2019), are inapposite. As NAR showed in its reply (ECF 93 at 7-8), the aspects of the decree at issue in those cases (which were not required by the decree and expressly were subject to a reservation of rights) did not relate to rules in the Modified VOW Policy that the decree required NAR to adopt. Nothing in the decree, the decree caselaw, or common sense excused the United States' responsibility to review every decree provision to determine if it was in the public interest.

For all these reasons, NAR respectfully requests that the Court simply ignore the United States' statement. This is not the time or the forum for the United States to relitigate the terms of a

QUINN EMANUEL URQUHART & SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
(206) 905-7000

settlement that was negotiated and accepted by the United States and an Illinois federal court in 2008.

DATED: August 12, 2021

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ Thomas C. Rubin

Thomas C. Rubin, WSBA #33829
1109 First Avenue, Suite 210
Seattle, WA 98101
Tel: (206) 905-7000
Fax: (206) 905-7100
tomrubin@quinnemanuel.com

Ethan Glass (*pro hac vice*)
Michael D. Bonanno (*pro hac vice*)
1300 I Street, Suite 900
Washington, D.C. 20005
Tel: (202)538-8000
Fax: (202) 538-8100
ethanglass@quinnemanuel.com
mikebonanno@quinnemanuel.com

Attorneys for Defendant National Association of REALTORS®

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I caused a true and correct copy of the foregoing to be filed in this Court's CM/ECF system, which will send notification of such filing to counsel of record.

DATED: August 12, 2021

/s/ Thomas C. Rubin
Thomas C. Rubin, WSBA #33829

QUINN EMANUEL URQUHART & SULLIVAN, LLP
1109 First Avenue, Suite 210
Seattle, WA 98101
(206) 905-7000

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	
Plaintiff,	Civil Action No. 05 C 5140
v.	Judge Kennelly
NATIONAL ASSOCIATION OF REALTORS®	Magistrate Judge Denlow
Defendant.	

STIPULATION

It is stipulated by and between the undersigned parties by their respective attorneys that:

1. The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the Northern District of Illinois, Eastern Division.

2. The parties stipulate that a proposed Final Judgment in the form attached as Exhibit 1 may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent.

3. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the Parties and submitted to this Court.

4. If (1) the proposed Final Judgment is not entered pursuant to this Stipulation and the time has expired for all appeals of any court ruling declining entry of the proposed Final Judgment, or (2) the United States has withdrawn its consent, then the Parties are released from

all further obligations under this Stipulation and the making of this Stipulation shall be without evidentiary prejudice to any party in this or any other proceeding.

United States of America

By: _____
Craig Conrath
United States Department of Justice
Antitrust Division
Litigation III
450 5th Street, NW
Room 4000
Washington DC 20530
(202) 307-5779
craig.conrath@usdoj.gov

Counsel for Plaintiff

National Association of Realtors®

By: _____ /sos/
Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7614
jbierig@sidley.com

Counsel for Defendant

Dated: May 27, 2008

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS®** Defendant.	)	Civil Action No. 05 C 5140 Judge Kennelly

<u>COMPETITIVE IMPACT STATEMENT</u>

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDINGS

<u>Overview</u>. The United States brought this lawsuit against Defendant National Association of Realtors® ("NAR") on September 8, 2005, to stop NAR from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by its suppression of competition from real estate brokers who use the Internet to deliver real estate brokerage services. NAR's policies singled out these innovative brokers and denied them equal access to the for-sale listings that are the lifeblood of competition in real estate markets. The settlement will eliminate NAR's discriminatory policies and restore even-handed treatment for all brokers, including those who use the Internet in innovative ways.

Virtual Office Websites ("VOWs"). The brokers who have been restrained by NAR's policies operate password-protected websites through which they deliver brokerage services to consumers. NAR has referred to these websites as "virtual office websites" or "VOWs." As discussed below and in the United States' October 4, 2005, Amended Complaint, brokers who use VOWs ("VOW brokers") can operate more productively than other brokers, providing high-quality brokerage services efficiently to consumers.

Defendant NAR and MLSs. NAR is a trade association whose membership includes both traditional, bricks-and-mortar real estate brokers and innovative brokers, such as those who operate VOWs. NAR promulgates rules for the operation of the approximately 800 multiple listing services ("MLSs") affiliated with NAR. MLSs are joint ventures of virtually all real estate brokers in each local or regional area. MLSs aggregate information about all properties in the areas they serve that are offered for sale through brokers.

NAR's Challenged Policies. On May 17, 2003, NAR adopted its "VOW Policy," which contained rules that obstructed brokers' abilities to use VOWs to serve their customers, as described below in Section II. After an investigation, the United States prepared to file a complaint challenging this Policy.

On September 8, 2005, NAR repealed its VOW Policy and replaced it with its Internet Listings Display Policy ("ILD Policy"). NAR hoped that this change would forestall the United States' challenge to its policies. NAR's ILD Policy, however, continued to discriminate against VOW brokers. As part of its adoption of the ILD Policy, NAR also revised and reinterpreted its MLS membership rule, which would have excluded some brokers who used VOWs, as detailed below in Section II. (NAR's VOW and ILD Policies, including its membership rule revision and

reinterpretation, are referred to collectively in this Competitive Impact Statement as NAR's "Challenged Policies.")

As an association of competitors with market power, NAR's adoption of policies that suppress new and efficient competition to the detriment of consumers violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

The Complaint. On September 8, 2005, the day NAR adopted its ILD Policy, the United States filed its Complaint. The United States filed an Amended Complaint on October, 4, 2005, that explicitly addressed the ILD Policy and membership rule revision and reinterpretation. The Amended Complaint alleges that NAR's adoption of the Challenged Policies constitutes a contract, combination, and conspiracy by and between NAR and its members which unreasonably restrains competition in brokerage service markets throughout the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In the Amended Complaint, the United States asks the Court to order NAR to stop violating the law. The United States did not seek monetary damages or fines; the law does not provide for these remedies in a case of this nature.

Motion to Dismiss. NAR filed a motion to dismiss the case, claiming that, because NAR did not restrain brokers by compelling them to use the "opt-out" provisions of the Challenged Policies (discussed below in Section II.C), those provisions did not constitute actionable restraints of trade. NAR also sought dismissal on two procedural grounds. On November 27, 2006, the Court issued an opinion denying NAR's motion. The Court found that the appropriate

analysis under Section 1 is not whether individual market actors are restrained but instead whether competition is restrained.[1] The Court also rejected NAR's procedural arguments.[2]

Course of the Litigation. Discovery began in December 2005 and continued through 2006 and 2007. The case was scheduled for trial on July 7, 2008.

Proposed Settlement. On May 27, 2008, six weeks before trial was scheduled to begin, the United States and NAR reached a settlement. The United States filed a Stipulation and proposed Final Judgment that are designed to eliminate the likely anticompetitive effects of NAR's Challenged Policies. The proposed Final Judgment, which is explained more fully below, requires NAR to repeal its VOW Policy and its ILD Policy and to adopt and apply new rules that do not discriminate against brokers who use VOWs to provide brokerage services to their customers.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

---

[1] *See United States v. NAR*, No. 05-C-5140, 2006-2 Trade Cas. ¶ 75,499, 2006 WL 3434263, at *12-14 (N.D. Ill. Nov. 27, 2006).

[2] *Id*. at *6-11 & 15.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Description of Competition and Innovation Enabled by VOWs

In many respects, most VOW brokers operate just like their more traditional competitors. They hold brokers' licenses in the states in which they operate, they ordinarily are Realtor members of NAR, they participate in their local MLS, they tour homes with potential buyer customers and guide those customers through the negotiating, contracting, and closing process, and they derive revenues from commissions earned in connection with real estate transactions.[3]

These VOW brokers differ from other brokers in how they use the Internet to provide brokerage services. VOW brokers use primarily their websites, rather than the efforts of their agents, to educate potential buyers about the market. This service necessarily involves – as it does with brokers who operate in a more traditional fashion – providing those MLS listings to buyer customers that meet their expressed needs and interests. NAR's MLS rules permit brokers to "reproduce from the MLS compilation and distribute to prospective purchasers" information about properties in which the purchaser might have an interest. *See* NAR, *Handbook on Multiple Listing Policy*, "Model Rules & Regulations for an MLS Operated as a Committee of an Association of Realtors®," § 12.2 (21st ed. 2008). Rather than providing this information to

[3] The real estate licensing laws of most states allow real estate professionals to be licensed as either brokers or as agents or sales associates. To offer real estate brokerage services, a person licensed as an agent or sales associate must affiliate with and be subject to the supervision of a person who holds a broker's license. *See, e.g.*, 225 ILCS 454/1-5.

prospective buyers by hand delivery, mail, fax, or e-mail – the delivery methods historically used by brokers – VOW brokers deliver listings over the Internet.[4]

VOWs help brokers operate more efficiently and increase the quality of services they provide. By enabling consumers to search for and retrieve relevant MLS listings, VOW brokers can operate more efficiently than other brokers. Because customers are educating themselves without the broker's expenditure of time, a VOW broker can expend less time, energy, and resources educating his or her customers. Operating a VOW can also enhance broker competitiveness in working with home seller clients by allowing the broker to provide detailed information to both potential and active seller clients about the apparent interests of buyers who are searching for homes in the seller's neighborhood. A study conducted in connection with this case showed that one sizeable VOW broker, for example, was able to generate many more transactions per agent (controlling for years of agent experience) than the traditional brokers it competed against.

---

[4] As the court found in *Austin Board of Realtors v. E-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000), "all . . . methods of distribution" of listings, including the Internet, "are equivalent" and should be treated equally under MLS rules. Until it began developing its VOW Policy, NAR agreed with this position. For instance, on January 29, 2001, a top NAR official stated in a letter to the president of eRealty (a VOW broker) that eRealty's distribution of MLS listings through its VOW was "in compliance with" MLS rules governing the provision of MLS listings to prospective buyers. NAR also published a white paper in December 2001 in which it described VOWs as an "emerging, authorized use of MLS current listing data," and stated that brokers using VOWs are subject to the same MLS rules governing the dissemination of listings to potential buyers that are applicable to all other brokers. The same official reiterated the point in a March 8, 2002, interview, stating that NAR's rules "don't discriminate between methods of delivery."

With lower costs and increased productivity, some VOW brokers have offered discounted commission rates to their seller clients and rebates to their buyer customers.[5] VOW brokers have already delivered tens of millions of dollars in financial benefits directly to their customers. Another study conducted in connection with this case revealed evidence consistent with a finding that the growth of a VOW broker that offered discounts led a sizeable traditional competitor to reduce its commissions to consumers.

Innovative brokers with VOWs have enhanced the consumer experience by offering tools and information that allow consumers to approach the purchase of a home well informed about all aspects of the markets they are considering. VOW brokers not only provide their customers access to up-to-date MLS listings information, but also offer mapping and property-comparison tools and provide school district information, crime statistics, and other neighborhood information for consumers to consider as they educate themselves regarding the most important purchase in the lives of most Americans. Many VOW brokers also allow customers to maintain a personal portfolio of properties they are monitoring, with the VOWs automatically updating those listings as their price or status changes.

Of course, many traditional brokers provide neighborhood and other similar information to their customers, and some even provide such information on Internet websites. VOWs can differ, however, in the quantity and quality of information that they provide. VOW brokers offer their customers complete and up-to-date information and often focus on information most valuable to prospective buyers, identifying price reductions and the number of days a property

[5] Prospective buyers frequently do not enter contractual relationships with the broker from whom they receive brokerage services and, as such, are considered “customers,” rather than “clients,” of the broker.

has been on the market and providing information about comparable recent sales. Customers of VOW brokers can obtain information at their own pace, on their own time, and in the form in which they are most interested in receiving it.

Some VOW brokers have established brokerage businesses that focus solely on the high-technology aspects of brokerage services that can be delivered over the Internet. Like other VOW brokers, these "referral VOWs" educate prospective buyers about the market in which they are considering a purchase by providing buyers MLS listings and other information on a VOW. When the buyer is ready to tour a home, the referral VOW broker can direct the buyer to brokers or agents who specialize in guiding the buyer on tours of homes and advising them during the negotiating, contracting, and closing process. In some instances, referral VOW brokers have obtained a referral fee (contingent on closing) for delivering educated buyer customers to the brokers or agents who received the referrals. Some referral VOW brokers have offered commission rebates or other financial benefits to their customers.

B. Description of the Defendant and Its Activities

Chicago-based NAR is a trade association that establishes and enforces policies and professional standards for its over one million real estate professional members and 1,400 local and state Boards or Associations of Realtors® ("Member Boards"). NAR promulgates rules governing the operation of the approximately 800 MLSs that are affiliated with NAR through their ownership or operation by NAR's Member Boards.[6] In order to encourage adherence to its

[6] There are approximately 1,000 MLSs in the United States, approximately 800 of which are affiliated with NAR and subject to NAR's rules. The rules of the remaining approximately 200 MLSs are not at issue in this lawsuit, although, as a practical matter, many MLSs that are not affiliated with NAR adopt rules that conform substantially to NAR's. Some non-NAR MLSs, such as the MLS serving the Columbia, South Carolina, area and the MLS serving the

policies, NAR can deny coverage under its errors and omissions insurance (*i.e.*, professional liability insurance) policy to any Member Board that maintains MLS rules not in compliance with NAR's policies.

MLSs are joint ventures among virtually all real estate brokers operating in local or regional areas.[7] NAR's MLS rules require its members to submit to the MLS, generally within two to three days of obtaining a listing, information about each property listed for sale through a broker member. By doing so, the broker promotes his or her seller client's listing to all other brokers in the MLS, who can provide information about the listing to their buyer customers. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting with each new listing an "offer of cooperation and compensation,"

Hilton Head, South Carolina, area, adopted and maintained rules that have been the subject of antitrust enforcement. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. *See* Complaint in *United States v. Consolidated Multiple Listing Service, Inc.*, No 3:08-cv-01786-SB (D.S.C. May 2, 2008), *available at* http://www.usdoj.gov/atr/cases/f232800/232803.htm. The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. *See* Complaint in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. Oct. 16, 2007), *available at* http://www.usdoj.gov/atr/cases/f226800/226869.htm. The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case on May 28, 2008. *See* Final Judgment in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. May 28, 2008), *available at* http://www.usdoj.gov/atr/cases/f233900/233901.htm.

[7] Many MLSs draw brokers and their listed properties from a single local community. Others are substantially larger, with some covering entire states and others – such as Metropolitan Regional Information Systems, Inc., which serves the District of Columbia, and parts of the states of Maryland, Virginia, West Virginia, and Pennsylvania – serving multi-state regions. As the Amended Complaint alleges, the relevant geographic markets in which brokers compete are local and normally no larger than the service area of the MLS or MLSs in which they participate.

identifying the amount (usually specified as a percentage of the listing broker's commission) that the listing broker will pay to any other broker who finds a buyer for the property.

Brokers regard participation in their local MLS to be critical to their ability to compete with other brokers for home sellers and buyers. By participating in the MLS, brokers can promise their seller clients that the information about the seller's property can be immediately made available to virtually all other brokers in the area. Brokers who work with buyers can likewise promise their buyer customers access to the widest possible array of properties listed for sale through brokers. An MLS is thus a market-wide joint venture of competitors that possesses substantial market power: to compete successfully, a broker must be a member; and to be a member, a broker must adhere to any restrictions that the MLS imposes.

