UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF REALTORS®,
430 North Michigan Ave.,
Chicago, IL 60611,

Petitioner,

v.

UNITED STATES OF AMERICA
950 Pennsylvania Avenue, NW
Washington, DC 20530,

U.S. DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION
450 Fifth Street NW, Suite 4000
Washington, DC 20530,

RICHARD A. POWERS, in his official capacity as
Acting Assistant Attorney General,
Antitrust Division
450 Fifth Street NW, Suite 4000
Washington, DC 20530,

Respondents.

Case No. 1:21-cv-2406

PETITION TO SET ASIDE, OR IN THE ALTERNATIVE MODIFY, CIVIL INVESTIGATIVE DEMAND NO. 30729

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutory Authorities

Rules and Regulations

Other Authorities

PRELIMINARY STATEMENT

1. The National Association of REALTORS® brings this petition to quash a Civil Investigative Demand (CID) issued by the Antitrust Division of the United States Department of Justice because it violates a binding settlement negotiated and agreed-to by the last Senate-confirmed head of the Antitrust Division.

2. NAR is a trade association that, among other things, promulgates policies for multiple listing services operated by local associations of REALTORS® throughout the country to ensure those multiple listing services are operated for benefit of home buyers, home sellers, and real estate professionals.

3. Last year, as part of a heavily negotiated settlement, the Antitrust Division agreed to (a) close civil antitrust investigations concerning two of NAR's policies for multiple listing services, called the Participation Rule and the Clear Cooperation Policy; and (b) withdraw two CIDs that had been issued to NAR as part of those investigations.

4. In exchange for the Antitrust Division's agreement to close those investigations and withdraw the related CIDs, NAR agreed to enter into a Consent Judgment, even though NAR had done nothing wrong.

5. As NAR told the Antitrust Division during settlement negotiations, it was willing to undertake the burdens of the Consent Judgment, but only in return for the certainty provided by the Antitrust Division's commitment to close the its investigations and withdraw the related CIDs.

6. On November 19, 2020, NAR agreed to the Consent Judgment and the Antitrust Division filed the Consent Judgment with this Court.

7. Later that same day, the Antitrust Division sent NAR a letter, signed by the Assistant Attorney General in charge of the Antitrust Division, Makan Delrahim, which confirmed

closed the Antitrust Division had closed its investigations of the Participation Rule and Clear Cooperation Policy and withdrawn the related CIDs.

8. But on June 30, 2021, the Antitrust Division abruptly issued an ultimatum to NAR: If NAR did not agree to change the Consent Judgment ***and*** stipulate that the Antitrust Division could re-open the very same investigations it agreed to close as part of the settlement agreement, the Antitrust Division would withdraw from the Consent Judgment the next day.

9. NAR refused to relinquish the benefits of its negotiated settlement.

10. On July 1, the Antitrust Division filed a notice of withdrawal from the Consent Judgment with this Court.

11. That same day, the Antitrust Division publicly acknowledged that its agreement with NAR limited its ability to investigate by issuing a press release, claiming, "[t]he department is taking this action to permit a broader investigation of NAR's rules and conduct to proceed without restriction." Glass Decl. Ex. 1. In that press release, the Acting Assistant Attorney General in charge of the Antitrust Division, Richard Powers, stated the Antitrust Division "cannot be bound by [the] settlement" that was negotiated and accepted by the prior administration. *Id.*

12. But nothing in the settlement agreement with NAR allowed the Antitrust Division to rescind its commitment to close its investigations of the Participation Rule and Clear Cooperation Policy and withdraw the related CIDs.

13. On July 6, in breach of the Antitrust Division's prior commitments to NAR, the Antitrust Division issued a new Civil Investigative Demand (CID No. 30729, Glass Decl. Ex. 2), which seeks information from NAR about the Participation Rule and the Clear Cooperation Policy and re-opens the very investigations the Antitrust Division previously agreed to close as part of its settlement with NAR. With few exceptions, the information requests in the newly issued CID are

substantively identical (and in many places literally identical) to the CIDs the Antitrust Division agreed to withdraw as part of its agreement with NAR.

14. These actions by the Antitrust Division are unprecedented. NAR has not identified any other time that the Antitrust Division has sought to withdraw from a duly negotiated settlement even though the defendant had complied with all of its obligations.

15. NAR brings this Petition, pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, to set aside CID No. 30729 because the Antitrust Division has exceeded its authority by (1) re-opening investigations into NAR that the Antitrust Division agreed to close as part of a binding settlement agreement; (2) re-issuing the CIDs the Antitrust Division agreed to withdraw as part of a binding settlement agreement; and (3) making demands that are overly broad, unduly burdensome, and irrelevant to any permissible investigation.

16. While this Petition is about NAR and NAR's recent settlement with the Antitrust Division, much more is at stake. Subjects of government investigations must be able to rely upon the commitments, settlements, and plea agreements entered into by the federal government, particularly in law enforcement matters. If the Antitrust Division can walk away from its agreed-to obligations in this matter, it will set a potentially catastrophic precedent that would undermine the strong public policy in favor of settlements and public confidence that the federal government will keep its word in future cases.

JURISDICTION AND VENUE

17. Under the Antitrust Civil Process Act, "[w]ithin twenty days after the service of any [civil investigative] demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file and serve upon such antitrust

investigator, . . . a petition for an order modifying or setting aside such demand . . . in the district court of the United States for the judicial district within which such person resides, is found, or transacts business." 15 U.S.C. § 1314(b)(1)(A).

18. NAR agreed to waive service of CID No. 30729 on July 19, 2021. The return date provided on the CID is August 5. Glass Decl. Ex. 2.

19. On July 25, 2021, the Antitrust Division and NAR entered an agreement to "toll and extend the deadline for NAR to file a petition to modify or set aside CID No. 30729 pursuant to 15 U.S.C. § 1314 until (and including) September 13, 2021." *Id.* Ex. 3 at 1. The same agreement "extend[ed] the deadline for compliance with CID No. 30729 until (and including) September 13, 2021." *Id.* The signatory to the agreement for the United States attested that "she is an antitrust investigator who was named in CID No. 30729, as that term is defined under 15 U.S.C. § 1314, and thus is authorized to grant an extension of the deadlines under that statute on behalf of the United States." *Id.* Ex. 3 at 2.

20. NAR is a membership organization composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Among other things, NAR promulgates a Code of Ethics for REALTORS® and rules that apply to multiple listing services operated by local associations of REALTORS®.