C. Description of the Alleged Violation

1. The Challenged Policies

NAR's Challenged Policies discriminate against and restrain competition from brokers who use VOWs. In its Challenged Policies, NAR denied VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. NAR did so by allowing a listing broker to "opt out" and keep his or her client's listings from being displayed on a competitor's VOW.

On May 17, 2003, NAR adopted its "VOW Policy." As the Amended Complaint alleges, the VOW Policy, most significantly, allowed brokers to opt out of VOWs, withholding their seller-clients' listings from display on VOWs. The opt-out provisions discriminated against VOW brokers because NAR's rules do not otherwise permit one broker to dictate how

competitors can convey his or her listings to customers. The VOW Policy permitted opt out either against all VOW brokers ("blanket") or against a particular VOW broker ("selective").

The Amended Complaint also alleges that the VOW Policy's "anti-referral" rule restrained competition by prohibiting VOW brokers from receiving any payment for referring prospective buyer customers to other brokers. The prospect that brokers could use VOWs to support referral-based businesses was a source of industry antipathy to VOWs, and NAR's rules singled out VOW brokers for a ban on referring customers for a fee.

NAR's VOW Policy, as alleged in the Amended Complaint, also restrained competition from VOW brokers by prohibiting them from selling advertising on pages of their VOWs on which the VOW broker displayed any listings, and by permitting MLSs to degrade the data they provide to VOWs, thus preventing the use of popular technological features offered by many VOW brokers.

NAR repealed its VOW Policy and replaced it with its ILD Policy on September 8, 2005, the day the United States filed its initial Complaint. As alleged in the Amended Complaint, NAR's ILD Policy continued to discriminate against VOW brokers by permitting their competitors a blanket opt out where they could withhold their listings from display on all VOWs.[8] Although the ILD Policy did not include an explicit anti-referral rule, NAR revised and reinterpreted its rule on MLS membership to prevent brokers who operate referral VOWs from becoming members of the MLS and obtaining access to MLS listings. The Amended Complaint

[8] NAR did delete from its ILD Policy its rule allowing brokers to selectively opt out against particular VOW brokers.

also alleges that the ILD Policy continued to permit MLSs to downgrade the data they provide to VOWs and to restrict VOW brokers' co-branding or advertising relationships with third parties.

2. Effects of the Challenged Policies

As discussed above, NAR's rules permit brokers to show prospective buyers all MLS listings in which the buyers might have an interest. For most brokers, this means that they can respond to a request from a buyer customer by delivering responsive listings by whatever delivery method the broker and customer choose. NAR's opt-out provisions deny this right only if the method of delivery selected by the broker and the customer is a VOW. Thus, NAR's rules restrain VOW-operating brokers from competing in a way that is efficient and desired by many customers.

Even if no broker uses the opt-out device, its existence renders a VOW broker unable to promise customers access to all relevant MLS listings, materially disadvantaging brokers who use a VOW to compete. When opt out occurs, a VOW broker is further disadvantaged because it cannot deliver complete MLS listings to customers through its VOW. Finally, with the threat of opt outs constantly hanging over it, any VOW broker contemplating a pro-consumer initiative would have to weigh the prospect of an angry response from its incumbent competitors.

Opt outs were an empirical reality. Although the United States' investigation became public just a few months after NAR adopted its VOW Policy, the United States discovered over fifty instances of broker opt outs under a wide variety of circumstances in fourteen diverse markets. Brokers opted out of VOWs in large markets (*e.g.*, Detroit and Cleveland), medium markets (*e.g.*, Des Moines), and small markets (*e.g.*, Emporia (Kansas), Hays (Kansas), and York (Pennsylvania)). In some markets (Emporia and Hays), virtually all brokers opted out. In

others, only one or a few opted out (*e.g.*, Detroit, York, Maine). Opt outs occurred in a market with one dominant broker (Des Moines), in markets with only a small number of broker competitors (Emporia and Hays), and in markets with hundreds of brokers (Detroit). In some markets (*e.g.*, Des Moines, Detroit, Cleveland, York, and Jackson (Wyoming)), large brokers opted out. In others (*e.g.*, Marathon (Florida) and Hudson (New York)), only relatively small brokers opted out. Brokers opted out in markets in which price competition is highly restricted by the state (Kansas, which prohibits brokers from providing commission rebates to home buyers), as well as in markets in which the state does not restrict such price competition (Michigan). Opt outs occurred in circumstances that imply they were independent business decisions by the opting-out brokers (*e.g.*, Detroit) and in circumstances in which opt-out forms were filled out by almost all brokers in the same room at the same time (Emporia).

NAR's Challenged Policies also obstruct the operation of referral VOWs. NAR's VOW Policy prohibited referral fees explicitly and directly. NAR's 2005 modification to the requirements of MLS membership denied MLS membership and – of greatest significance to a referral VOW – access to MLS data to any broker whose business focused exclusively on educating customers on a VOW and referring those customers to other brokers to receive other in-person brokerage services. Each of these policies prevents two brokers from working together in an innovative and efficient way, with a VOW broker attracting new business and educating potential buyers about the market, and the other broker guiding the buyer through home tours and the negotiating, contracting, and closing process.

As discussed above, NAR's Challenged Policies also permit MLSs to downgrade the MLS data feed provided to VOW brokers, which limits the consumer-friendly features VOW

brokers could provide through their VOWs. The Challenged Policies also allow MLSs to prohibit VOW brokers from establishing some advertising or co-branding relationships with third parties, limiting the freedom of VOW brokers to operate their businesses as they desire and enabling MLSs (which are controlled by a VOW broker's competitors) to micromanage the appearance of brokers' VOWs.

3. The Challenged Policies Violate the Antitrust Laws

NAR's Challenged Policies violate Section 1 of the Sherman Act, which prohibits unreasonable restraints on competition. The Challenged Policies were the product of an agreement among a group of competitors (the members of NAR) mandating how brokers could use VOWs to compete and unreasonably restraining competition from VOW brokers. Competition from VOW brokers had posed a threat to the established order in the real estate industry. Yet it was clear from prior litigation that antitrust law would not allow incumbent brokers simply to prevent VOW brokers from providing any listings to customers through their VOWs. *See Austin Board of Realtors v. e-Realty, Inc.*, No. 00-CA-154, 2000 WL 34239114 (W.D. Tex. Mar. 30, 2000). Instead, NAR's Challenged Policies restrained competition from VOW brokers by denying them full access to MLS listings and restricting how VOW brokers could do business.

While an MLS, like other joint ventures with market power, can have reasonable membership restrictions related to a legitimate, procompetitive purpose, it cannot create rules that unreasonably impede competition among brokers and harm consumers. *See United States v. Realty Multi-List*, 629 F.2d 1351, 1371 (5th Cir. 1980). NAR's Challenged Policies restrain competition because they dictate how the MLS's broker-members could compete – specifically,

restricting how they could compete using a VOW. *See id*. at 1383-85 (finding MLS rule precluding part-time brokerage to be unlawful); *Cantor v. Multiple Listing Serv. of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (S.D.N.Y. 1983) (finding that MLS yard sign restriction violated Section 1 of the Sherman Act because it "substantially impair[ed] [the plaintiffs'] freedom to conduct their businesses as they see fit" and "vitiated any competitive advantage which plaintiffs endeavored to obtain" through association with a national franchisor); *see also National Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 695 (1978) (condemning trade association ban on competitive bidding by members). Similarly, NAR's Challenged Policies restrain competition because they impede the operations of a particularly efficient class of competitors: VOW brokers. *See Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1159 (3d Cir. 1993) (upholding verdict against railroads that "block[ed] the entry of low cost competitors"); *see also RE/MAX v. Realty One, Inc.*, 173 F.3d 995, 1014 (6th Cir. 1999) (upholding Sherman Act § 1 claim where competitors "impose[d] additional costs" on innovative entrant). NAR's Challenged Policies also restrain competition by denying consumers the full MLS listings information (including valuable information such as sold data and data fields such as days on market) that consumers want. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457, 462 (1986) ("The Federation's collective activities resulted in the denial of the information the customers requested in the form they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. . . . The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.")

Moreover, NAR's Challenged Policies constitute an unreasonable restraint on competition because they produced no procompetitive benefits that justified the restraints. Although NAR claimed that the Challenged Policies were essential to the continued existence of MLSs, those MLSs without the Challenged Policies functioned just as well without them. Given the market power of the MLS, brokers believe it would amount to economic suicide for them to leave the MLS.

D. Harm from the Alleged Violation

Taken together, NAR's Challenged Policies obstruct innovative brokers' use of efficient, Internet-based tools to provide brokerage services to customers and clients. The Challenged Policies inhibit VOW brokers from achieving the operating efficiencies that VOWs can make available and likely diminish the high-quality and low-priced services offered to consumers by VOW brokers. The result is that the Challenged Policies, products of agreements among competitor brokers, likely would deter, delay, or prevent the benefits of innovation and competition from reaching consumers, and thus violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment embodies the fundamental principle that an association of competing brokers, operating an MLS, cannot use the aggregated power of the MLS to discriminate against a particular method of competition (in this case, VOWs). The proposed Final Judgment will end the competitive harm resulting from NAR's Challenged Policies and will allow consumers to benefit from the enhanced competition that VOW brokers can provide. The proposed Final Judgment requires NAR to repeal its VOW and ILD Policies and to replace

them with a "Modified VOW Policy" (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.[9] With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment's general nondiscrimination provisions apply.[10]

The Modified VOW Policy does not allow brokers to opt out and withhold their clients' listings from VOW brokers.[11] This change eliminates entirely the most egregious impediment to VOWs that was contained in the Challenged Policies.[12] Under the Modified VOW Policy, the

---

[9] *See* proposed Final Judgment, ¶¶ V.A-V.D. Under the Modified VOW Policy, with the consent of their supervising broker, agents and sales associates are also expressly permitted to operate VOWs. Brokers cannot agree, by MLS rule or otherwise, to ban VOWs operated by agents or sales associates. *See* Modified VOW Policy, ¶ I.1.b.

[10] *See* proposed Final Judgment, ¶¶ IV.A, IV.B, & IV.C; *see also id.*, ¶ V.F (requiring NAR to deny insurance coverage to any Member Board that maintains rules at odds with ¶ IV of the proposed Final Judgment).

[11] *See* Modified VOW Policy, ¶ I.4.

[12] The Modified VOW Policy does allow an individual home seller to direct that information about his or her own home not appear on *any* Internet websites, *id.*, ¶ II.5.a, recognizing the legitimate interests of a seller to protect his or her privacy and not to expose information about his or her property or the fact that it is on the market to the public on the Internet. It also allows a home seller to request that a VOW broker who permits customers to provide written reviews of properties disable that feature as to the seller's listing. *Id.*, ¶ II.5.c. Such comments – which can be anonymous – have no exact analogue in the bricks-and-mortar world. Unlike books, music, or other consumer goods, reviews of which can provide useful information to other potential purchasers of the same items, the uniqueness of each individual home creates an opportunity for an interested buyer (or his or her broker) to attempt to manipulate the market by providing a negative review in hopes of deterring other buyers from visiting or making an offer on the home. An individual home seller is also permitted under the Modified VOW Policy to request that an automated home valuation feature provided by a VOW broker be disabled as to the seller's individual property, although the VOW broker is permitted to state on the VOW that the seller requested that this type of information not be presented on the VOW about his or her property. *See id.* Though such valuations might be provided in a bricks-and-mortar environment, they would not likely be provided without evaluation, comment, or

MLS must provide to a VOW broker for display on the VOW all MLS listings information that brokers are permitted to provide to customers by all other methods of delivery.[13]

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. It expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.[14] It also provides two avenues by which a broker desiring to serve customers through a referral VOW may do so: as an "Affiliated VOW Partner" ("AVP") and as a member who directly serves some customers.

Under the Modified VOW Policy, a broker who desires to operate a referral business can partner as an AVP with a network of brokers and agents to whom the AVP will ultimately refer educated buyer customers who are ready to tour homes and receive in-person brokerage services.[15] The Modified VOW Policy requires MLSs to provide complete MLS listings

---

input from an agent or sales associate. The Modified VOW Policy also provides a mechanism for sellers to correct any false information about their property that a VOW adds, *id.*, ¶ II.5.d, consistent with the general responsibility of any broker (VOW or otherwise) to present accurate information.

[13] *See id.*, ¶ III.2. The information that MLSs must provide to VOW brokers for display on their VOWs includes information about properties that have sold (except in areas where the actual sales prices of homes is not accessible from public records) and all other information that brokers can provide to customers by any method, including by oral communications. *Id.*

[14] *Id.*, ¶ III.11.

[15] Nothing in the Modified VOW Policy requires an AVP to hold a broker's license. An unlicensed technology company would be permitted under the Modified VOW Policy to host a VOW for a broker or brokers (or for one or more agents or sales associates, with the consent of their supervising brokers). When a licensed broker operates VOWs as an AVP in conjunction with other brokers (or their agents or sales associates), the AVP can perform services for which a broker's license may be required, including answering questions for customers who register on the VOW and referring customers to the brokers and agents or sales associates for whom the AVP operates the VOWs. *See, e.g.*, 225 ILCS 454/1-10 (describing the activities for which a broker's license is required in Illinois, including "assist[ing] or direct[ing] in procuring or referring of prospects").

information to any broker designated by another broker to be an AVP that will operate a VOW on the designating broker's behalf.[16] The MLS must provide listings information to the AVP on the same terms and conditions on which the MLS would provide listings to the broker who designated the AVP to operate the VOW.[17] This provision will allow referral VOWs to partner with brokers or agents, obtain access to MLS data to operate their referral VOWs, and provide the efficiencies that come from operating a VOW to the brokers and agents with whom they partner.

Under the proposed Final Judgment, a broker who works directly with some buyers and sellers, but who also wants to operate a VOW and focus on referrals, can become a member of the MLS and use MLS data as a member, including for its referral VOW. The Final Judgment permits NAR's Member Boards to implement the new requirements for MLS membership that NAR originally adopted with its ILD Policy,[18] but an interpretive Note (see Exhibit B to the proposed Final Judgment) explains that the new membership rule is not to be interpreted to restrain VOW competition.[19]

---

[16] Modified VOW Policy, ¶¶ I.1.a & III.10. An AVP's rights to obtain listings information from the MLS is derivative of the rights of the brokers for whom the AVP is operating VOWs. *Id.*, ¶ III.10. The AVP would not itself be an MLS member entitled to MLS access directly.

[17] *Id.*, ¶ III.10.

[18] Proposed Final Judgment, ¶ VI.A.

[19] Under the interpretative Note included in Exhibit B to the proposed Final Judgment, if a VOW broker actively endeavors to obtain some seller clients for whom it will market properties or some buyer customers to whom it will offer in-person brokerage services, that VOW broker will be permitted to operate a referral VOW and refer to other brokers the educated customers he or she does not serve directly.

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers[20] and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.[21] VOW brokers, under the Modified VOW Policy, will be free from MLS interference in the appearance and features of their VOWs.[22]

NAR is required by the Final Judgment to direct its Member Boards to adopt rules implementing the Modified VOW Policy within ninety days of this Court's entry of the Final Judgment.[23] To ensure that its Member Boards adopt, maintain, and enforce rules implementing the Modified VOW Policy, NAR is required to deny errors and omissions insurance coverage to any Member Board that refuses to do so and forward to the United States any complaints it receives concerning the failure of any Member Board (or any MLS owned or operated by any Member Board) to abide by or enforce those rules.[24] The proposed Final Judgment also broadly prohibits NAR from adopting any other rules that impede the operation of VOWs or that discriminate against VOW brokers in the operation of their VOWs.[25]

---

[20] *See* Modified VOW Policy, ¶ III.2 ("For purposes of this Policy, 'downloading' means electronic transmission of data from MLS servers to a Participant's or AVP's server on a *persistent* basis" (emphasis added)).