21. NAR maintains an office at 500 New Jersey Avenue NW, Washington, DC 20001.

22. This Court has jurisdiction over this Petition pursuant to 15 U.S.C. § 1314(e) and 28 U.S.C. § 1331.

23. Venue in this District is proper pursuant to 15 U.S.C. § 1314(b) and 28 U.S.C. § 1391(e).

BACKGROUND

I. In Late 2020, the Antitrust Division and NAR Agreed to a Settlement

24. In 2019, the Antitrust Division opened an investigation concerning certain NAR practices, purportedly to determine whether they amounted to civil violations of federal antitrust law.

25. In 2020, NAR and the Antitrust Division began negotiating the terms of a settlement that would bring an end to all ongoing investigations concerning NAR. Those negotiations involved direct communications between NAR's counsel and then-AAG Delrahim, his delegates, and Antitrust Division Staff.

26. On October 14, 2020, after NAR and the Antitrust Division had come to a rough understanding of the terms of a potential settlement, under which the Antitrust Division would agree to close its ongoing investigations in return for changes to a limited set of NAR rules, the Antitrust Division provided NAR with an initial draft of a proposed Consent Judgment. Glass Decl. Ex. 4.

27. On October 16, NAR responded to that draft with edits. *Id*.

28. In its October 16 revisions, NAR struck the proposed reservation of rights clause from the draft Consent Judgment, which provided: "Nothing in this Final Judgment shall limit the right of the United States to investigate or bring future actions to prevent or enjoin violations of the antitrust laws concerning any NAR Rule, including any rules relating to the payment of Broker commissions or offers of compensation (e.g. NAR's Participation Rule) or any other Rule adopted or enforced by NAR or any Member Board, that is not already specifically enjoined by this Final Judgment." *Id*. Ex. 4 at 16.

29. On October 21, the Antitrust Division sent NAR a new draft of a proposed Consent Judgment, which among other changes, re-inserted a reservation of rights clause. The new

reservation of rights clause omitted any reference to the Participation Rule. It provided: "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." *Id*. Ex. 5 at 16.

30. On October 26, NAR responded to the October 21 draft, including a comment indicating that:

> NAR will only agree to sign a consent decree including this provision [the reservation of rights clause] if DOJ provides written confirmation, prior to the execution of the decree, that it will issue a closing letter to NAR upon execution of the decree that confirms:
>
> 1. the Division has closed its investigation of the Participation Rule;
> 2. the Division has closed its investigation of the Clear Cooperation Policy;
> 3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
> 4. NAR has no obligation to respond to CID No. 30360 (in its entirety).

Id. Ex. 6 at 15.

31. Those same terms were conveyed in the cover email that transmitted NAR's comments on the Antitrust Division's October 21 draft:

> When you respond to this round of comments, we would like DOJ to please confirm, in writing, that when NAR agrees to sign the consent decree, DOJ will send a closing letter to NAR that will confirm:
>
> 1. the Division has closed its investigation of the Participation Rule;
> 2. the Division has closed its investigation of the Clear Cooperation Policy;
> 3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
> 4. NAR has no obligation to respond to CID No. 30360 (in its entirety).

> ***NAR will not agree to the consent decree without prior written assurances that these provisions will be included in the closing letter from DOJ***.

Id. Ex. 6 at 1 (emphasis added).

32. On October 28, the Antitrust Division accepted these terms, unconditionally, in an email from Counsel to AAG Delrahim (who was charged with negotiating with NAR). *Id*. Ex. 7 at 1. This email copied the Principal Deputy Assistant Attorney General for the Antitrust Division and another Counsel to AAG Delrahim. *Id*.

33. The proposed Consent Judgment did not provide the Antitrust Division the right to re-open the investigations it agreed to close or re-issue the CIDs the Antitrust Division agreed to withdraw.

34. The drafts of the Consent Judgment and the final proposed Consent Judgment did not include an integration or merger clause.

35. As is the regular practice for Antitrust Division Consent Judgments, NAR also agreed to enter a Stipulation with a number of commitments that applied to NAR during the time between the filing of the proposed Consent Judgment and its approval by the Court, including a provision that provided the Antitrust Division could withdraw from the proposed Consent Judgment—***and only the Consent Judgment***—before it was entered by the Court. *See id*. Ex. 8, Stipulation and Order ¶ 2, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 5 (D.D.C. Nov. 20, 2020).

36. Specifically, NAR agreed to a Stipulation (to which the proposed Consent Judgment was attached) that provided:

> [A] Final Judgment in the form attached as Exhibit A may be filed with and entered by the Court, upon the motion of the United States or upon the Court's own motion . . . provided that the United States has not withdrawn its consent. The United States may withdraw its consent at any time before the entry of the proposed Final Judgment by serving notice on Defendant and by filing that notice with the Court.

Id.

37. None of the drafts of the Stipulation or the final Stipulation allowed the Antitrust Division to re-open the investigations it agreed to close or re-issue the CIDs the Antitrust Division agreed to withdraw—they did not mention those investigations, the Participation Rule or the Clear Cooperation Policy, or the CIDs at all.

38. None of the drafts of the Stipulation or the final Stipulation included an integration or merger clause.

39. On November 19, the Antitrust Division filed in this Court a Complaint, the proposed Consent Judgment, and the Stipulation. *Id*. Ex. 9, Compl., *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 1 (D.D.C. Nov. 19, 2020); Ex. 10, Proposed Stipulation and Order, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 4-1 (D.D.C. Nov. 19, 2020); Ex. 11, Proposed Final Judgment, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 4-2 (D.D.C. Nov. 19, 2020).

40. Then-AAG Delrahim signed the Complaint. *Id*. Ex. 9, Compl. at 11, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 1 (D.D.C. Nov. 19, 2020).

41. The Complaint did not reserve the right for the Antitrust Division to re-open the investigations it agreed to close or re-issue the CIDs the Antitrust Division agreed to withdraw—it did not mention those investigations, the Participation Rule or the Clear Cooperation Policy, or the CIDs at all.

42. The Complaint did not include an integration or merger clause.

43. Consistent with the terms of the parties' agreement, no later than November 19, the Antitrust Division closed the investigations into the Participation Rule and Clear Cooperation

Policy and withdrew the CIDs related to these investigations, as was confirmed in a closing letter sent to NAR by the Division and signed by AAG Delrahim.