[21] *See id.*, ¶ III.7.

[22] *See id.*, ¶¶ III.8 & III.9.

[23] Proposed Final Judgment, ¶ V.D.

[24] *Id.*, ¶¶ V.E & V.H.

[25] *Id.*, ¶¶ IV.A & IV.B.

Finally, the proposed Final Judgment, applicable for ten years after its entry by this Court,[26] establishes an antitrust compliance program under which NAR is required to review its Member Board's rules for compliance with the proposed Final Judgment, to provide materials to its Member Boards that explain the proposed Final Judgment and the Modified VOW Policy, and to hold an annual program for its Member Boards and their counsel discussing the proposed Final Judgment and the antitrust laws.[27] The proposed Final Judgment expressly places no limitation on the United States' ability to investigate or bring an antitrust enforcement action in the future to prevent harm to competition caused by any rule adopted or enforced by NAR or any of its Member Boards.[28]

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against NAR.

---

[26] *Id.*, ¶ X.

[27] *Id.*, ¶ V.G.

[28] *Id.*, ¶ IX.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and NAR have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW; Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.[29]

VI. ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

At several points during the litigation, the United States received from defendant NAR proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, proceeding with the full trial on the merits against NAR that was scheduled to commence on July 7, 2008. The United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure that consumers can benefit from the enhanced brokerage service competition brought by VOW brokers as effectively as any remedy the United States likely would have obtained after a successful trial.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

---

[29] Proposed Final Judgment, ¶ VIII.

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[30]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981));

[30] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

see also Microsoft, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[31] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

---

[31] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[32]

[32] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

s/David C. Kully
Craig W. Conrath
David C. Kully
U.S. Department of Justice
Antitrust Division
450 5th Street, NW; Suite 4000
Washington, DC 20530
Tel: (202) 307-5779
Fax: (202) 307-9952

Dated: June 12, 2008

CERTIFICATE OF SERVICE

I, David C. Kully, hereby certify that on this 12th day of June, 2008, I caused a copy of the foregoing Competitive Impact Statement to be served by ECF on counsel for the defendant identified below.

Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com

s/David C. Kully
David C. Kully

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS** Defendant.	Civil Action No. 05 C 5140 Judge Kennelly

PLAINTIFF UNITED STATES' MOTION FOR ENTRY OF THE AMENDED PROPOSED FINAL JUDGMENT AND MEMORANDUM IN SUPPORT

Pursuant to Section 2(e)-(f) of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16(e)-(f), with the consent of Defendant National Association of Realtors ("NAR"), the United States moves for entry of the attached amended proposed Final Judgment in this civil antitrust action.

I. THE UNITED STATES AND THE DEFENDANT HAVE COMPLIED WITH THE APPA

Simultaneously with this motion, the United States is filing a Certificate of Compliance certifying that the parties have complied with all applicable provisions of the APPA and that the waiting periods imposed by the APPA have expired. The APPA prescribes a sixty-day period for submission of public comments, following publication, in the *Federal Register* and in newspapers of general circulation in this district and in the District of Columbia, of notice of a proposed settlement of an antitrust case brought by the United States. *See* 15 U.S.C. §§ 16(b)-(d). Notice of the proposed Final Judgment was published in the *Federal Register* on August 14, 2008, in the *Washington Post*, beginning on June 27, 2008, and ending on July 3, 2008, and in

the *Chicago Tribune*, beginning on July 7, 2008, and ending on July 13, 2008. The sixty-day comment period ended on October 13, 2008. The United States received nine comments and filed those comments, along with its response to those comments, on October 23, 2008. The United States published the comments and its response in the *Federal Register* on November 4, 2008. *See* 15 U.S.C. § 16(d).

II. MINOR AMENDMENTS TO THE PROPOSED FINAL JUDGMENT

A. Explanation of Minor Amendments

Based on comments received by the United States, the United States and NAR agreed to two minor modifications to the Modified VOW Policy, Exhibit A to the now-amended proposed Final Judgment. As explained in the United States' Response to Comments, those minor modifications effectuate the parties' intent and prevent potential ambiguities in the Modified VOW Policy from being exploited to the detriment of brokers operating VOWs. The first minor modification, to paragraph II.2.c.iv of the Modified VOW Policy, will ensure that customers of VOW brokers can share listings they are provided with persons with whom they wish to consult in making a purchase decision.

> *Amendments to paragraph II.2.c.iv* (underlined text added): That the Registrant will not copy, redistribute, or retransmit any of the data or information provided, except in connection with the Registrant's consideration of the purchase or sale of an individual property.

The second minor modification, to paragraph II.5.a of the Modified VOW Policy, will ensure that VOW brokers may provide customers, by non-VOW methods of delivery, property addresses that home sellers have withheld from the Internet.

> *Amended version of paragraph II.5.a* (underlined text added; stricken text removed): No VOW shall display the listings or property addresses of any sellers who has ve affirmatively directed ~~their~~ its listing brokers to withhold ~~their~~ its

> listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listings or property address of a sellers who has determined not to have the listing or address for their its property displayed on the Internet.

The United States and NAR also agreed to modify the proposed Final Judgment to make it clear that NAR's state and local Boards of Realtors or Associations of Realtors ("Member Boards") that do not operate or share in the ownership of multiple listing services do not need to adopt the Modified VOW Policy. The United States agreed with NAR that this requirement was not intended and would serve no purpose. The parties have effectuated this minor modification by requiring NAR, under paragraphs V.D of the proposed Final Judgment, to direct only "Covered Entities," *i.e.*, Member Boards that operate MLSs or MLSs exclusively owned by Member Boards, to adopt the Modified VOW Policy. Under paragraph V.E of the amended proposed Final Judgment, NAR would be required to withhold insurance coverage from Covered Entities that failed to adopt, maintain, act consistently with, and enforce the Modified VOW Policy.[1]

B. The Proposed Amendments Do Not Necessitate Republication of the Amended Proposed Final Judgement

The three minor amendments to the proposed Final Judgment do not necessitate a republication of the proposed Final Judgment or a second public comment period. In an APPA proceeding, the role of the district court is to determine if the proposed Final Judgment is "in the public interest." 15 U.S.C. § 16(e)(1). As the legislative history explains, the statute's

[1] This minor amendment also impacts NAR's reporting requirements under paragraph V.G.3 of the proposed Final Judgment.

"procedural" requirements – preparation by the United States of a Competitive Impact Statement ("CIS") and participation in a notice and comment proceeding – are intended "to assist the court in making that determination." S. Rep. No. 93-298, at 4-5 (1973).[2]

The two minor changes to the Modified VOW Policy to which the United States and NAR agreed advance the public interest by eliminating potential ambiguities in the Modified VOW Policy that, as noted by commentors, could be used by MLSs to impede the use of VOWs. As the third proposed change merely eliminates from the proposed Final Judgment a requirement that serves no purpose whatsoever, it is also not inconsistent with the public interest. Additional public comment as to these minor changes is not necessary for the Court to find that the public interest would be served by entry of the amended proposed Final Judgment.

The proposed amendments also do not change the nature of the proposed settlement of this litigation. As the Court of Appeals for the District of Columbia Circuit found in a similar circumstance, "[a]s long as the final consent decree is a 'logical outgrowth' of the proposed consent decree, there is no need for successive rounds of notice and comment on each revision." *Hyperlaw, Inc. v. United States*, No. 97-5183, 1998 WL 388807, at *3 (D.C. Cir. May 29, 1998).

[2] *Accord* H.R. Rep. No. 93-1463, at 21 (1974) (comments of Rep. Hutchinson) (the statutory requirement that the "Department of Justice . . . publish a competitive impact statement in the Federal Register and receive public comment . . . is to enable a court to determine whether a proposed consent decree is in the 'public interest.'").

III. THE AMENDED PROPOSED FINAL JUDGMENT SATISFIES THE "PUBLIC INTEREST" STANDARD

Before entering the amended proposed Final Judgment, the Court must determine whether the Judgment "is in the public interest," *see* 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1).

The United States filed a CIS on June 12, 2008. In the CIS, the United States explained how the proposed Final Judgment eliminates the likely anticompetitive effects of NAR's VOW Policies and enjoins NAR from taking future actions to impede competition from VOW brokers. The CIS describes the meaning and proper application of the public-interest standard under the APPA, and the United States incorporates those statements herein by reference.

The public has had an opportunity to comment on the proposed Final Judgment as required by law. Nine comments were submitted to the United States. The United States' Response to Comments identifies the minor modifications to the proposed Final Judgment discussed above and explains why the amended proposed Final Judgment is within the range of settlements consistent with the public interest.

IV. CONCLUSION

For the reasons set forth in this Memorandum, the CIS, and the Response to Comments, the Court should find that the amended proposed Final Judgment is in the public interest. The Court should then enter the amended proposed Final Judgment.

Respectfully submitted,

s/David C. Kully
David C. Kully
Owen M. Kendler
U.S. Department of Justice
Antitrust Division
450 5th Street, NW; Suite 4000
Washington, DC 20530
Tel: (202) 307-5779
Fax: (202) 307-9952

Dated: November 7, 2008

CERTIFICATE OF SERVICE

I, David C. Kully, hereby certify that on this 7th day of November, 2008, I caused a copy of the foregoing Motion for Entry of the Amended Proposed Final Judgment and Memorandum in Support to be served by ECF on counsel for the defendant identified below.

Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com

s/David C. Kully
David C. Kully

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS®** Defendant.	Civil Action No. 05 C 5140 Judge Kennelly

MV 11-6-08

[~~AMENDED PROPOSED~~] FINAL JUDGMENT

WHEREAS, Plaintiff, the United States of America, filed its Amended Complaint on October 4, 2005, alleging that Defendant National Association of Realtors® ("NAR") adopted policies that restrain competition from innovative real estate brokers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact, and without this Final Judgment constituting any evidence against, or any admission by, any party regarding any issue of fact or law;

WHEREAS, Defendant has not admitted and does not admit either the allegations set forth in the Amended Complaint or any liability or wrongdoing;

WHEREAS, the United States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws; and

WHEREAS, the United States requires Defendant to agree to certain procedures and prohibitions for the purpose of preventing the loss of competition alleged in the Complaint;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the Parties and subject matter of this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 1 of the Sherman Act, as amended (15 U.S.C. § 1).

II. DEFINITIONS

As used in this Final Judgment:

A. "Broker" means a Person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any Person who possesses a Broker's license and any agent or sales associate who is affiliated with such a Broker.

B. "Covered Entity" means each Member Board that, at any time prior to the expiration of this Final Judgment, operates a multiple listing service and each multiple listing service that, at any time prior to the expiration of this Final Judgment, is exclusively owned by one or more Member Boards or is otherwise obligated to comply with NAR mandatory multiple listing service policies.

C. "Customer" means a seller client of a Broker or a Person who has expressed to a Broker an interest in purchasing residential real property and who has described the type, features, or location of the property in which he or she has an interest, entitling the Broker to Provide the Customer multiple listing service ("MLS") listing information by any method (*e.g.*, by hand, mail, facsimile, electronic mail, or display on a VOW).

D. "Final Judgment" includes the Modified VOW Policy attached as Exhibit A and the definition of MLS Participant and accompanying Note attached as Exhibit B.

E. "ILD Policy" means the "ILD (Internet Listing Display) Policy" that NAR adopted on or about August 31, 2005, and any amendments thereto.

F. "Including" means including, but not limited to.

G. "Listing Information" means all records of residential properties (and any information relating to those properties) stored or maintained by a multiple listing service.

H. "Member Board" means any state or local Board of Realtors® or Association of Realtors®, including any city, county, inter-county, or inter-state Board or Association, and any multiple listing service owned by, or affiliated with, any such Board of Realtors® or Association of Realtors®.

I. "Modified VOW Policy" means the policy attached to this Final Judgment as Exhibit A.

J. "NAR" means the National Association of Realtors®, its predecessors, successors, divisions, subsidiaries, affiliates, partnerships, and joint ventures and all directors, officers, employees, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate," and "joint venture" refer to any Person in which there is or has been partial (twenty percent or more) or total ownership or control between NAR and any other Person.

K. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

L. "Provide" means to deliver, display, disseminate, convey, or reproduce.

M. "Rule" means any rule, model rule, ethical rule, bylaw, policy, standard, or guideline and any interpretation of any Rule issued or approved by NAR, whether or not the final implementation date of any such Rule has passed.

N. "VOW" or "virtual office website" means a website, or feature of a website, operated by a Broker or for a Broker by another Person through which the Broker is capable of providing real estate brokerage services to consumers with whom the Broker has first established a Broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Broker's oversight, supervision, and accountability.

O. "VOW Policy" means the "Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ('Virtual Office Websites')," adopted by NAR on or about May 17, 2003, and any amendments thereto.

P. The terms "and" and "or" have both conjunctive and disjunctive meanings.

III. APPLICABILITY

This Final Judgment applies to NAR and all other Persons in active concert or participation with NAR who have received actual notice of this Final Judgment. A Member Board shall not be deemed to be in active concert with NAR solely as a consequence of the Member Board's receipt of actual notice of this Final Judgment and its affiliation with or membership in NAR and its involvement in regular activities associated with its affiliation with or membership in NAR (*e.g.*, coverage under a NAR insurance policy, attendance at NAR meetings or conventions, or review of Member Board policies by NAR).

IV. PROHIBITED CONDUCT

Subject to the provisions of Sections V and VI of this Final Judgment, the Modified VOW Policy (Exhibit A), and the definition of MLS Participant and accompanying Note (Exhibit B), NAR shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly

A. prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

B. unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;

C. prohibits, restricts, or impedes the referral of Customers whose identities are obtained from a VOW by a Broker who uses a VOW to any other Person, or establishes the price of any such referral;

D. imposes fees or costs upon any Broker who operates a VOW or upon any Person who operates a VOW for any Broker that exceed the reasonably estimated actual costs incurred by a Member Board in providing Listing Information to the Broker or Person operating the VOW or in performing any other activities relating to the VOW, or discriminates in such VOW-related fees or costs between those imposed upon a Broker who operates a VOW and those imposed upon a Person who operates a VOW for a Broker, unless the MLS incurs greater costs

in providing a service to a Person who operates a VOW for a Broker than it incurs in providing the same service to the Broker; or

E. is inconsistent with the Modified VOW Policy.

V. REQUIRED CONDUCT

A. Within five business days after entry of this Final Judgment, NAR shall repeal the ILD Policy and direct each Member Board that adopted Rules implementing the ILD Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

B. Within five business days after entry of this Final Judgment, NAR shall direct Member Boards that adopted Rules implementing the VOW Policy to repeal such Rules at the next meeting of the Member Board's decisionmaking body that occurs more than ten days after receipt of the directive, but no later than ninety days after entry of this Final Judgment.

C. Within five business days after entry of this Final Judgment, NAR shall adopt the Modified VOW Policy. NAR shall not change the Modified VOW Policy without either obtaining advance written approval by the United States Department of Justice, Antitrust Division ("DOJ") or an order of the Court pursuant to Section VIII of this Final Judgment authorizing the proposed modification.

D. Within five business days after entry of this Final Judgment, NAR shall direct each Covered Entity to adopt the Modified VOW Policy within ninety days after entry of this Final Judgment, and to thereafter maintain, act consistently with, and enforce Rules implementing the Modified VOW Policy. NAR shall simultaneously direct Covered Entities,

beginning upon receipt of the directive, not to adopt, maintain, or enforce any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs).

E. If NAR determines that a Covered Entity has not timely adopted or maintained, acted consistently with, or enforced Rules implementing the Modified VOW Policy, it shall, within thirty days of such determination, direct in writing that the Covered Entity do so. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Covered Entity for as long as that Covered Entity refuses to adopt, maintain, act consistently with, and enforce rules implementing the Modified VOW Policy. NAR shall also notify the DOJ of the identity of that Covered Entity and the Modified VOW Policy provisions it refused to adopt, maintain, act consistently with, or enforce. For purposes of this provision, a failure of a Covered Entity to adopt, maintain, act consistently with, or enforce Rules implementing the Modified VOW Policy within ninety days of a written directive to that Covered Entity from NAR shall constitute a refusal by the Covered Entity to do so.

F. If NAR determines that a Member Board has adopted, maintained, or enforced any Rule or practice that NAR would be prohibited from adopting, maintaining, or enforcing pursuant to Section IV of this Final Judgment (including Rules or practices that unreasonably discriminate against Brokers in their operation of VOWs), it shall, within thirty days of such determination, direct in writing that the Member Board rescind and cease to enforce that Rule or practice. NAR shall deny coverage under any NAR insurance policy (or cause coverage to be denied) to any Member Board for as long as that Member Board refuses to rescind and cease to

enforce that Rule or practice. NAR shall also notify the DOJ of the identity of that Member Board and the Rule or practice it refused to rescind and cease to enforce. For purposes of this provision, a Member Board's failure to rescind and cease to enforce the Rule or practice within ninety days of a written directive from NAR shall constitute a refusal by the Member board to do so.

G. Within thirty days of entry of this Final Judgment, NAR shall designate an Antitrust Compliance Officer with responsibility for educating Member Boards about the antitrust laws and for achieving full compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

(1) supervising NAR's review of Rules of NAR's Member Boards for compliance with this Final Judgment and the Modified VOW Policy;

(2) maintaining copies of any communications with any Person containing allegations of any Member Board's (i) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (ii) failure to enforce any Rules implementing the Modified VOW Policy;

(3) reporting to the United States 180 days after entry of this Final Judgment and again on the first anniversary of the entry of this Final Judgment, the identity of each Covered Entity that has not adopted Rules implementing the Modified VOW Policy;

(4) ensuring that each of NAR's Member Boards that owns or operates a multiple listing service are provided briefing materials, within ninety days of the entry of this Final Judgment, on the meaning and requirements of the Modified VOW Policy and this Final Judgment; and

(5) holding an annual program for NAR Member Boards and their counsel that includes a discussion of the antitrust laws (as applied to such Member Boards) and this Final Judgment.

H. NAR shall maintain and shall furnish to the DOJ on a quarterly basis (beginning ninety days after entry of this Final Judgment) copies of any communications with any Person

containing allegations of any Member's Board's (1) noncompliance with any provision of the Modified VOW Policy or with this Final Judgment or (2) failure to enforce any Rules implementing the Modified VOW Policy.

I. Within five business days after entry of this Final Judgment, NAR shall provide, in a prominent size and location on its website (www.realtor.org) a hyperlink to a webpage on which NAR has published copies of

(1) this Final Judgment;

(2) a notification that Member Boards must repeal any Rules implementing the ILD and VOW Policies (in accordance with Sections V.A and V.B of this Final Judgment); and

(3) a copy of the Modified VOW Policy.

NAR shall also publish each of the three above items in the first issue of Realtor® Magazine scheduled for publication after the date of entry of this Final Judgment.

VI. PERMITTED CONDUCT

A. Subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting and maintaining the definition of MLS Participant and the accompanying Note, together attached as Exhibit B. However, NAR shall direct each Member Board not to suspend or expel any Broker from multiple listing service membership or participation for reasons of the Broker's then-failure to qualify for membership or participation under the definition of MLS Participant and the accompanying Note, together attached as Exhibit B, until May 27, 2009.

B. Notwithstanding any of the above provisions, and subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining,

or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the DOJ, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to NAR, be permitted:

(1) access during NAR's office hours to inspect and copy, or at the option of the United States, to require NAR to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of NAR, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, NAR's officers, employees, or agents, who may have their individual counsel and counsel for NAR present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by NAR. NAR may, however, prevent the interviewee from divulging matters protected by the attorney-client privilege, work product doctrine, or other applicable privilege.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, NAR shall submit written reports or response to written interrogatories, under oath if requested, relating to its compliance with any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any Person other than an authorized representative of the

executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by NAR to the United States, NAR marks as confidential any pertinent page of such material on the grounds that such page contains information as to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, then the United States shall give NAR ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards.

X. EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire ten years from the date of its entry.

XI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: 11-18-08

Court approval subject to procedures
of Antitrust Procedures and Penalties
Act, 15 U.S.C. § 16

Matthew F. Kennelly
United States District Judge

EXHIBIT A

Policy governing use of MLS data in connection with Internet brokerage services offered by MLS Participants ("Virtual Office Websites")

I. Definitions and Scope of Policy.

1. For purposes of this Policy, the term Virtual Office Website ("VOW") refers to a Participant's Internet website, or a feature of a Participant's Internet website, through which the Participant is capable of providing real estate brokerage services to consumers with whom the Participant has first established a broker-consumer relationship (as defined by state law) where the consumer has the opportunity to search MLS data, subject to the Participant's oversight, supervision, and accountability.

a. A Participant may designate an Affiliated VOW Partner ("AVP") to operate a VOW on behalf of the Participant, subject to the Participant's supervision and accountability and the terms of this Policy.

b. A non-principal broker or sales licensee, affiliated with a Participant, may, with the Participant's consent, operate a VOW or have a VOW operated on its behalf by an AVP. Such a VOW is subject to the Participant's supervision and accountability and the terms of this Policy.

c. Each use of the term "Participant" in this Policy shall also include a Participant's non-principal brokers and sales licensees (with the exception of references in this section to the "Participant's consent" and the "Participant's supervision and accountability," and in section III.10.a, below, to the "Participant acknowledges"). Each reference to "VOW" or "VOWs" herein refers to all VOWs, whether operated by a Participant, by a non-principal broker or sales licensee, or by an AVP.

2. The right to display listings in response to consumer searches is limited to display of MLS data supplied by the MLS(s) in which the Participant has participatory rights. This does not preclude a firm with offices participating in different MLSs from operating a master website with links to such offices' VOWs.

3. Participants' Internet websites, including those operated for Participants by AVPs, may also provide other features, information, or services in addition to VOWs (including the Internet Data Exchange ("IDX") function).

4. The display of listing information on a VOW does not require separate permission from the Participant whose listings will be available on the VOW.

5. Except as permitted in Sections III and IV, MLSs may not adopt rules or regulations that conflict with this Policy or that otherwise restrict the operation of VOWs by Participants.

II. Policies Applicable to Participants' VOWs.

1. A Participant may provide brokerage services via a VOW that include making MLS active listing data available, but only to consumers with whom the Participant has first established a lawful consumer-broker relationship, including completion of all actions required by state law in connection with providing real estate brokerage services to clients and customers (hereinafter "Registrants"). Such actions shall include, but are not limited to, satisfying all applicable agency, non-agency, and other disclosure obligations, and execution of any required agreement(s).

2. A Participant's VOW must obtain the identity of each Registrant and obtain each Registrant's agreement to Terms of Use of the VOW, as follows:

a. A Registrant must provide his or her name and a valid email address. The Participant must send an email to the address provided by the Registrant confirming that the Registrant has agreed to the Terms of Use (described in subsection c below). The Registrant may be permitted to access the VOW only after the Participant has verified that the email address provided is valid and that Registrant received the Terms of Use confirmation.

b. The Registrant must supply a user name and a password, the combination of which must be different from those of all other Registrants on the VOW, before being permitted to search and retrieve information from the MLS database via the VOW. The user name and password may be established by the Registrant or may be supplied by the Participant, at the option of the Participant. An email address may be associated with only one user name and password. The Registrant's password and access must expire on a date certain but may be renewed. The Participant must at all times maintain a record of the name and email address supplied by the Registrant, and the username and current password of each Registrant. Such records must be kept for not less than 180 days after the expiration of the validity of the Registrant's password. If the MLS has reason to believe that a Participant's VOW has caused or permitted a breach in the security of the data or a violation of MLS rules related to use by one or more Registrants, the Participant shall, upon request, provide to the MLS a copy of the record of the name, email address, user name, current password, and audit trail, if required, of any Registrant identified by the MLS to be suspected of involvement in the violation.

c. The Registrant must be required affirmatively to express agreement to a "Terms of Use" provision that requires the Registrant to open and review an agreement that provides at least the following:

   i. That the Registrant acknowledges entering into a lawful consumer-broker relationship with the Participant;

   ii. That all data obtained from the VOW is intended only for the Registrant's personal, non-commercial use;

iii. That the Registrant has a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through the VOW;

iv. That the Registrant will not copy, redistribute, or retransmit any of the data or information provided, except in connection with the Registrant's consideration of the purchase or sale of an individual property;

v. That the Registrant acknowledges the MLS's ownership of, and the validity of the MLS's copyright in, the MLS database.

After the Registrant has opened for viewing the Terms of Use agreement, a "mouse click" is sufficient to acknowledge agreement to those terms. The Terms of Use Agreement may not impose a financial obligation on the Registrant or create any representation agreement between the Registrant and the Participant.

The Terms of Use agreement shall also expressly authorize the MLS, and other MLS Participants or their duly authorized representatives, to access the VOW for the purposes of verifying compliance with MLS rules and monitoring display of Participants' listings by the VOW.

d. An agreement entered into at any time between the Participant and Registrant imposing a financial obligation on the Registrant or creating representation of the Registrant by the Participant must be established separately from the Terms of Use, must be prominently labeled as such, and may not be accepted solely by mouse click.

3. A Participant's VOW must prominently display an e-mail address, telephone number, or specific identification of another mode of communication (e.g., live chat) by which a consumer can contact the Participant to ask questions, or get more information, about properties displayed on the VOW. The Participant, or a non-principal broker or sales licensee licensed with the Participant, must be willing and able to respond knowledgeably to inquiries from Registrants about properties within the market area served by that Participant and displayed on the VOW.

4. A Participant's VOW must protect the MLS data from misappropriation by employing reasonable efforts to monitor for and prevent "scraping" or other unauthorized accessing, reproduction, or use of the MLS database.

5. A Participant's VOW must comply with the following additional requirements:

a. No VOW shall display the listing or property address of any seller who has affirmatively directed its listing broker to withhold its listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery

mechanisms, such as email, fax, or otherwise, the listing or property address of a seller who has determined not to have the listing or address for its property displayed on the Internet.

b. A Participant who lists a property for a seller who has elected not to have the property listing or the property address displayed on the Internet shall cause the seller to execute a document that conforms to the form attached to this Policy as Appendix A. The Participant shall retain such forms for at least one year from the date they are signed.

c. With respect to any VOW that

(i) allows third-parties to write comments or reviews about particular listings or displays a hyperlink to such comments or reviews in immediate conjunction with particular listings, or
(ii) displays an automated estimate of the market value of the listing (or hyperlink to such estimate) in immediate conjunction with the listing,

the VOW shall disable or discontinue either or both of those features as to the seller's listing at the request of the seller. The listing broker or agent shall communicate to the MLS that the seller has elected to have one or both of these features disabled or discontinued on all Participants' websites. Except for the foregoing and subject to subparagraph (d), a Participant's VOW may communicate the Participant's professional judgment concerning any listing. Nothing shall prevent a VOW from notifying its customers that a particular feature has been disabled "at the request of the seller."

d. A VOW shall maintain a means (e.g., e-mail address, telephone number) to receive comments about the accuracy of any data or information that is added by or on behalf of the VOW operator beyond that supplied by the MLS and that relates to a specific property displayed on the VOW. The VOW operator shall correct or remove any false data or information relating to a specific property upon receipt of a communication from the listing broker or listing agent for that property explaining why the data or information is false. However, the VOW operator shall not be obligated to remove or correct any data or information that simply reflects good faith opinion, advice, or professional judgment.

e. Each VOW shall refresh MLS data available on the VOW not less frequently than every 3 days.

f. Except as provided elsewhere in this Policy or in MLS rules and regulations, no portion of the MLS database may be distributed, provided, or made accessible to any person or entity.

g. Every VOW must display a privacy Policy that informs Registrants of the ways in which information obtained from them will be used.

h. A VOW may exclude listings from display based only on objective criteria, including, but not limited to, factors such as geography, list price, type of property, cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.

6. A Participant who intends to operate a VOW must notify the MLS of its intention to establish a VOW and must make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy and any other applicable MLS rules or policies.

7. A Participant may operate more than one VOW itself or through an AVP. A Participant who operates a VOW itself shall not be precluded from also operating VOWs in conjunction with AVPs.

III. Policies Applicable to Multiple Listing Services.

1. A Multiple Listing Service shall permit MLS Participants to operate VOWs, or to have VOWs operated for them by AVPs, subject to the requirements of state law and this Policy.

2. An MLS shall, if requested by a Participant, provide basic "downloading" of all MLS non-confidential listing data, including without limitation address fields, listings types, photographs, and links to virtual tours. Confidential data includes only that which Participants are prohibited from providing to customers orally and by all other delivery mechanisms. They include fields containing the information described in paragraph IV(1) of this Policy, provided that sold data (i.e., listing information relating to properties that have sold) shall be deemed confidential and withheld from a download only if the actual sales prices of completed transactions are not accessible from public records. For purposes of this Policy, "downloading" means electronic transmission of data from MLS servers to a Participant's or AVP's server on a persistent basis. An MLS may also offer a transient download. In such case, it shall also, if requested, provide a persistent download, provided that it may impose on users of such download the approximate additional costs incurred by it to do so.

3. This Policy does not require an MLS to establish publicly accessible sites displaying Participants' listings.

4. If an MLS provides a VOW-specific feed, that feed must include all of the non-confidential data included in the feed described in paragraph 2 above except for listings or property addresses of sellers who have elected not to have their listings or addresses displayed on the Internet.

5. An MLS may pass on to those Participants who will download listing information the reasonably estimated costs incurred by the MLS in adding or enhancing its "downloading" capacity to enable such Participants to operate VOWs.

6. An MLS may require that Participants (1) utilize appropriate security protection, such as firewalls, as long as such requirement does not impose security obligations greater than those

employed concurrently by the MLS, and/or (2) maintain an audit trail of Registrants' activity on the VOW and make that information available to the MLS if the MLS has reason to believe that any VOW has caused or permitted a breach in the security of the data or a violation of applicable MLS rules.

7. An MLS may not prohibit or regulate display of advertising or the identification of entities on VOWs ("branding" or "co-branding"), except to prohibit deceptive or misleading advertising or co-branding. For purposes of this provision, co-branding will be presumed not to be deceptive or misleading if the Participant's logo and contact information (or that of at least one Participant, in the case of a VOW established and operated by or for more than one Participant) is displayed in immediate conjunction with that of every other party, and the logo and contact information of all Participants displayed on the VOW is as large as the logo of the AVP and larger than that of any third party.