44. That letter stated:

> This letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.
>
> No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.

Id. Ex. 12.

45. The closing letter did not include a merger clause or integration clause.

46. Therefore, no later than November 19, 2020, the Antitrust Division had committed to close the investigations concerning the Participation Rule and the Clear Cooperation Policy, and withdraw the two CIDs related to those investigations.

47. On December 10, the Antitrust Division filed a Competitive Impact Statement with this Court, as is required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

48. The Competitive Impact Statement provided that "[t]he proposed Final Judgment prohibits NAR and its Member Boards from undertaking certain conduct and affirmatively requires NAR to take certain actions to remedy the antitrust violations alleged in the Complaint." *Id*. Ex. 13, Competitive Impact Statement at 11, *United States v. Nat'l Ass'n of REALTORS*®, No. 1:20-cv-3356, Dkt. No. 11 (D.D.C. Dec. 10, 2020).

49. In the Competitive Impact Statement, the Antitrust Division wrote that the changes to NAR rules in the proposed Consent Judgment "are designed to resolve the competitive concerns . . . as alleged in the Complaint." *Id.*

50. The Competitive Impact Statement did not reserve the right for the Antitrust Division to re-open the investigations it agreed to close or re-issue the CIDs the Antitrust Division agreed to withdraw—it did not mention those investigations, the Participation Rule or the Clear Cooperation Policy, or the CIDs at all.

51. The Competitive Impact Statement did not include an integration or merger clause.

52. On December 16, the Antitrust Division published notice of the Consent Judgment in the *Federal Register*, 85 Fed. Reg. 81489, as required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) ("Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment.").

53. The public notice did not reserve the right for the Antitrust Division to re-open the investigations it agreed to close or re-issue the CIDs the Antitrust Division agreed to withdraw—it did not mention those investigations, the Participation Rule or the Clear Cooperation Policy, or the CIDs at all.

54. The public notice did not include an integration or merger clause.

II. NAR Satisfied Its Obligations Under the Settlement Agreement

55. In reliance on the closing letter and as part of the overall settlement agreement, NAR agreed to the Consent Judgment and Stipulation. Moreover, pending approval by the Court, NAR agreed to take further actions in reliance on the settlement agreement.

56. In the Stipulation, NAR agreed to arrange for publication of notice of the Consent Judgment in a national newspaper no later than three business days after the Antitrust Division provided the text of the required notice, consistent with the requirements of the Antitrust Procedures and Penalties Act. *See* 15 U.S.C. § 16(c); Glass Decl. Ex. 8, Stipulation and Order ¶ 4,

United States v. Nat'l Ass'n of REALTORS®, No. 1:20-cv-3356, Dkt. No. 5 (D.D.C. Nov. 20, 2020).

57. In Section VI.A of the Consent Judgment, NAR agreed: "By not later than 30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address." Glass Decl. Ex. 11, Proposed Final Judgment § VI.A, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 4-2 (D.D.C. Nov. 19, 2020).

58. In Section V.B of the Consent Judgment, NAR agreed to "furnish notice of this action to all its Member Boards and MLS Participants." *Id.* § V.B.

59. In Section V.A of the Consent Judgment, NAR agreed: "By not later than 45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule changes that NAR proposes to adopt to comply with Paragraphs V.C-I of this Final Judgment." *Id.* § V.A.

60. NAR satisfied all of these obligations. *Id.* ¶ 15.

61. Relying on the commitments made by the Antitrust Division, multiple listing services affiliated with NAR and brokers who are members of NAR began to change their practices in reliance of the terms of the proposed Consent Judgment.

62. After the Consent Judgment was filed, NAR was sued in two follow-on class actions, which copied, in parts verbatim, the allegations in the Complaint that accompanied the Consent Judgment. *See* Compl., *Leeder v. The National Association of Realtors*, No. 1:21-cv-430,

Dkt. No. 1 (N.D. Ill. Jan. 25, 2021); Compl., *Conti v. San Francisco Association of Realtors*, No. 3:21-cv-1934, Dkt. No. 1 (N.D. Cal. Mar. 19, 2021).[1]

63. Without the benefit of the bargain it obtained on the settlement agreement—i.e., closure of the investigations concerning the Participation Rule and the Clear Cooperation Policy, and the withdrawal of the related CIDs—NAR would not have voluntarily undertaken any of these burdens.

III. After the Administration Changed, the Antitrust Division Breached Its Commitments

64. As required by the Consent Judgment, on January 4, 2021, NAR submitted to the Antitrust Division its proposal for the rule changes required under the Consent Judgment. Glass Decl. ¶ 15.

65. The Antitrust Division never responded to that proposal. *Id.* ¶ 16.

66. The Antitrust Division also never published and filed the public comments it received concerning the Consent Judgment, and its responses to those public comments, as is required by 15 U.S.C. § 16(d).

67. Instead, on April 15, 2021, Antitrust Division Staff contacted NAR's counsel to schedule a time to discuss the proposed Consent Judgment. *Id.* ¶ 17.

68. This started a series of discussions that continued at the pace dictated by the Antitrust Division, until June 30, when the Antitrust Division issued NAR an ultimatum and demanded that it give up the benefits of the settlement agreement.

[1] *Conti v. San Francisco Association of Realtors* was later voluntarily dismissed without prejudice. *See* Notice of Voluntary Dismissal, *Conti v. San Francisco Association of Realtors*, No. 3:21-cv-1934, Dkt. No. 42 (N.D. Cal. May 27, 2021).

A. The First Call (April 19, 2021)

69. On April 19, NAR's counsel and Antitrust Division Staff spoke by telephone. *Id.* ¶ 17.

70. During that call, Antitrust Division Staff conveyed—for the first time—that the Antitrust Division wanted to change the reservation of rights clause in the already-filed Consent Judgment.

71. During this discussion, Antitrust Division Staff read aloud the following proposed language, which it intended to replace the agreed-to reservation of rights clause: "The final judgment shall only terminate the claims expressly raised in the complaint. The final judgment shall not in any way affect any other charges or claims filed by the United States subsequent to the commencement of this action." *Id.* ¶ 18.

72. Antitrust Division Staff also said the Antitrust Division would not discuss NAR's proposed rule changes or anything else related to the Consent Judgment with NAR until NAR agreed to change the reservation of rights language in the Consent Judgment. *Id.* ¶ 19.