8. Except as provided in this Policy, an MLS may not prohibit Participants from enhancing their VOWs by providing information obtained from sources other than the MLS, additional technological services (such as mapping functionality), or information derived from non-confidential MLS data (such as an estimated monthly payment derived from the listed price), or regulate the use or display of such information or technological services on any VOW.

9. Except as provided in generally applicable rules or policies (such as the Realtor® Code of Ethics), an MLS may not restrict the format of data display on a VOW or regulate the appearance of VOWs.

10. Subject to the provisions below, an MLS shall make MLS listing data available to an AVP for the exclusive purpose of operating a VOW on behalf of a Participant. An MLS shall make MLS listing data available to an AVP under the same terms and conditions as those applicable to Participants. No AVP has independent participation rights in the MLS by virtue of its right to receive data on behalf of a Participant, or the right to use MLS data except in connection with operation of a VOW for a Participant. AVP access to MLS data is derivative of the rights of the Participant on whose behalf the AVP is downloading data.

a. A Participant, non-principal broker or sales licensee, or AVP may establish the AVP's right to receive and use MLS data by providing to the MLS a writing in which the Participant acknowledges its or its non-principal broker's or sales licensee's selection of the AVP to operate a VOW on its behalf.

b. An MLS may not charge an AVP, or a Participant on whose behalf an AVP operates a VOW, more than a Participant that chooses to operate a VOW itself (including any fees or costs associated with a license to receive MLS data, as described in (g), below), except to the extent that the MLS incurs greater costs in providing listing data to the AVP than the MLS incurs in providing listing data to a Participant.

c. An MLS may not place data security requirements or restrictions on use of MLS listing data by an AVP that are not also imposed on Participants.

d. An MLS must permit an AVP to download listing information in the same manner (e.g., via a RETS feed or via an FTP download), at the same times and with the same frequency that the MLS permits Participants to download listing information.

e. An MLS may not refuse to deal directly with an AVP in order to resolve technical problems with the data feed. However, the MLS may require that the Participant on whose behalf the AVP is operating the VOW participate in such communications if the MLS reasonably believes that the involvement of the Participant would be helpful in order to resolve the problem.

f. An MLS may not condition an AVP's access to a data feed on the financial terms on which the AVP provides the site for the Participant.

g. An MLS may require Participants and AVPs to execute license or similar agreements sufficient to ensure that Participants and AVPs understand and agree that data provided by the MLS may be used only to establish and operate a VOW on behalf of the Participant and not for any other purpose.

h. An MLS may not (i) prohibit an AVP from operating VOWs on behalf of more than one Participant, and several Participants may designate an AVP to operate a single VOW for them collectively, (ii) limit the number of entities that Participants may designate as AVPs for purposes of operating VOWs, or (iii) prohibit Participants from designating particular entities as AVPs except that, if an AVP's access has been suspended or terminated by an MLS, that MLS may prevent an entity from being designated an AVP by another Participant during the period of the AVP's suspension or termination.

i. Except as stated below, an MLS may not suspend or terminate an AVP's access to data (a) for reasons other than those that would allow an MLS to suspend or terminate a Participant's access to data, or (b) without giving the AVP and the associated Participant(s) prior notice and the process set forth in the applicable provisions of the MLS rules for suspension or termination of a Participant's access. Notwithstanding the foregoing, an MLS may immediately terminate an AVP's access to data (a) if the AVP is no longer designated to provide VOW services to any Participant, (b) if the Participant for whom the AVP operates a VOW ceases to maintain its status with the MLS, (c) if the AVP has downloaded data in a manner not authorized for Participants and that hinders the ability of Participants to download data, or (d) if the associated Participant or AVP has failed to make required payments to the MLS in accordance with the MLS's generally applicable payment policies and practices.

11. An MLS may not prohibit, restrict, or impede a Participant from referring Registrants to any person or from obtaining a fee for such referral.

IV. Requirements That MLSs May Impose on the Operation of VOWs and Participants.

1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:

a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:

i. Expired, withdrawn, or pending listings.

ii. Sold data unless the actual sales price of completed transactions is accessible from public records.

iii. The compensation offered to other MLS Participants.

iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.

v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.

vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.

b. The content of MLS data that is displayed on a VOW may not be changed from the content as it is provided in the MLS. MLS data may be augmented with additional data or information not otherwise prohibited from display as long as the source of such other data or information is clearly identified. This requirement does not restrict the format of MLS data display on VOWs or display of fewer than all of the listings or fewer authorized data fields.

c. There shall be a notice on all MLS data displayed indicating that the data is deemed reliable but is not guaranteed accurate by the MLS. A Participant's VOW may also include other appropriate disclaimers necessary to protect the Participant and/or the MLS from liability.

d. Any listing displayed on a VOW shall identify the name of the listing firm in a readily visible color, and reasonably prominent location, and in typeface not smaller than the median typeface used in the display of listing data.

e. The number of current or, if permitted, sold listings that Registrants may view, retrieve, or download on or from a VOW in response to an inquiry may be limited to a

reasonable number. Such number shall be determined by the MLS, but in no event may the limit be fewer than 100 listings or 5% of the listings in the MLS, whichever is less.

f. Any listing displayed on a VOW shall identify the name of the listing agent.

2. An MLS may also impose the following other requirements on the operation of VOWs:

a. Participants displaying other brokers' listings obtained from other sources, e.g., other MLSs, non-participating brokers, etc. shall display the source from which each such listing was obtained.

b. A maximum period, no shorter than 90 days and determined by the MLS, during which Registrants' passwords are valid, after which such passwords must be changed or reconfirmed.

3. An MLS may not prohibit Participants from downloading and displaying or framing listings obtained from other sources, e.g., other MLSs or from brokers not participating in that MLS, etc., but may require either that (i) such information be searched separately from listings obtained from other sources, including other MLSs, or (ii) if such other sources are searched in conjunction with searches of the listings available on the VOW, require that any display of listings from other sources identify such other source.

EFFECTIVE DATE:

MLSs have until not later than [90 DAYS AFTER ENTRY OF THE FINAL JUDGMENT] to adopt rules implementing the foregoing policies and to comply with the provisions of section III above, and (2) Participants shall have until not later than 180 days following adoption and implementation of rules by an MLS in which they participate to cause their VOW to comply with such rules.

See Appendix A for Seller Opt-Out Form

Appendix A
Seller Opt-Out Form

1.[Check one]

a. [Check here] I have advised my broker or sales agent that I do not want the listed property to be displayed on the Internet; or

b. [Check here] I have advised my broker or sales agent that I do not want the address of the listed property to be displayed on the Internet.

2. I understand and acknowledge that, if I have selected option a, consumers who conduct searches for listings on the Internet will not see information about the listed property in response to their search.

_____
initials of seller

EXHIBIT B

(Statement of MLS Policy)
Statement 7.9 . . . Definition of MLS "Participant"

The term "Participant" in a Board Multiple Listing Service is defined, as follows:

"Where the term REALTOR® is used in this explanation of policy in connection with the word 'Member' or the word 'Participant', it shall be construed to mean the REALTOR® principal or principals, of this or any other Board, or a firm comprised of REALTOR® principals participating in a Multiple Listing Service owned and operated by the Board. Participatory rights shall be held by an individual principal broker unless determined by the Board or MLS to be held by a firm. It shall not be construed to include individuals other than a principal or principals who are REALTOR® Members of this or any other Board, or who are legally entitled to participate without Board membership. However, under no circumstances is any individual or firm, regardless of membership status, entitled to MLS 'Membership' or 'Participation' unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept cooperation and compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey 'Participation' or 'Membership' or any right of access to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. Additionally, the foregoing does not prohibit Board Multiple Listing Services, at their discretion, from categorizing non-principal brokers, sales licensees, licensed and certified appraisers and others affiliated with the MLS 'Members' or 'Participants' as 'users' or 'subscribers' and, holding such individuals personally subject to the rules and regulations and any other governing provisions of the MLS and to discipline for violations thereof. MLSs may, as a matter of local determination, limit participatory rights to individual principal brokers, or to their firms, and to licensed or certified appraisers, who maintain an office or Internet presence from which they are available to represent real estate sellers, buyers, lessors or lessees or from which they provide appraisal services. (Amended 5/02)

Where the terms 'subscriber' or 'user' are used in connection with a Multiple Listing Service owned or operated by a Board of REALTORS®, they refer to non-principal brokers, sales licensees, and licensed and certified real estate appraisers affiliated with an MLS Participant and may, as a matter of local option, also include a Participant's affiliated unlicensed administrative and clerical staff, personal assistants, and individuals seeking licensure or certification as real estate appraisers provided that any such individual is under the direct supervision of an MLS Participant or the Participant's licensed designee. If such access is available to unlicensed or uncertified individuals, their access is subject to the rules and regulations, the payment of applicable fees and charges (if any), and the limitations and restrictions of state law. None of the foregoing shall diminish the Participant's ultimate responsibility for ensuring compliance with the rules and regulations of the MLS by all individuals affiliated with the Participant. (Adopted 4/92)

Under the 'Board of Choice' policy, MLS participatory rights shall be available to any REALTOR® (principal) or any firm comprised of REALTORS® (principals) irrespective of where they hold primary membership subject only to their agreement to abide by any MLS rules or regulations; agreement to arbitrate disputes with other Participants; and payment of any MLS dues, fees, and charges." Participatory rights granted under Board of Choice do not confer voting privileges or eligibility for office as an MLS committee member, officer, or director, except as granted at the discretion of the local Board and/or MLS. (Amended 5/97)

The universal access to services component of Board of Choice is to be interpreted as requiring that MLS Participatory rights be available to REALTOR® principals, or to firms comprised of REALTOR® principals, irrespective of where primary or secondary membership is held. This does not preclude an MLS from assessing REALTORS® not holding primary or secondary membership locally fees, dues, or charges that exceed those or, alternatively, that are less than those charged Participants holding such memberships locally or additional fees to offset actual expenses incurred in providing MLS services such as courier charges, long distance phone charges, etc., or for charging any Participant specific fees for optional additional services. (Amended 11/96)

None of the foregoing shall be construed as requiring a Board to grant MLS participatory rights, under Board of Choice, where such rights have been previously terminated by action of that Board's Board of Directors." (Adopted 11/95)

(Model MLS rules)
Section 3—Participation: Any REALTOR® of this or any other Board who is a principal, partner, corporate officer, or branch office manager acting on behalf of a principal, without further qualification, except as otherwise stipulated in these bylaws, shall be eligible to participate in Multiple Listing upon agreeing in writing to conform to the rules and regulations thereof and to pay the costs incidental thereto.* However, under no circumstances is any individual or firm, regardless of membership status, entitled to Multiple Listing Service "membership" or "participation" unless they hold a current, valid real estate broker's license and ~~are capable of offering and accepting~~ offer or accept compensation to and from other Participants or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property.** Use of information developed by or published by a Board Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey "participation" or "membership" or any right of access

to information developed by or published by a Board Multiple Listing Service where access to such information is prohibited by law. (Amended 11/96)

Note: Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm 'offers or accepts cooperation and compensation' means that the Participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a continual and on-going basis during the operation of the Participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a Participant or potential Participant that operates a real estate business on a part time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a Participant or potential Participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the Participant or potential Participant as long as the level of service satisfies state law.

The key is that the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a Participant or potential Participant that operates a Virtual Office Website ("VOW") (including a VOW that the Participant uses to refer customers to other Participants) if the Participant or potential Participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a Participant or potential Participant "actively endeavors during the operation of its real estate business" to "offer or accept cooperation and compensation" only if the MLS has a reasonable basis to believe that the Participant or potential Participant is in fact not doing so.

The membership requirement shall be applied on a nondiscriminatory manner to all Participants and potential Participants.

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. **NATIONAL ASSOCIATION OF REALTORS** Defendant.	Civil Action No. 05 C 5140 Judge Kennelly

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

TABLE OF CONTENTS

INDEX TO COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), the United States responds to nine public comments concerning the proposed Final Judgment that has been lodged with the Court for eventual entry in this case. After review of the comments, the United States has concluded that the proposed Final Judgment, with minor modifications to which Defendant National Association of Realtors ("NAR") has agreed, will provide an effective and appropriate remedy for the antitrust violation alleged in the Amended Complaint. The United States will move the Court for entry of the proposed Final Judgment on November 7, 2008, as ordered by the Court, after the comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

The United States brought this civil antitrust action against NAR on September 8, 2005, to stop NAR from violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by its suppression of competition from real estate brokers who use password-protected "virtual office websites," or "VOWs," to deliver high-quality brokerage services efficiently to consumers. On May 27, 2008, the United States and NAR reached a settlement. On that day, the United States filed a Stipulation and proposed Final Judgment to eliminate the likely anticompetitive effects of NAR's policies.

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Pursuant to that statute, the United States filed a Competitive Impact Statement ("CIS") on June 12, 2008; the proposed Final Judgment and CIS

were published in the Federal Register on August 14, 2008[1]; and a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, was published for seven days in the *Washington Post*, from June 27th to July 3rd, and in the *Chicago Tribune*, from July 7th to July 13th. NAR filed the statement required by 15 U.S.C. § 16(g) on June 10, 2008.

The sixty-day public comment period ended on October 13, 2008. The United States received nine comments, which are addressed below.

II. SUMMARY OF THE ALLEGATIONS IN THE AMENDED COMPLAINT

A. Overview

The United States' Amended Complaint challenged policies adopted by NAR that restrain the ability of real estate brokers to use VOWs to serve their customers and clients. NAR is a trade association that promulgates rules that govern the operation of its approximately 800 affiliated multiple listing services ("MLSs") across the United States. The Amended Complaint alleged that, through its "VOW Policy," adopted on May 17, 2003, and its "Internet Listings Display Policy" ("ILD Policy"), adopted on September 8, 2005 (collectively, the "Challenged Policies"), NAR suppressed new and efficient competition and harmed consumers. By enjoining NAR from permitting its affiliated MLSs to adopt the Challenged Policies, innovative broker members of NAR's 800 affiliated MLSs would be free to use VOWs to provide their customers better service at a lower cost.

[1] 73 Fed. Reg. 47613. An incorrectly typeset version of the proposed Final Judgment and CIS had been published in the Federal Register on June 25, 2008. 73 Fed. Reg. 36104.

B. Multiple Listing Services

MLSs are joint ventures among virtually all residential real estate brokers operating in local or regional areas. NAR's MLS rules require member brokers who have been hired by home sellers to market their properties to submit information about those listed properties to the MLS.[2] The MLS compiles this information into a database containing all properties listed for sale through member brokers. Member brokers can then search the listings database for properties that prospective buyers might be interested in purchasing.

As alleged in the Amended Complaint, MLSs possess substantial market power because brokers regard participation in the MLS to be critical to their ability to effectively compete with other brokers for home buyers and sellers. By participating in the MLS, brokers can promise seller clients that the information about the seller's property will immediately be made available to all other brokers in the area. Brokers who work with buyers can likewise promise them access to the widest possible array of properties listed for sale through brokers. To compete successfully, a broker must be an MLS member. To be a member, a broker must adhere to any restrictions imposed by the MLS.

---

[2] For this service, home sellers typically agree to pay real estate brokers a commission based on the ultimate sales price of the property. Listing brokers create incentives for other MLS members to try to find buyers for their listed properties by submitting to the MLS with each new listing an "offer of cooperation and compensation," identifying the amount (usually specified as a percentage of the listing broker's commission) that the listing broker will pay to any other broker who finds a buyer for the property.