73. NAR's counsel told Antitrust Division Staff it would discuss the Antitrust Division's request with NAR. *Id.*

74. NAR's counsel asked whether the request to change the reservation of rights clause in the Consent Judgment was intended to modify any aspect of the Antitrust Division's commitment to close the its prior investigations or withdraw the related CIDs. *Id.*

75. Antitrust Division Staff responded that it was not prepared to answer that question. *Id.* Antitrust Division Staff also stated that the Antitrust Division generally planned to change the boilerplate reservation of rights language in all consent decrees in civil, non-merger matters. *Id.*

B. The Second Call (April 22, 2021)

76. On April 22, NAR's counsel and Antitrust Division Staff spoke again by telephone. *Id.* ¶ 20.

77. On that April 22 call, NAR's counsel told Antitrust Division Staff that NAR would consider modifying the reservation of rights clause, but NAR still did not understand the purpose of the change, given that the new language was so similar to the existing language in the Consent Judgment. *Id.* ¶ 21. (For example, the reservation was still expressly limited to the Consent Judgment.)

78. In response, Antitrust Division Staff indicated that the new language was intended to convey that only the claims asserted in the Complaint against NAR had been released. *Id.*

79. NAR's counsel again asked whether the request to change the reservation of rights clause in the Consent Judgment was intended to modify any aspect of the Antitrust Division's commitment to close its investigations and withdraw the related CIDs. *Id.* ¶ 22.

80. In response, Antitrust Division Staff asked NAR's counsel to describe their understanding of the closing letter. *Id.*

81. NAR's counsel explained that the Antitrust Division's commitments to (1) close the investigations of the Participation Rule and Clear Cooperation Policy; and (2) withdraw the related CIDs were the only benefits that NAR received from the settlement agreement, and thus the closing letter, which memorialized those commitments, was a key part of NAR's decision to enter into the settlement agreement, including the Stipulation and Consent Judgment. *Id.*

82. NAR's counsel expressly acknowledged that the Antitrust Division's commitments did not mean NAR had immunity from all future investigations. NAR's counsel told Antitrust Division Staff that the effect of the parties' agreement would depend on the nature and scope of any future investigation. *Id.* ¶ 23. In an illustrative example, NAR's counsel volunteered that if

NAR made material changes to the Participation Rule or Clear Cooperation Policy, the Antitrust Division would be able to investigate those changes. *Id.* NAR's counsel acknowledged that, if such an investigation were to be opened, it was possible there could be disagreement between NAR and the Antitrust Division about whether the new investigation breached the parties' agreement, but maintained that it made no sense to address that potential conflict before such a scenario arose. *Id.*

83. Antitrust Division Staff agreed to discuss the issue internally, and indicated that they would contact NAR's counsel within a few days. *Id.*

C. The Third Call (June 2, 2021)

84. Almost two months later, on June 1, Antitrust Division Staff asked for a third call, and NAR's counsel promptly agreed to have that call the next day. *Id.* ¶ 24.

85. During the June 2 call, Antitrust Division Staff claimed NAR's position was that it would only agree to modify the reservation of rights clause in the Consent Judgment if the Antitrust Division agreed that the closing letter forever barred any investigation of NAR. *Id.* ¶ 25.

86. NAR's counsel told Antitrust Division Staff, however, that NAR had never made such a demand. *Id.*

87. As NAR's counsel explained, NAR was only seeking to understand how the proposed change to the Consent Judgment's reservation of rights language might impact the Antitrust Division's commitment to close the investigations and withdraw the CIDs. *Id.*

88. NAR's counsel again affirmed that NAR would consider the change to the reservation of rights clause once it understood the Antitrust Division's position on how the change would impact the Antitrust Division's other commitments, if at all. *Id.*

89. As it did on April 22, NAR's counsel suggested that the Antitrust Division focus on the proposed rule changes that NAR provided almost six months earlier, and that the parties should avoid trying to resolve a hypothetical dispute that may never arise. *Id.*

90. Antitrust Division Staff ended the call, promising to get back to NAR promptly. *Id.*

C. The June 29, 2021 Letter

91. On June 29, the Antitrust Division sent a letter to NAR's counsel, which stated:

> Specifically, we sought consent from your client, the National Association of REALTORS® ("NAR"), to modify the Reservation of Rights provision in Section XI to eliminate any potential limitation on the future ability of the Division to investigate and challenge conduct by NAR that is not covered by the proposed Final Judgment.
>
> NAR, however, has conditioned its consent on the Division agreeing that a revised Reservation of Rights in no way limits NAR from arguing against any future investigation by the Division based on the letter that was sent to your colleague, Mr. William Burck, on November 19, 2020, where the Division informed you that it was closing its investigation. We cannot accept NAR's condition.

Id. Ex. 14 at 1.

92. Contrary to the claims in the letter, NAR had never conditioned its consent to change the reservation of rights language on anything.

93. Even though it took the Antitrust Division 27 days to send NAR a one-and-a-half-page letter, Antitrust Division Staff demanded to know by July 1 at noon (within forty-eight hours), whether NAR would "remove its condition and consent to modifying the Reservation of Rights provision in the proposed Final Judgment." *Id.*

94. NAR's counsel responded to the Antitrust Division by email about 24 hours later, acknowledging receipt and stating, "we will not be able to respond substantively by your July 1 deadline. We will respond as soon as we can." *Id.* Ex. 15 at 5.

95. The Antitrust Division replied by email, "[a]s we consider whether to grant you additional time, could you please provide us a date for when we can expect a response and an explanation for why you will not be able to respond by tomorrow?" *Id.*

96. NAR's counsel responded: "We are not asking DOJ to consider anything; we are telling you that we need more than 48 hours to respond to your letter. Nonetheless, the reason for more time is that your unilaterally imposed deadline is unreasonable, especially in light of the facts that it has been many months since the comment period ended, NAR has complied with all its obligations and DOJ has not responded to our 2020 submissions, and we have not heard from DOJ at all for over a month [sic]." *Id.* Ex. 15 at 4.

D. On July 1, the Antitrust Division Abruptly Withdrew from the Consent Judgment

97. On June 30, at 7:19 pm, Antitrust Division Staff wrote to NAR's counsel: "We understand NAR is insisting on a condition for its consent to which we cannot agree. If this remains NAR's position despite our request to remove the condition or we do not receive an answer to the contrary, then the Antitrust Division will conclude that NAR does not agree to modify the decree unencumbered by its condition. In such an event, we will take steps towards withdrawing our consent for the proposed Final Judgment starting at noon tomorrow." *Id.* Ex. 15 at 3-4.