C. VOW Brokers

NAR's rules permit brokers to provide to prospective buyers information from the MLS about all properties that satisfy the buyers' expressed needs or interests. Brokers typically give this information to buyers by hand, mail, fax, or e-mail. While many brokers who use VOWs ("VOW brokers") operate in most respects like other brokers, they differ from traditional brokers in their use of their password-protected VOWs to provide listings to consumers. A VOW broker's customers can search for and retrieve MLS listings information on the broker's VOW, rather than relying on the personal involvement of the broker in all stages of the process of finding a home.

As alleged in the Amended Complaint, VOWs help brokers operate more efficiently and increase the quality of services they provide. For example, VOWs enable consumers to search for and retrieve relevant MLS listings and educate themselves without the broker's expenditure of time. As a result, a VOW broker can spend less time, energy, and resources educating customers. Lower costs and increased productivity have enabled some VOW brokers to offer commission rebates to their buyer customers.

Some VOW brokers have differentiated themselves further from traditional brokers by focusing solely on the high-technology aspects of brokerage services that can be delivered over the Internet. Like other VOW brokers, these "referral VOWs" allow prospective buyers to search for homes online, but when buyers are ready to tour homes, the referral VOW broker directs them to other brokers or agents who can guide them through the negotiating, contracting, and closing process. The customers of referral VOWs can benefit from the specialized service provided by the referral VOW broker and the broker or agent to whom the customer is referred.

In some instances, referral VOW brokers have also offered commission rebates or other financial benefits to their customers.

D. The Challenged Policies

As alleged in the Amended Complaint, NAR's Challenged Policies discriminate against and restrain competition from VOW brokers. They do so, most significantly, by denying VOW brokers the ability to use their VOWs to provide customers access to the same MLS listings that the customer could obtain from all other brokers by other delivery methods. Under the "opt-out" provisions of the Challenged Policies, NAR permitted brokers to withhold their seller clients' listings from display on VOWs. NAR's MLS rules otherwise do not permit one broker to withhold listings from another broker based on how that competitor conveys his or her listings to customers. By blocking VOW brokers from allowing their customers to review the same set of MLS listings that traditional brokers can provide to their customers, NAR's rules restrained VOW brokers from competing in a way that is efficient and desired by many customers.

The Amended Complaint also alleged that the Challenged Policies restrained competition from referral VOW brokers. NAR's May 17, 2003 VOW Policy prohibited referral VOW brokers from receiving any compensation for the referral of a customer to another broker. NAR's rules do not otherwise restrict broker-to-broker referrals. In its September 8, 2005 ILD Policy, NAR revised and reinterpreted its rule on MLS membership to prevent referral VOW brokers from becoming members of the MLS and obtaining access to MLS listings.

Finally, the Amended Complaint challenged restrictions on VOW brokers' advertising activities and provisions that permitted MLSs to degrade the data the MLS provided to VOW brokers.

III. SUMMARY OF RELIEF TO BE OBTAINED UNDER THE PROPOSED FINAL JUDGMENT

As explained in the CIS, the proposed Final Judgment eliminates the likely anticompetitive effects of NAR's Challenged Policies, prevents the recurrence of anticompetitive effects associated with NAR's Challenged Policies, and enjoins NAR from taking future actions to discriminate against VOW brokers. The proposed Final Judgment requires NAR to repeal its Challenged Policies and to replace them with a "Modified VOW Policy" (attached to the proposed Final Judgment as Exhibit A) that makes it clear that brokers can operate VOWs without interference from their rivals.[3] With respect to any issues concerning the operation of VOWs that are not explicitly addressed by the Modified VOW Policy, the proposed Final Judgment imposes a general obligation that NAR and its MLSs not discriminate against VOW brokers.[4]

Under the Modified VOW Policy, brokers are not permitted to opt out and withhold their seller clients' listings from display on VOWs.[5] The Modified VOW Policy instead requires MLSs to provide to VOW brokers, for display on their VOWs, all MLS listings information that brokers can give customers by all other methods of delivery.[6]

The Modified VOW Policy that NAR must adopt under the proposed Final Judgment also permits brokers to operate referral VOWs. Some existing referral VOWs have established relationships with Internet companies or other businesses and consequently have developed

---

[3] *See* proposed Final Judgment, ¶¶ V.A-V.D.

[4] *See id.*, ¶¶ IV.A-IV.B.

[5] *See* Modified VOW Policy, ¶ I.4.

[6] *See id.*, ¶ III.2.

significant numbers of potential buyer leads. These referral VOWs educate those buyers on their VOWs and then refer those buyer customers to other brokers once the customers have selected properties in which they are interested and are ready to enter the negotiating, contracting, and closing process. The Modified VOW Policy expressly prohibits MLSs from impeding VOW brokers from referring customers to other brokers for compensation.[7]

The Modified VOW Policy allows a broker, who independently qualifies for MLS membership by actively endeavoring to provide in-person brokerage services to buyers and sellers, to either operate its own referral VOW or contract with an "Affiliated VOW Partner" ("AVP") to operate a referral VOW on its behalf and subject to its supervision and accountability. Under the proposed Final Judgment, a broker who actively endeavors to obtain some seller clients for whom it will market properties or some buyer clients to whom it will offer in-person brokerage services can become a member of the MLS and use MLS data as a member, including to populate its referral VOW.[8]

Additionally, such a broker can designate an entity (even another broker) as its AVP, allowing the AVP to receive MLS listings data to operate the VOW on behalf of the designating broker.[9] The MLS must provide listings to the AVP on the same terms and conditions as it

---

[7] *See id.*, ¶ III.11.

[8] The proposed Final Judgment permits NAR's affiliated MLSs to implement new requirements for MLS membership that NAR originally adopted with its ILD Policy. *See* proposed Final Judgment, ¶ VI.A. This revised and reinterpreted membership rule, attached to the proposed Final Judgment as Exhibit B, contains an interpretative note that explains that a broker who meets the new rule's membership requirements cannot be denied membership on the grounds that the broker operates a VOW, "including a VOW that the [broker] uses to refer customers to other [brokers]."

[9] *See* Modified VOW Policy, ¶ III.10.

would provide listings to the designating broker, although the AVP's rights to the data would be entirely derivative of the rights of the designating broker.[10] An AVP, just like any broker, can, through Internet marketing or other relationships, establish sources of potential buyer leads. The designating broker can take some or all of the buyer leads from its AVP on whatever compensation terms the designating broker and AVP agree to.[11]

Finally, the Modified VOW Policy prohibits MLSs from using an inferior data delivery method to provide MLS listings to VOW brokers and from unreasonably restricting the advertising and co-branding relationships VOW brokers establish with third parties.

IV. STANDARD OF JUDICIAL REVIEW

Upon the publication of the public comments and this Response, the United States will have fully complied with the APPA and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e), as amended. Because the United States frequently files antitrust actions and consent judgments in the District of Columbia, the Court of Appeals for the District of Columbia Circuit has been the primary source of judicial interpretations of the APPA. No decision from a court in the Seventh Circuit has considered the APPA's requirements.

In making the "public interest" determination, the Court should review the proposed Final Judgment in light of the violations charged in the Amended Complaint, *see, e.g.*, *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir.

---

[10] *See id.*

[11] Once an AVP refers a buyer lead to a broker or agent for whom it operates a VOW and the buyer registers on the VOW, that buyer becomes a customer of the broker or agent.

1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)), and be "deferential to the government's predictions as to the effect of the proposed remedies." *Microsoft*, 56 F.3d at 1461.

The APPA states that the Court shall consider in making its public interest determination:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). *See generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) (concluding that the 2004 amendments to the APPA "effected minimal changes" to the court's scope of review under APPA, and that review is "sharply proscribed by precedent and the nature of Tunney Act proceedings").[12]

[12] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006).

As the Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62 (D.C. Cir. 1995). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (*citing United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. *The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest."* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted). *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"). In making its public interest determination, a district court "must accord deference to

the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant "due respect to the [United States'] prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case").

Court approval of a consent decree requires a standard more flexible and less strict than that appropriate to court adoption of a litigated decree following a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the district court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in the Amended Complaint, and the APPA does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As the District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In the 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language effectuated what the Congress that enacted the APPA in 1974 intended, as Senator Tunney then explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).

V. SUMMARY OF PUBLIC COMMENTS AND THE RESPONSE OF THE UNITED STATES

The United States received nine comments during the sixty-day public comment period. Among the commentors were two significant VOW brokers and a real estate franchisor that operates VOWs for hundreds of its broker franchisees. These VOW operators are best positioned to evaluate the likely effects of the proposed Final Judgment on competition from VOW brokers, and none suggested that the public interest would not be served by entry of the proposed Final Judgment. On the contrary, ZipRealty, which founded its VOW-based brokerage in 1999 and currently operates in thirty-five major markets in twenty states, submitted its comment "in support of the [p]roposed Final Judgment" because it believes the proposed Final Judgment "favors public and consumer interests." Real estate franchisor Prudential, which operates VOWs for 480 of its franchisees, also asserted in its comments that "entry of the Proposed Final Judgment is in the public interest" because it "resolve[s] the fundamental issues raised in the [United States' Amended] Complaint against NAR."

Upon review and consideration of each of the nine comments, the United States believes that nothing in the comments suggests that the proposed Final Judgment is not in the public interest. Based on the comments, the United States, with the support of NAR, believes two minor modifications should be made to the Modified VOW Policy to eliminate any ambiguity

and to effectuate the intention of the parties.[13] The United States identifies these minor modifications and summarizes and addresses each of the comments it received below.

A. Comments Submitted by Entities Operating VOWs

1. Comments Submitted by ZipRealty

ZipRealty is a VOW broker operating in thirty-five markets nationwide. It (along with eRealty, a company later purchased by Prudential) was one of the first two innovative brokers that, in 1999, launched VOWs as a way to provide better service to consumers at a lower price than many of its competitor brokers. It submitted comments (Attachment 1) supporting entry of the proposed Final Judgment, asserting that the proposed Final Judgment "favors public and consumer interests." According to ZipRealty's comments, "had the proposed NAR policy challenged by the United States . . . been implemented, [ZipRealty's] business would likely have faced significant challenges."

---

[13] The United States and NAR have also agreed to a third, minor modification to the proposed Final Judgment. This modification was not precipitated by a comment from a third party. As filed with the Court and published in the Federal Register, the proposed Final Judgment would require NAR's local Boards or Associations of Realtors that *do not own or operate MLSs* to adopt and adhere to the Modified VOW Policy (which sets forth the rules an MLS must have for VOWs). *See* proposed Final Judgment, ¶¶ V.D & E (requiring all "Member Boards" to adopt the Modified VOW Policy or risk losing coverage under NAR's insurance policy). The United States agrees with NAR that requiring Boards or Associations of Realtors that do not own or operate MLSs to adopt the Modified VOW Policy would serve no purpose. As a result, the United States will move the Court to enter a proposed Final Judgment that clarifies that only Boards or Associations of Realtors that own or operate MLSs must adopt and adhere to the Modified VOW Policy. This additional, minor modification will not necessitate a second public comment period. *See Hyperlaw, Inc. v. United States*, No. 97-5183, 1998 WL 388807, at *3 (D.C. Cir. May 29, 1998) (finding that, because the proposed modification was a "logical outgrowth" of the original proposed consent decree, no additional public comment period was required).

Based on its past experiences with MLSs that favored traditional, bricks-and-mortar brokers over VOW brokers, ZipRealty's comments caution that "it is essential that . . . MLSs reasonably interpret the terms of the Proposed Judgment and [Modified VOW] Policy to ensure that they apply the same policies, rules and regulations to Brokers operating VOWs as are applied to 'traditional' Brokers, and that they do not subject Brokers operating VOWs to inappropriate and unreasonable additional costs, fees or restrictions not imposed on other Brokers."

Under the proposed Final Judgment, NAR is required to direct its affiliated MLSs to adopt, maintain, act consistently with, and enforce the Modified VOW Policy.[14] It is also required to withhold insurance from and report to the United States the identity of any MLS that fails to do so.[15] NAR is also required to forward to the United States any communications it receives concerning any MLS's noncompliance with the terms of the proposed Final Judgment or Modified VOW Policy.[16] The United States believes that these provisions will cause MLSs to comply with the Modified VOW Policy and will provide the United States with the ability to detect whether MLSs are, in fact, complying. If MLSs fail to comply, the United States will be prepared to move to enforce the proposed Final Judgment in the event of NAR inaction, or to consider any additional antitrust enforcement activities, including suing the MLS directly, if necessary.[17]

---

[14] *See* proposed Final Judgment, ¶ V.D.

[15] *See id.*

[16] *See id.*, ¶ V.H.

[17] The United States has not been reluctant to sue MLSs to bring an end to violations of the antitrust laws. The United States recently brought actions against two MLSs in South

2. Comments Submitted by Prudential Real Estate Services Company, LLC, and Prudential Real Estate Affiliates, Inc.

Prudential Real Estate Affiliates is a real estate franchisor with over 600 broker franchisees across the United States. Prudential Real Estate Services Company operates websites, including VOWs, on behalf of 480 of Prudential's broker franchisees. These companies ("Prudential") collectively submitted a lengthy set of comments on the proposed Final Judgment (Attachment 2).

Like ZipRealty, Prudential believes that entry of the proposed Final Judgment would be in the public interest. Prudential observes that the proposed Final Judgment, including the Modified VOW Policy resolves the "fundamental issues" raised in the United States Amended Complaint by eliminating a broker's ability to "opt out" of allowing VOW brokers to display the broker's clients' listings and by requiring MLSs to provide VOW brokers the same complete MLS listings that other brokers can give to their customers and clients by traditional delivery methods.

Carolina that are among the approximately 200 MLSs in the country not affiliated with NAR. On May 2, 2008, the United States brought an antitrust action against the MLS in Columbia, South Carolina, alleging that its rules restrain competition among real estate brokers in that area and likely harm consumers. *See* Complaint in *United States v. Consolidated Multiple Listing Service, Inc.*, No 3:08-cv-01786-SB (D.S.C. May 2, 2008), *available at* http://www.usdoj.gov/atr/cases/f232800/232803.htm. The United States challenged similar allegedly anticompetitive rules imposed by the MLS in Hilton Head, South Carolina, also not affiliated with NAR. *See* Complaint in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. Oct. 16, 2007), *available at* http://www.usdoj.gov/atr/cases/f226800/226869.htm. The MLS in Hilton Head agreed to settle the case by repealing the challenged rules and agreeing to other conduct restrictions, and the court entered the Final Judgment in the case on May 28, 2008. *See* Final Judgment in *United States v. Multiple Listing Service of Hilton Head Island, Inc.*, No. 9:07-cv-03435-SB (D.S.C. May 28, 2008), *available at* http://www.usdoj.gov/atr/cases/f233900/233901.htm.

Prudential, however, asks that the United States use this Response to Public Comments "to clarify, or to provide interpretive guidance for certain provisions of the [p]roposed Final Judgment and the Modified VOW Policy." Prudential then lists twelve areas on which it seeks clarification or interpretive guidance. The United States summarizes and responds to Prudential's twelve specific comments below.

(i) Minor Modification Warranted

Prudential raises two provisions that the United States agrees warrant a minor modification of the proposed Final Judgment. First, Prudential seeks clarification of the requirement in paragraph II.2.c.iv of the Modified VOW Policy that a VOW brokers' customers commit, through the terms of use, not to "copy, redistribute, or retransmit" any listings data they receive on the VOW. This provision protects the MLS from someone using a VOW not to purchase a property, but to access and sell the information found on a VOW to third parties. Prudential, however, believes that this requirement as currently written is too broad and would prevent the customer of a VOW broker from saving listings to an electronic property portfolio or from forwarding copies of any listings to spouses, friends, lenders, or others who are assisting the customer in his or her home purchase.

The United States agrees that paragraph II.2.c.iv of the Modified VOW Policy is too broad as currently written and could unreasonably discriminate against VOW brokers by preventing their customers from saving copies of listings in which they might have an interest or sharing listings with persons with whom they wish to consult in making a purchase decision. Customers of traditional, bricks-and-mortar brokers are not subject to the same limitations.

NAR has agreed to a minor modification to paragraph II.2.c.iv to eliminate any unintended discriminatory effect.

> *Current version of paragraph II.2.c.iv*: That the Registrant will not copy, redistribute, or retransmit any of the data or information provided.
>
> *Revised version of paragraph II.2.c.iv*: That the Registrant will not copy, redistribute, or retransmit any of the data or information provided, except in connection with the Registrant's consideration of the purchase or sale of an individual property.

Second, Prudential discussed paragraph II.5.a of the Modified VOW Policy, which permits individual property sellers, concerned with the dissemination of information about their properties over the Internet, to direct that their listings or property addresses be withheld from the Internet. This provision also states that VOW brokers are permitted to provide withheld listings to customers by any other method of delivery such as e-mail or fax. Prudential points out that this provision, as written, does not explicitly authorize VOW brokers to provide withheld property addresses as well to customers using other delivery methods.

This result was unintended. The United States intended that a VOW broker be permitted also to provide customers the property addresses withheld from VOW display, by other methods of delivery. NAR has agreed to a minor modification to paragraph II.5.a to correct this oversight.

> *Current version of paragraph II.5.a*: No VOW shall display the listings or property addresses of sellers who have affirmatively directed their listing brokers to withhold their listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listings of sellers who have determined not to have the listing for their property displayed on the Internet.

> *Revised version of paragraph II.5.a*: No VOW shall display the listing or property address of any seller who has affirmatively directed its listing broker to withhold its listing or property address from display on the Internet. The listing broker or agent shall communicate to the MLS that a seller has elected not to permit display of the listing or property address on the Internet. Notwithstanding the foregoing, a Participant who operates a VOW may provide to consumers via other delivery mechanisms, such as email, fax, or otherwise, the listing or property address of a seller who has determined not to have the listing or address for its property displayed on the Internet.

The United States will move the Court to enter a proposed Final Judgment with these modifications.

(ii) The Proposed Final Judgment Means What It Says

Prudential seeks clarification from the United States that, as to three different provisions of the Modified VOW Policy, the provisions literally mean what they say. It first seeks clarification concerning the requirement in paragraph II.5.a of the Modified VOW Policy that VOW brokers not display the listing or property addresses of sellers who have affirmatively directed that information about their properties be withheld from "the Internet." Prudential says that the provision "presumably means" that information withheld from "the Internet" must mean that the information be withheld "from all forms of Internet display" and excluded from any data that the listing broker or MLS sends to any other websites.

Prudential has interpreted paragraph II.5.a of the Modified VOW Policy correctly. Under the Modified VOW Policy, an MLS may not permit a seller to single out individual VOWs or VOWs generally and withhold the listing or property address from only VOW websites. Rather, the MLS and listing broker would also be required to withhold the seller's listing or property address from all other non-VOW websites.

Prudential next seeks to confirm the meaning of the requirement in paragraph III.2 of the Modified VOW Policy that MLSs provide VOW brokers "all MLS non-confidential listing data." Prudential seeks to clarify that this does not permit MLSs to refuse to provide VOW brokers the listings of sellers who have requested that their listings not be displayed on the Internet. It explains that, unless VOW brokers receive from the MLS even the listings they are not permitted to show on their VOWs, the VOW brokers cannot meaningfully exercise their right under paragraph II.5.a to provide their customers those seller-withheld listings by other delivery methods. Prudential expresses some concern that MLSs might interpret paragraph III.4, which refers to a "VOW-specific feed" from which the seller-withheld listings have been removed, as a basis to disregard the requirement in paragraph III.2 that MLSs provide "all MLS non-confidential listing data" to VOW brokers who request it.

Paragraph III.2 of the Modified VOW Policy is unambiguous in requiring MLSs to provide "*all* MLS non-confidential listing data" (emphasis added) to VOW brokers who request it. MLSs may *also* offer to VOW brokers, under paragraph III.4 of the Modified VOW Policy, a "VOW-specific feed" from which seller-withheld listings or addresses have been removed. Some VOW brokers might opt for the VOW-specific feed as a matter of convenience, but nothing in paragraph III.4 suggests that such a VOW-specific feed could replace the MLS's unambiguous obligation under paragraph III.2. As Prudential explains, a contrary interpretation of the Modified VOW Policy would also prevent VOW brokers from filtering seller-withheld listings and delivering those listings to customers by non-VOW methods of delivery, as expressly permitted under paragraph II.5 of the Modified VOW Policy.

The third provision on which Prudential seeks clarification is paragraph II.5.c of the Modified VOW Policy. That paragraph requires a VOW broker to disable or discontinue, at the request of a home seller, any functionality providing automated market valuations on or any third-party commenting on or reviews about the seller's property. The seller may not, under this provision, selectively target particular VOWs with requests that these activities be discontinued. Under paragraph II.5.c, such a request by a seller is applicable to "all Participants' websites" (*i.e.*, all websites operated by any member of the MLS). Prudential seeks confirmation that this provision cannot be exercised on a selective basis as to any single broker's VOW.

There is also no ambiguity in paragraph II.5.c. A sellers's request, under that provision, to discontinue automated market valuations or third-party comments or reviews about his or her listing applies to "all Participants' websites," whether VOW or non-VOW sites. This provision cannot be exercised selectively against a single VOW or against all VOWs, but would also be applicable to all non-VOW websites operated by all other MLS members.[18]

[18] Prudential also suggests that such an election by a seller should apply to automated market valuations or third-party comments or reviews permitted by non-broker websites that display MLS-supplied listings. Paragraph II.5.c. applies only to MLS "Participants' websites." While an MLS could require third-party websites, as a condition of receiving MLS data, to discontinue valuations, comments, or reviews, the United States believes the potential cost to third-party websites outweighs the benefits of such a requirement and elected not to insist on such a term in its proposed Final Judgment. As written, this provision strikes the appropriate balance among (i) permitting sellers some ability to limit the extent to which their properties might be marketed in a bad light, (ii) preventing VOW brokers' competitors from directing sellers to target VOWs with requests to discontinue these services, and (iii) minimizing the effect on third parties.

(iii) Nondiscrimination Provisions Apply Where Modified VOW Policy is Silent

Prudential seeks clarification or interpretative guidance with respect to two issues on which it suggests the Modified VOW Policy is silent. It first expresses concern that MLSs might interpret the requirement in paragraph II.5.e of the Modified VOW Policy, that VOW brokers refresh information on their websites no less frequently than every three days, to prohibit VOW brokers from refreshing the information on their VOW more frequently than every three days. Prudential states that "[o]perating a VOW with three (3) day old data is totally unacceptable in a web based environment," particularly when VOW brokers' traditional competitors can provide their customers listings data that is refreshed continuously by the MLS.

As Prudential observes, the Modified VOW Policy is silent as to how frequently VOW brokers may refresh the MLS listings they display on their VOWs. Paragraph II.5.e of the Modified VOW Policy states that VOW brokers "shall refresh MLS data available on a VOW not less frequently than every 3 days." It does not state or imply that VOW brokers cannot refresh their data more frequently than every three days.

The proposed Final Judgment expressly prohibits NAR from adopting rules that discriminate against VOW brokers or that impede the operation of VOWs.[19] When issues concerning VOWs are not expressly covered by the Modified VOW Policy, these provisions would prevent NAR from filling the void with discriminatory rules. Here, the United States agrees with Prudential that, with no express provision in the Modified VOW Policy, the general nondiscrimination provisions found in paragraphs IV.A and IV.B of the proposed Final Judgment would apply to prevent MLSs from restricting the ability of VOW brokers to provide

[19] *See* proposed Final Judgment, ¶¶ IV.A-IV.B.

data to customers that is less current than the data that other brokers can provide to their customers.

Prudential also expresses concern that an AVP that operates VOWs for several different brokers in an MLS could be charged a separate data download fee for each broker for whom the AVP operates a VOW, even though the AVP could operate its entire network of VOWs using only a single data download.

Prudential describes a "common circumstance" in which a single AVP has been designated by several different brokers in a single MLSs to operate VOWs on their behalf. According to Prudential, the AVP would, as a technical matter, need to download the MLS data only one time and could use that data to populate all of the VOWs it operates. Paragraph III.10.b of the Modified VOW Policy prohibits MLSs from charging an AVP more than it charges a VOW broker to download MLS listings, but the proposed Final Judgment and Modified VOW Policy do not expressly address whether the MLS could charge separate downloading fees to the AVP for each VOW it operates. However, because the AVP would need only a single MLS data download, a rule requiring an AVP to pay for additional unnecessary downloads would likely violate paragraph IV.D of the proposed Final Judgment as it would impose fees on the AVP in excess of the MLSs costs in delivering data to the AVP. Moreover, because downloading data imposes some costs on the MLS, a rule requiring multiple unnecessary downloads for no apparent purpose other than to impose additional costs on AVPs and the brokers for whom they operate VOWs would likely unreasonably disadvantage the AVP and VOW broker and violate paragraph IV.B of the proposed Final Judgment.

(iv) Relief Not Sought by the United States

Prudential identifies two areas in which it believes additional relief, not sought by the United States, might be warranted. First, Prudential observes that the proposed Final Judgment would bind only NAR, the sole defendant in this case, and expresses concern whether the proposed Final Judgment sufficiently compels NAR to require its affiliated MLSs to abide by the terms of the proposed Final Judgment, including the Modified VOW Policy. Prudential specifically questions whether paragraphs V.E and V.F of the proposed Final Judgment, which require NAR to take action against MLSs when NAR "determines" that the MLSs are not in compliance, require NAR to find out about any noncompliance in the first place or to determine whether the conduct at issue complies with the proposed Final Judgment.

The United States believes that the proposed Final Judgment adequately compels NAR to direct its affiliated MLSs to comply with the Modified VOW Policy. The second sentence of Paragraph V.E of the proposed Final Judgment clearly says that NAR shall deny coverage under its insurance policy (a consequence that Prudential does not dispute will motivate compliance by the MLS) to any MLS that "refuses to adopt, maintain, act consistently with, or enforce" the Modified VOW Policy.

The proposed Final Judgment is drafted with the assumption that NAR would find out through multiple channels about an MLS's failure to act in accordance with the decree. First, MLSs would turn to NAR and ask if their conduct was consistent with the law and the decree in order to maintain their insurance coverage. MLSs routinely turn to NAR for advice and approval

on various issues in order to maintain coverage under NAR's insurance.[20] Second, brokers who feel aggrieved can complain directly to NAR (or to the United States) about an MLS's conduct.[21] And third, the United States can alert NAR to any actions by an MLS that are inconsistent with the Modified VOW Policy and ask NAR to take action. Thus, there should be little concern that if NAR acts in good faith it will fail to find out that an MLS is acting inconsistently with the Modified VOW Policy.

The proposed Final Judgment does not require NAR to act on frivolous allegations of noncompliance by an MLS. But NAR is required to act when it determines the allegations are well-founded.[22] To the extent NAR operates in bad faith, failing to reach a determination when an allegation is well-founded, the United States could move to enforce the Final Judgment. Additionally, the United States retains the right to sue any MLS directly for violations of the antitrust law.[23]

The United States believes that the enforcement scheme negotiated through these provisions of the proposed Final Judgment appropriately incentivizes NAR to evaluate any

---

[20] The proposed Final Judgment also requires NAR to educate its MLSs about the terms of the proposed Final Judgment by providing briefing materials on the "meaning and requirements" of the proposed Final Judgment and by holding an annual program that includes a discussion of the proposed Final Judgment. *See* proposed Final Judgment, ¶¶ V.G.4-V.G.5.

[21] Note that NAR is required under the proposed Final Judgment to furnish to the United States copies of any communications it receives from an MLS or an aggrieved third party concerning allegations of noncompliance by an MLS with the proposed Final Judgment or Modified VOW Policy. *See* proposed Final Judgment, ¶ V.H. The United States' access to such records will ensure that the United States knows what NAR knows about any instances of MLS noncompliance and will allow the the United States to make sure NAR fulfills its obligations.

[22] *See* proposed Final Judgment, ¶¶ V.E and V.F.

[23] *See id.*, ¶ IX.

information it receives concerning MLS noncompliance and to take timely and appropriate actions to bring its MLSs into compliance. NAR understands that its failure to respond where a response is warranted may mean the initiation of an inquiry by the United States. As a membership organization, NAR will want to minimize the circumstances under which its members (as well as NAR itself) receive direct scrutiny by the United States and will act to correct instances of noncompliance that it observes. This enforcement scheme also permits NAR to decline to address allegations of noncompliance that have no merit. The United States believes that these provisions strike the appropriate balance and will ensure that MLSs do not unreasonably discriminate against VOW brokers.

Second, Prudential discusses Paragraph IV.D of the proposed Final Judgment which forbids NAR from adopting, maintaining, or enforcing rules that impose fees or costs on a VOW broker "that exceed the reasonably estimated actual costs" an MLS incurs in providing listings to a VOW broker. Under paragraph III.5 of the Modified VOW Policy, an MLS is authorized to pass along to a VOW broker "the reasonably estimated actual costs incurred by the MLS" in establishing the ability to download listings data to VOW brokers. Prudential expresses concern that, because "costs" is not defined in the proposed Final Judgment or Modified VOW Policy, MLSs might assess against VOW brokers the salaries of software programmers or compliance officers, or other substantial additional expenses incurred by the MLS. Prudential seeks a clarification that "'costs' may include only actual direct costs, and may not include any allocations of salaries, consultant fees, rent, utilities, or other overhead expenses." It also argues that, under paragraph III.5 of the Modified VOW Policy, an MLS may not charge VOW brokers more than it charges other brokers who download listings data from the MLS for other purposes.

The proposed Final Judgment and Modified VOW Policy permit MLSs to charge VOW brokers fees no greater than the MLSs "reasonably estimated actual costs" of providing services to VOW brokers[24] and equal to the "reasonably estimated costs" the MLS incurs in adding or enhancing downloading capacity for purposes of supporting VOWs.[25] Because the circumstances and capabilities of MLSs vary, the United States does not believe it would be appropriate to attempt to express with greater precision the type or level of costs it would be permissible for MLSs to impose upon VOW brokers. The United States believes that imposing on MLSs an obligation to account for the fees they impose on VOW brokers will be adequate to prevent the imposition of exorbitant fees. Furthermore, a definition is unnecessary because the United States agrees with Prudential that the proposed Final Judgment's general nondiscrimination provisions would forbid charging VOW brokers for downloading listings information differently than other brokers, unless the costs to the MLS differed as to each recipient.

(v) Long-Standing Provisions

Prudential expresses concern about three provisions that long existed in NAR's VOW Policy but that the United States did not challenge. First, it discusses a requirement in paragraph II.2.c of the Modified VOW Policy that consumers who seek to register on a VOW "open and review" the VOW's mandatory terms of use. Prudential asserts that this provision might be interpreted to prohibit the usual practice on many Internet websites of opening terms of use in "a scrollable frame" that the viewer can read if he or she desires. Prudential also asserts that,

---

[24] Proposed Final Judgment, ¶ IV.D.