98. The next morning, NAR's counsel responded: "Your threat to withdraw from the proposed consent decree is not something that DOJ has mentioned prior to your email of 7:19[ ]pm last night—less than 24 hours before your noon deadline. Due to the significance of that threat, the fact that the 'condition' you mention is simply that the DOJ abide by its agreement, and the reality that we are a membership organization that must involve several busy people in significant decisions, we cannot substantively respond to your letter today." *Id.* Ex. 15 at 3.

99. NAR's counsel still committed that NAR would respond to the Antitrust Division Staff's demand within two weeks (even with an intervening July 4th holiday). *Id.*

100. NAR's counsel also requested a meeting with the Acting-AAG for the Antitrust Division, Richard Powers, "before the DOJ makes a decision on whether to withdraw from the proposed consent decree." *Id.*

101. At 12:39 pm on July 1, Antitrust Division Staff emailed Ethan Glass, one of NAR's attorneys, indicating it had tried to reach him by calling his cell phone, and within 10 minutes, Mr. Glass responded that he was unable to speak for approximately two hours. *Id.* Ex. 15 at 2-3.

102. At 1:18 pm, Antitrust Division Staff replied, stating that Acting-AAG Powers was available to meet with NAR at 9:00 am on July 2, "but before he agree[d] to the meeting, he would first like to know what the purpose of the meeting is for him to assess whether it is worth holding." *Id.* Ex. 15 at 2. Antitrust Division Staff indicated that if NAR would not commit to accepting the Antitrust Division's demands by 2:00 pm—one hour before Mr. Glass was available to speak—Acting-AAG Powers would not give NAR an audience. *Id.*

103. Because Mr. Glass was temporarily unavailable, one of his partners responded to Antitrust Division Staff at 1:57 pm:

> The purpose of the Front Office meeting NAR has requested is to discuss the unprecedented step the Division is contemplating—withdrawing from a consent decree, not because of intervening changes in the market, but because the Division has second thoughts about a settlement a prior Senate-confirmed Assistant Attorney General negotiated and accepted. As far as we are aware, this has never happened before. And we had no idea that this course of action was being contemplated before you said so last night. That was the first time in our months-long discussions that the prospect of DOJ withdrawal from the consent decree has even been mentioned.

Id. Ex. 15 at 1-2.

104. At 2:45 pm, still before Mr. Glass was available at 3:00 pm, Antitrust Division Staff replied by email: "We explained that the current reservation does not adequately protect the

Division's ability to investigate in the future NAR rules that may harm competition. . . . It should be no surprise to you that, as we are at an impasse on amending the proposed decree, we need to move forward to resolve this matter . . . ." *Id.* Ex. 15 at 1.

105. At 3:57 pm, the Antitrust Division filed a notice with the district court, indicating it had withdrawn its consent to entry of the Consent Judgment, and at the same time, it voluntarily dismissed the lawsuit it had filed against NAR. *Id.* Ex. 16; Ex. 17, Notice of Voluntary Dismissal, *United States v. Nat'l Ass'n of REALTORS*®, No. 1:20-cv-3356, Dkt. No. 15 (D.D.C. July 1, 2021).

106. In its notice, the Antitrust Division stated: "After filing the Complaint and proposed Final Judgment, the United States sought Defendant's consent to amend the Reservation of Rights provision in Section XI of the proposed Final Judgment to eliminate any potential limitation on the future ability of the United States to investigate and challenge additional potential antitrust violations committed by Defendant." *Id.* Ex. 18, Notice of Withdrawal of Consent, *United States v. Nat'l Ass'n of REALTORS*®, No. 1:20-cv-3356, Dkt. No. 14 (D.D.C. July 1, 2021).

107. The Antitrust Division also issued a press release, which stated: "The department is taking this action to permit a broader investigation of NAR's rules and conduct to proceed without restriction." *Id.* Ex. 1.

108. In the press release, Acting-AAG Powers is quoted: "We cannot be bound by a settlement that prevents our ability to protect competition in a market that profoundly affects Americans' financial well-being." *Id.*

109. At or around 4:00 pm, roughly three minutes after the Antitrust Division filed its notice of withdrawal, Bloomberg published an article about the Antitrust Division's decision to withdraw from the proposed consent judgment, which also quoted Acting-AAG Powers' statement from the press release. *Id.* Ex. 19.

110. On July 6, two business days after withdrawing from the Consent Judgment, the Antitrust Division sent NAR CID No. 30729. This CID indicates that the Antitrust Division has re-opened the investigations it closed under the settlement agreement, including those concerning the Participation Rule and the Clear Cooperation Policy.

111. Nearly all of the requests in CID No. 30729 were copied, often almost verbatim, from the requests in the previous CIDs the Antitrust Division agreed to withdraw under the settlement agreement. *Id.* Ex. 20 (CID No. 29935); Ex. 21 (CID No. 30360); Ex. 22 (comparing CID requests).

ARGUMENT

I. The Antitrust Division Entered Into a Binding Commitment

112. "It is axiomatic that a settlement agreement," including a settlement agreement with a government agency, "is a contract." *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *see also Shaffer v. Veneman*, 325 F.3d 370, 372 (D.C. Cir. 2003) (settlement agreements with the government are enforceable contracts); *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 & n.62 (D.C. Cir. 1982) (collecting cases).

113. Indeed, the Antitrust Division recently affirmed that it is bound by its contractual commitments in settlement and non-prosecution agreements. *See* Glass Decl. Ex. 23, United States' Response in Opposition to Defendant's Motion to Dismiss the Superseding Indictment ("US Opposition") at 1-2, *United States v. Rodgers*, No. 4:20-cr-358-2 (E.D. Tex. July 16, 2021).

114. Here, the settlement agreement between NAR and the Antitrust Division was affirmed no later than November 19, 2020, when (1) the Antitrust Division sent a letter to NAR that was signed by then-AAG Delrahim, confirming the Antitrust Division had closed its investigations of the Participation Rule and Clear Cooperation Policy and withdrawn the related

CIDs; and (2) NAR agreed to the Consent Judgment and signed the Stipulation that the Antitrust Division filed with this Court.

115. The settlement was formed as a result of "an offer, an acceptance, and consideration passing between the parties." *United States ex rel. Morsell v. Symantec Corp.*, 471 F. Supp. 3d 257, 278 (D.D.C. 2020) (quoting *Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411, 414 (1995)); *see also id*. at 280 ("A contract with terms spread across a number of documents is far from the ideal of a single mutually signed document, but it is not unheard of as a form of contract.").

116. NAR made the offer: in exchange for the Division's commitments to close its investigations of the Participation Rule and Clear Cooperation Policy and withdraw the related CIDs, NAR would agree to a Consent Judgment and accompanying Stipulation.

117. The Antitrust Division accepted that offer.

118. Consideration was exchanged. *See Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 174 (D.D.C. 2007) (finding sufficient consideration for a settlement agreement because the parties "benefitted from the settlement agreement by achieving a clean resolution of the dispute" and "avoiding continuing litigation").

119. When negotiating the settlement, NAR made clear there would be no settlement agreement and it would not agree to a Consent Judgment without a commitment from the Antitrust Division to (a) close the investigations into the Participation Rule and the Clear Cooperation Policy; and (b) withdraw the related CIDs.

120. On October 26, 2020, NAR's counsel wrote to AAG Delrahim's Counsel:

> When you respond to this round of comments, we would like DOJ to please confirm, in writing, that when NAR agrees to sign the consent decree, DOJ will send a closing letter to NAR that will confirm:
>
> 1. the Division has closed its investigation of the Participation Rule;

> 2. the Division has closed its investigation of the Clear Cooperation Policy;
>
> 3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
>
> 4. NAR has no obligation to respond to CID No. 30360 (in its entirety).
>
> ***NAR will not agree to the consent decree without prior written assurances that these provisions will be included in the closing letter from DOJ***.

Glass Decl. Ex. 7 at 1 (emphasis added).

121. Two days later, AAG Delrahim's Counsel unconditionally accepted these terms:

> [O]nce the consent decree is filed, the Division will notify NAR in its closing letter that it has closed its investigation into the Participation Rule and the Clear Cooperation Policy and that NAR will have no obligation to respond to CID Nos. 29935 and 30360.

Id.

122. AAG Delrahim then authorized the Antitrust Division to move forward with the settlement, signed the Complaint that accompanied the Consent Judgment, and signed the closing letter.

123. As the Senate-confirmed Assistant Attorney General for the Antitrust Division, AAG Delrahim was "authorized, with respect to matters assigned to [his] . . . division[], to . . . [a]ccept offers in compromise in all nonmonetary cases." 28 C.F.R. § 0.160(a)(4). Thus, he "had authority to bind the United States in contract." *Symantec Corp.*, 471 F. Supp. 3d at 278 (quoting *Thermalon Indus.*, 34 Fed. Cl. at 414).

124. The commitment to close the investigations and withdraw the CIDs was therefore part of a binding contract.

125. Just prior to the filing of this Petition, Antitrust Division Staff suggested that the terms of the settlement agreement "established, at most, that the Division agreed that a letter would be issued closing the investigation." *Id.* Ex. 24 at 1.

126. But that position defies reason and common sense. NAR would not have agreed to enter into a consent decree in return for a worthless piece of paper that allowed the Antitrust Division to re-open the same investigations on a whim. Such an interpretation also would not be a good faith reading of the agreement, and the Antitrust Division is bound by the covenant of good faith and fair dealing. *See Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 800 (1993) ("Every contract, including those in which the Government is a party, contains an implied covenant of good faith and fair dealing."); *see also Alabama v. North Carolina*, 560 U.S. 330, 351 (2010) ("Of course every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." (cleaned up)); *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) ("The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner.").

127. Indeed, as the communications preceding the settlement agreement made clear, the benefit to NAR was the closing of the investigations and the withdrawing of the CIDs, and NAR simply sought a letter to "confirm" the Antitrust Division had done what it promised. *Id.* Ex. 7. The mere issuance of a letter did not discharge that commitment, as the Antitrust Division now suggests.

128. Even in the absence of the express agreement by the Antitrust Division—for example, if there were no contemporaneous written confirmation of the commitments made by the Antitrust Division—a contract was formed when NAR detrimentally relied on the Antitrust Division's promises. *See Gov't of Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3d Cir. 1980) ("When . . . [a] defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees."); *see also id.* at 365 n.14 (citing authorities that enforce plea proposals because a defendant performed some obligation of the

agreement before the government reneged); *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992) ("Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining could make a plea agreement binding." (cleaned up)); *Ramallo v. Reno*, 931 F. Supp. 884, 895 (D.D.C. 1996) ("Ramallo's reliance on the government's promise was reasonable, given that both she and the government understood the danger to her life involved with her cooperation with prosecutors and openly testifying against members of South American drug gangs. Estoppel is necessary to overcome the grave injustice that would befall Ramallo if she is deported. Finally, the public interest is furthered in ensuring that constitutional rights are upheld, that the government does not induce individuals to forfeit substantial rights in exchange for meaningless promises, and that persons in the American system of justice are encouraged to cooperate with the government."); *United States v. Minnesota Min. & Mfg. Co.*, 551 F.2d 1106, 1111 (8th Cir. 1977) (affirming dismissal of indictments where "the defendants acted in reliance upon the agreement to their detriment in performing the conditions required by the government").

129. In reliance on the Antitrust Division's promises to close the investigations and withdraw the CIDs, NAR agreed to the Consent Judgment and Stipulation, invested resources in publicizing and educating its members about the Consent Judgment, developed proposed changes to its rules to comply with the Consent Judgment, and subjected itself to the risk of follow-on litigation. Some of NAR's members, including brokers and multiple listing services operated by local associations, have changed rules and practices to align with the proposed Consent Judgment the Antitrust Division filed as part of its settlement with NAR.

130. Because all of those actions were taken in reliance on the commitment made by the Assistant Attorney General, the Antitrust Division is bound by its promises.

II. CID No. 30729 Is Barred by the Plain Terms of the Antitrust Division's Commitments

131. In his closing letter to NAR, AAG Delrahim confirmed that the Antitrust Division had closed its investigations into the Participation Rule and Clear Cooperation Policy and withdrawn the CIDs related to those investigations.

132. In its recent words and actions, the Antitrust Division has acknowledged that there was an agreement, and that the commitments made by AAG Delrahim would prevent the Antitrust Division from investigating the Participation Rule and Clear Cooperation Policy or issuing CIDs related to those rules.