[25] Modified VOW Policy, ¶ III.5.

because traditional brokers provide listings information to customers upon a simple request of a consumer, the registration requirement in II.2.c of the Modified VOW Policy discriminates against VOW brokers.

NAR included the "open and review" requirement in the VOW Policy it adopted on May 17, 2003, and over 200 MLSs subsequently adopted rules implementing the VOW Policy. Through its lengthy investigation and litigation of this matter, the United States neither received any complaints about this requirement nor discovered any evidence that it had restrained or was likely to restrain competition from any VOW broker. Had the United States proceeded to trial in this case, it would not have sought relief from the "open and review" requirement.

The United States notes, however, that it sees no inconsistency between the "open and review" requirement and the "scrollable frame" in which Prudential's franchisees currently present terms of use to their customers. In the event that MLSs in the future insist upon different and more onerous procedures from Prudential's franchisees or other VOW brokers than the "scrollable frame" currently offered, the United States would then be in a position to evaluate whether those procedures restrained competition from VOW brokers.[26]

Second, Prudential mentions paragraph II.2.d of the Modified VOW Policy, which prohibits the VOW broker from establishing any representation agreement or imposing any financial obligation upon a customer through use of a "mouse click." According to Prudential, this provision "would be tantamount to preventing VOW operators from engaging in electronic commerce at their websites."

---

[26] *See* proposed Final Judgment, ¶ IX.

This provision was included in the 2003 VOW Policy. Discovery in this case revealed no evidence that this provision had restrained or was likely to restrain competition from VOW brokers. Additionally, the Modified VOW Policy recognizes explicitly that websites maintained by VOW brokers "may also provide other features, information, or services in addition to VOWs."[27] And, as Prudential concedes, the Modified VOW Policy would not prevent VOW brokers from "engaging in electronic commerce" on those non-VOW portions of their websites. Thus, the United States disagrees with Prudential that paragraph II.2.d of the Modified VOW Policy is likely to restrain competition from VOW brokers or to "prevent[ ] VOW operators from engaging in electronic commerce at their websites."

Third, Prudential mentions paragraph II.6 of the Modified VOW Policy, which requires VOW brokers to "make the VOW readily accessible to the MLS and to all MLS Participants for purposes of verifying compliance with this Policy." Prudential expresses concern that MLSs might, under this provision, demand intrusive access to VOW brokers' systems and files and it asserts that MLSs should be permitted to observe only the password-protected portions of the VOW accessible by any customer of the VOW broker.

NAR included a nearly identical provision in its 2003 VOW Policy, which was adopted by over 200 MLSs. The United States heard no complaints nor uncovered any evidence that that provision had been exercised by any MLS in the manner about which Prudential expresses concern. Nevertheless, the United States agrees with Prudential and hereby clarifies that paragraph II.6 of the Modified VOW Policy, by its terms, cannot be used for purposes other than to verify compliance with NAR's policies and it should not provide a basis for MLSs to harass

[27] Modified VOW Policy, ¶ I.3.

VOW brokers or to conduct a detailed examination of VOW brokers' business files or computer systems.

In over four years of investigation and litigation concerning the Challenged Policies, the United States had neither received complaints nor uncovered evidence that these three provisions had been used in the manner Prudential describes. But, by way of clarification and guidance, the United States reiterates that, to the extent that MLSs discriminate against and harm VOW brokers through these provisions in the future, the proposed Final Judgment allows the United States to investigate and bring an antitrust enforcement action as appropriate.[28]

3. Comments Submitted by Home Buyers Marketing II

Home Buyers Marketing II ("HBM II") is a VOW broker operating in approximately 400 markets throughout the United States. HBM II's comments (Attachment 3) identify "particular anticompetitive practices" and seek confirmation that the proposed Final Judgment, including the Modified VOW Policy, would prohibit MLSs from engaging in those practices.[29]

HBM II expresses concern about paragraph II.3 of the Modified VOW Policy, which requires that VOW brokers "be willing and able to respond knowledgeably to inquires from [customers]." It seeks clarification that an MLS would not be permitted to demand a greater

---

[28] *See* proposed Final Judgment, ¶ IX.

[29] Three issues raised by HBM II repeat concerns expressed by Prudential. HBM II repeats Prudential's comment concerning how frequently VOW brokers may update the MLS listings that populate their websites, the meaning of the requirement in paragraph II.2 of the Modified VOW Policy that MLSs provide VOW brokers "all MLS nonconfidential listing data," and whether the United States and NAR intended, in paragraph II.2.c.iv of the Modified VOW Policy, to prevent a VOW brokers' customers from sharing listings with friends, family, lenders, or others with whom they need to consult in their home purchase decision. The United States addressed each of these issues fully in its response to Prudential's comments.

level of knowledge from a VOW broker concerning properties it displays to customers than the MLS demands from other brokers.

Because the Modified VOW Policy does not define the level of knowledge that a VOW broker must possess when responding to customer inquiries, the United States agrees with HBM II that the proposed Final Judgment's general nondiscrimination provisions would prevent MLSs from demanding greater knowledge from VOW brokers than they demand of other brokers.[30]

HBM II also comments on paragraph IV.1.e of the Modified VOW Policy. Under that provision, an MLS may limit to a "reasonable number" the listings that VOW brokers can provide to customers in response to a customer's query, but the number can be no fewer than 100 listings or five percent of all listings in the MLS, whichever is lower. HBM II suggests that even a limit of 100 listings would be unreasonable if the MLS permitted consumers to search without such limits on other websites populated with data provided by the MLS.

The Modified VOW Policy does not define when a limitation on the number of listings a VOW broker could provide to customers would be unreasonable. While Paragraph IV.1.e of the Modified VOW Policy sets 100 listings or five percent of all listings in the MLS as a floor below which an MLS cannot go, the use of the reasonableness limitation suggests that, in some circumstances, a limitation set higher than the floor could still be impermissible. HBM II suggests one such circumstance: a 100-listing limitation applicable to VOWs would be unreasonable if the MLS permitted non-VOW websites to show a greater number of listings to

[30] As HBM II points out, NAR's general counsel explained in a June 16, 2008, speech that brokers cannot "always be expected to have the answer right there" when they receive inquiries from customers. "In many instances, . . . you may have to say, 'I'll find that information out and I'll get back to you.' That would be responding knowledgeably."

customers. The United States agrees with HBM II that, if an MLS were to restrict the number of listings a VOW broker could provide his or her customers but did not restrict in the same way other websites on which it permits its listings to be displayed, the MLS would unreasonably disadvantage VOW brokers and would violate the proposed Final Judgment's nondiscrimination provisions.

Finally, HBM II observes that the proposed Final Judgment or Modified VOW Policy do not define the word "cost." HBM II seeks confirmation that MLSs could not charge VOW brokers for the entire cost of items or services used only partially to support the use of VOWs.

As stated above, because MLSs vary, the United States has not sought to prescribe the types or levels of costs that MLSs could reasonably allocate to VOW-related activities for purposes of establishing fees applicable to VOW brokers. The United States agrees with HBM II, however, that the proposed Final Judgment would prohibit an MLS from "allocat[ing] the cost of facilities (or staff time) used for other purposes exclusively or disproportionately to the VOW feed." Such an allocation would exceed the "reasonably estimated actual costs" incurred by the MLS in performing services for VOW brokers and would unreasonably disadvantage VOW brokers in violation of the proposed Final Judgment's nondiscrimination provisions.

B. Comments Submitted by Exclusive Buyer Agents

Two groups of exclusive buyer agents sent comments. Both expressed concerns that NAR's revision and reinterpretation of its membership rule, attached to the proposed Final Judgment as Exhibit B, might be interpreted to exclude them as members of the MLS. The United States has confirmed that such concerns are unfounded.

The first commentor, the National Association of Exclusive Buyer Agents ("NAEBA"), consists of real estate brokers and agents "who represent buyers only and who never list property for sale or represent sellers." The second commentor, the Buyer's Broker of Northern Michigan, LLC, is a member of the NAEBA. Both the NAEBA and the Buyer's Broker of Northern Michigan submitted comments that are similar in substance. (Attachments 4 and 5).

The NAEBA began its comment by commending the Department for its "efforts on behalf of the nation's consumers to address some of the anticompetitive practices in the real estate marketplace today." But both commentors expressed concern that, under NAR's revised membership rule, brokers or agents who commit to work exclusively with buyers and to be compensated exclusively by buyers, rather than receiving a share of the commission from the listing broker, might be precluded from joining the MLS. They worry that, because NAR's revision to its membership rule opens MLS membership only to licensed brokers who actually "offer or accept cooperation and compensation to and from other [MLS members]," they could be prevented from participating in the MLS.

First, even though exclusive buyer brokers do not list properties or represent sellers, they usually are compensated, at least in part, by a share of the commission that the listing broker offers to the broker who finds a buyer for the property. In such a circumstance, the buyer broker would be accepting cooperation and compensation and would be entitled to MLS membership under NAR's revised membership rule. Additionally, NAR's revised membership rule does not prevent, as the commentors feared, an exclusive buyer broker from accepting the commission offered by the listing broker (even if the offer is zero percent) and supplementing that commission with payment directly from the buyer. Moreover, NAR has told the United States

that it does not interpret its revised membership rule to exclude a buyer broker who always refuses the share of the commission offered by the listing broker and chooses to be compensated entirely by the buyer. NAR recognizes that an exclusive buyer broker is still "cooperating" with the listing broker to sell the property and has stated that it will advise its MLS members in writing that such a broker is not to be excluded from the MLS.[31] Finally, if NAR changes its interpretation so that its MLSs begin to exclude exclusive buyer brokers from MLS membership in the future, the United States remains free to challenge such conduct as anticompetitive.[32]

C. Comments Submitted by MLS4owners.com

MLS4owners.com is a broker operating in the State of Washington. According to its comment (Attachment 6), it is a "flat-fee, limited-service brokerage." Its comment concerns the third paragraph of the preamble to the proposed Final Judgment, which states that "the United

---

[31] NAR's rules already prohibit MLSs from excluding buyer brokers. *See* National Association of Realtors, *Handbook on Multiple Listing Policy* (2008), at 25 ("Since the MLS is an association service by which the participants make blanket unilateral offers of cooperation and compensation to the other participants with respect to listings for which they are an agent, no association or association MLS may make or maintain a rule which would preclude an individual or firm, otherwise qualified, from participating in an association MLS solely on the basis that the individual or firm functions, to any degree, as the agent of potential purchasers under a contract between the individual (or firm) and the prospective purchaser (client).").

[32] In its penultimate paragraph, NAEBA expressed an additional concern about provisions IV.1.d and IV.1.f of the Modified VOW Policy, which allow MLSs to require VOW brokers to include the name of the listing broker or agent in any listings the VOW broker displays on its VOW. NAEBA believes this requirement would force an exclusive buyer broker who operates a VOW to advertise its competition – the broker who listed the property. However, NAR included these provisions in its 2003 VOW Policy and the United States chose not to challenge them as there did not appear to be any significant effects from notifying a customer of the identity of the listing agent. Additionally, the proposed Final Judgment allows MLSs to adopt these provisions only if the MLS imposes the same requirements on brokers who provide listings by more traditional methods of delivery. Thus, the MLS cannot use these provisions to discriminate against VOW brokers.

States does not allege that Defendant's Internet Data Exchange (IDX) Policy in its current form violates the antitrust laws." MLS4owners.com believes that NAR's IDX Policy does violate the antitrust laws, by permitting brokers operating IDX websites to exclude exclusive agency or limited-service listings from their own IDX websites.

As MLS4owners.com itself correctly observes, "the IDX Policy was NOT the subject of the DOJ's pre-complaint investigation, complaint, amended complaint or discovery" (emphasis in original). The United States takes no position as to the permissibility under the antitrust laws of NAR's IDX Policy; paragraph three of the preamble to the proposed Final Judgment reflects that this case involved only VOWs and not the IDX websites about which MLS4owners.com is concerned.[33]

To the extent that MLS4owners.com suggests that the United States' Amended Complaint should have challenged NAR's IDX Policy, its argument should be rejected. Review under the APPA should not involve an examination of possible competitive harms the United States did not allege. *See, e.g.*, *Microsoft*, 56 F.3d at 1459 (stating that the district court may not "reach beyond the complaint to evaluate claims that the government did not make").

---

[33] VOWs are password protected websites through which brokers provide brokerage services to customers or clients, including the opportunity to search MLS listings and other information. NAR's "Internet Data Exchange" or "IDX" rules govern websites operated by brokers though which they can advertise listings to consumers with whom the broker has not yet established a customer or client relationship. As Prudential explains in its comments, "[b]ecause any web visitor can view a broker's IDX pages without having any direct contact with the broker who owns the site, the IDX listing information is the functional equivalent of newspaper or magazine advertising directed to the general public at large. . . . [A]n MLS' IDX data feed does not necessarily include all properties in the MLS' database compilation [or] all of the information about a listed property that MLS participants may delivery to customers or clients . . . ."

D. Comments That Do Not Address the Amended Complaint or Proposed Final Judgment

The United States received three additional comments that do not address the Amended Complaint or proposed Final Judgment.

Bernard Tompkins of Realty Specialist Inc. submitted a comment (Attachment 7) critiquing a report published jointly in 2007 by the Department of Justice and the Federal Trade Commission entitled "Competition in the Real Estate Brokerage Industry."[34] Mr. Tompkins' comments are not relevant to the Court's APPA inquiry.

The United States also received comments (Attachment 8) submitted anonymously by brokers from Montgomery County, Pennsylvania. These commentors propose relief, unrelated to the allegations in the Amended Complaint or the subject of this case, that they contend would "prevent[ ] the loss of competition" and "better serv[e] the public interest." They suggest that brokers should be prohibited from referring customers to mortgage lenders, that brokers provide "maximum exposure" for listed properties, and that properties on NAR's Realtor.com website include home addresses. Whatever the merits of these suggestions, they do not address the allegations in the Amended Complaint or the relief obtained in the proposed Final Judgment.

Finally, an anonymous broker from San Jose, California, submitted a comment (Attachment 9) complaining about an unrelated rule adopted by his MLS that prevents him from publishing on the Internet the same median sold price information that brokers are permitted to publish in the newspaper. This allegation is not related to the United States' Amended

[34] A copy of this report is available at www.usdoj.gov/atr/public/reports/223094.pdf.

Complaint or to the proposed Final Judgment and has no role in the Court's evaluation under the APPA.

VI. CONCLUSION

After careful consideration of the public comments, the United States concludes that, with the minor modifications identified above, the entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, on November 7th, after this Response to Comments has been published in the *Federal Register* pursuant to 15 U.S.C. § 16(b) and (d), the United States will move this Court to enter the proposed Final Judgment.

Respectfully submitted,

s/David C. Kully
David C. Kully
Owen M. Kendler
U.S. Department of Justice
Antitrust Division
450 5th Street, NW; Suite 4000
Washington, DC 20530
Tel: (202) 307-5779
Fax: (202) 307-9952

Dated: October 23, 2008

CERTIFICATE OF SERVICE

I, David C. Kully, hereby certify that on this 23rd day of October, 2008, I caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment to be served by ECF on counsel for the defendant identified below.

Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com

s/David C. Kully
David C. Kully