133. In the notice of withdrawal from the Consent Judgment that it filed with the Court, the Antitrust Division stated that its commitments created a "potential limitation on the future ability of the United States to investigate and challenge additional potential antitrust violations committed by Defendant." Glass Decl. Ex. 18, Notice of Withdrawal of Consent at 1-2, *United States v. Nat'l Ass'n of REALTORS*®, No. 1:20-cv-3356, Dkt. No. 14 (D.D.C. July 1, 2021).

134. The Antitrust Division's press release was even more direct, stating, "[t]he department is taking this action to permit a broader investigation of NAR's rules and conduct to proceed without restriction." *Id.* Ex. 1. The press release continued, "[t]he proposed settlement will not sufficiently protect the Antitrust Division's ability to pursue future claims against NAR," and the Antitrust Division "cannot be bound by a settlement" that restricts its ability to investigate NAR. *Id.*

135. The Antitrust Division's June 29 letter stated that the Antitrust Division needed to change the reservation of rights language in the Consent Judgment "to eliminate any potential limitation on the future ability of the Division to investigate and challenge conduct by NAR that is not covered by the proposed Final Judgment." *Id.* Ex. 14.

136. The Consent Judgment, however, does not apply to conduct that is not discussed in the Consent Judgment or Complaint, which means the limitation of concern must have arisen from other aspects of the settlement agreement—specifically, the commitments to close the investigations and withdraw the related CIDs, which were memorialized in the closing letter.

137. The limitations acknowledged by the Antitrust Division remain in place today, because they came from the commitments affirmed in the closing letter, and the Antitrust Division had no right or ability to withdraw from those commitments.

138. The Antitrust Division breached those commitments when it issued CID No. 30729, which confirms the Antitrust Division has re-opened the closed investigations and seeks the same information that was requested in the withdrawn CIDs.

139. Indeed, CID No. 30729 repeats substantively identical, and often verbatim, the demands in the CIDs that AAG Delrahim agreed to withdraw as part of the settlement. *Id.* Ex. 22.

III. The Antitrust Division's Commitment Remains in Place Regardless of Whether It Withdraws From the Consent Judgment

140. The Antitrust Division has no right, under the law or the parties' agreements, to unilaterally modify or rescind the commitments it made in return for NAR agreeing to enter into a Consent Judgment and Stipulation.

A. The Antitrust Division Has No Legal Ability to Rescind Its Commitments

141. When the government enters into a settlement agreement to resolve civil claims, it is bound by the terms of the deal, just like any other litigant.

142. As numerous courts have held, "a settlement contract may not be unilaterally rescinded," and it may be enforced against a government agency over the agency's objection. *Burton v. Adm'r, Gen. Servs. Admin.*, No. 89-2338, 1992 WL 300970, at *3, *6 (D.D.C. July 10, 1992); *see also Watt*, 689 F.2d at 230.

143. In *United States v. U.S. Currency in the Sum of Six Hundred Sixty Thousand, Two Hundred Dollars ($660,200.00), More or Less*, 423 F. Supp. 2d 14, 25 (E.D.N.Y. 2006), an Assistant United States Attorney entered into an oral settlement agreement in a civil forfeiture action and sent the defendants an unexecuted stipulation, memorializing the terms of settlement. The government subsequently "decided not to finalize the settlement" and took the position it was not bound by the deal. *Id.* at 19. On claimants' motion, the court enforced the settlement agreement, even though the government claimed it had learned of new evidence indicating the claimants intended to use the disputed funds to finance terrorism. *See id.* at 33-34. Recognizing that, just like any other litigant, the government cannot back out of a duly authorized settlement simply because it "changed its mind," the court enforced the terms of the agreement. *Id.* (cleaned up). That decision was upheld by the Second Circuit on appeal. *See United States v. U.S. Currency in the Sum of Six Hundred Sixty Thousand, Two Hundred Dollars ($660,200.00), More or Less*, 242 F. App'x 750, 752 (2d Cir. 2007).

144. In *Burton v. Administrator, General Services Administration*, No. 89-2338, 1992 WL 300970, at *1 (D.D.C. July 10, 1992), the plaintiff filed suit against the General Services Administration under Title VII of the Civil Rights Act of 1964. The Assistant United States Attorney who was assigned to the case made a settlement offer to the plaintiff, in writing, that was generated by the General Services Administration's Office of General Counsel. *Id.* at *1. The plaintiff accepted that offer, and the parties stipulated to dismissal of the case. *Id.* at *2. Subsequently, the Assistant United States Attorney conveyed that the agency had "changed the terms of the settlement offer," and that, "if plaintiff was unwilling to accept the changed terms of settlement, [the government] would stipulate with plaintiff to request reopening the case." *Id.* The plaintiff sought to enforce the settlement agreement, and the government contested the validity of

the contract. *See id*. The court enforced the settlement agreement, holding, "[n]ot only did the responsible Assistant U.S. Attorney have the authority from the GSA's Office of General Counsel to make this offer to plaintiff, but evidence suggests that the responsible agency official approved of the terms of the offer." *Id*. at *6.

145. In *Western Watersheds Project v. U.S. Fish & Wildlife Service*, No. 06-277, 2008 WL 619336, at *2-3 (D. Idaho Feb. 29, 2008), the Department of Justice entered into a settlement and stipulation on behalf of the United States Fish and Wildlife Service. Before the stipulation was entered by the court, the Department attempted to back out of the agreement. *See id.* at *2. The district court rejected that maneuver, holding that, under standard contract principles, the Department was bound by the terms of the settlement agreement, and it entered the parties' stipulation. *See id.* at *3 ("There is no dispute that Williams and Lucas reached an agreement. There is also no dispute that Williams' superiors at the DOJ approved the agreement. Finally, there is no evidence to support a claim of mutual mistake, duress, coercion, or lack of consideration.").

146. In *United States v. McInnes*, 556 F.2d 436, 437-39 (9th Cir. 1977), radiation control monitors employed by the United States Navy sued the government when their compensation was altered by newly adopted regulations. Their attorney entered an oral settlement agreement with the attorney representing the government, which was subsequently confirmed in writing by the responsible Assistant Attorney General. *Id.* at 440. But before payment was made by the government, the plaintiffs were informed that the government "had decided not to complete performance of the agreement." *Id*. The Ninth Circuit rejected that argument, holding that the settlement agreement was enforceable, even though "the parties never signed the formal stipulation." *Id.* at 441.

147. Other courts have reached similar conclusions. *See Haggart v. United States*, 943 F.3d 943, 946 (Fed. Cir. 2019) (affirming "conclu[sions] that 'the Settlement Agreement was and remains a binding and enforceable contract' that '[t]he [G]overnment cannot avoid . . . even if it now has had a change of heart and wishes to back out'"); *Reed v. United States*, 717 F. Supp. 1511, 1516 (S.D. Fla. 1988) (enforcing a settlement agreement and holding that "the government may not rescind the agreement while the issue of its approval is before the court"), *aff'd*, *Reed v. United States*, 891 F.2d 878, 882 n.3 (11th Cir. 1990) ("The fact that the court did not approve the settlement before Benjamin's death does not make the agreement any less binding on the government.").

148. These cases have a unifying theme: "There is no question that a settlement agreement is a contract which, like any other contract, may not be unilaterally rescinded," and "[t]hat principle applies to the government as to any other party, and it applies irrespective of whether or not the agreement has yet been approved by the court." *Watt*, 689 F.2d at 234 (Greene, J., concurring in part and dissenting in part) (footnote omitted).

149. Any contrary contention could not be squared with "[t]he strong policies favoring enforcement of settlements," which "require that '[o]ne who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity.'" *Gaines v. Cont'l Mortg. & Inv. Corp.*, 865 F.2d 375, 378 (D.C. Cir. 1989) (quoting *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 630 (1948)).

150. Thus, the Antitrust Division, like any other party to a settlement agreement, is bound by the terms of the settlement agreement, and it has no inherent right to unilaterally rescind its settlement agreement with NAR.

B. The Antitrust Division Has No Contractual Right to Rescind Its Commitments

151. None of the documents memorializing the terms of the settlement agreement allowed the Antitrust Division to unilaterally back out of the deal on a whim.

152. The closing letter contains two paragraphs, and neither of them allows the Antitrust Division to unilaterally deprive NAR of the benefit of the settlement agreement.

153. The first paragraph of the closing letter provides that "[t]his letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively." Glass Decl. Ex. 12. This paragraph reflects the benefit of the settlement agreement to NAR: The Antitrust Division's confirmation that it had in fact complied with its commitment to close its investigations and withdraw the related CIDs.

154. The second paragraph of the closing letter provides: "No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." *Id.* That sentence prevents NAR from arguing that the Antitrust Division had made an affirmative determination about the legality of the Participation Rule or the Clear Cooperation Policy, presumably so that NAR would not argue in pending private civil litigation that the Antitrust Division had approved of either rule.

155. As is commonplace in settlement agreements, NAR maintained that in settling and agreeing to the Consent Judgment, it was not "admitting liability, wrongdoing, or the truth of any allegations in the Complaint." *Id.* Ex. 11, Proposed Final Judgment at 1, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 4-2 (D.D.C. Nov. 19, 2020).

156. Similarly, in its closing letter, the Antitrust Division stated that "no inference should be drawn from the Division's decision to close its investigation into these rules, policies or

practices not addressed by the consent decree," *id.* Ex. 12, to maintain that the letter was not intended as an admission or affirmative determination about any potential liability relating to the Participation Rule and Clear Cooperation Policy.

157. The second paragraph does not alter or limit the Antitrust Division's commitment to close the investigations identified in the letter and withdraw the related CIDs.

158. The second paragraph also does not give the Antitrust Division the right to re-open the same investigations it agreed to close or re-issue the CIDs it agreed to withdraw.

159. To interpret the "inference" paragraph in any other way, as may be suggested by the Antitrust Division, would render the first paragraph (and thus the Antitrust Division's prior commitments) meaningless.

160. Moreover, that paragraph in the closing letter was never discussed before the Antitrust Division sent it to NAR, *see id.* Ex. 7, so it cannot change the meaning of the settlement agreement, *see Williams v. Washington Metro. Area Transit Auth.*, 537 F. Supp. 2d 220, 222 (D.D.C. 2008) (holding that "misgivings about his acceptance of" a settlement "do not constitute grounds for relieving a party of his obligations to comply with the terms of [it]"); *Ulliman Schutte Const., Inc. v. Emerson Process Mgmt. Power & Water Sols.*, No. 02-1987, 2007 WL 1794105, at *7 (D.D.C. June 19, 2007) ("A party cannot avoid the effects of a valid oral settlement agreement because of second thoughts or because one of the company's principals decides to go in a different direction than the other.").

161. When the Antitrust Division negotiates an agreement that preserves its ability to pursue further investigations, it expressly includes such a reservation in the agreement. *See* Glass Decl. Ex. 23, US Opposition at 6, *United States v. Rodgers*, No. 4:20-cr-358-2 (E.D. Tex. July 16,

2021) ("The NDUs thus unambiguously contemplated a future prosecution of Rodgers and expressly provided that the United States *could* prosecute such a case.").

162. No such provision was negotiated as part of the Antitrust Division's settlement with NAR.

163. Under such circumstances, the Antitrust Division also includes a merger clause or integration clause in the agreement, making clear that all aspects of the agreement have been reduced to a single document. *Id.* at 7-8 ("Moreover, each agreement included a merger clause. The first NDU stated: 'This letter constitutes the entire understanding between the United States and you.' The second NDU stated: 'This letter and attached Addendum [with video teleconference provisions] constitute the entire understanding between the United States and you in connection with this interview.'" (footnote and citations omitted)).

164. The government similarly includes merger or integration clauses in civil consent decrees when such clauses are applicable. *See, e.g.*, *id.* Ex. 25, Consent Decree § XXII, *United States v. Empire Iron Mining Partnership*, No. 2:19-cv-95, Dkt. No. 8 (W.D. Mich. Sept. 4, 2019) ("This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree."); Ex. 26, Consent Decree § XXI, *United States v. Dyno Nobel, Inc.*, No. 3:19-cv-984, Dkt. No. 11 (D. Or. Sept. 20, 2019) (same).

165. There is no merger or integration clause in any of the documentation surrounding NAR's settlement agreement with the Antitrust Division.

166. While the proposed Consent Judgment does contain a reservation of rights clause, by its terms that clause only purported to reserve the Antitrust Division's rights as to the relief discussed in the ***Consent Judgment itself***: "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." Glass Decl. Ex. 11, Proposed Final Judgment § IX, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 4-2 (D.D.C. Nov. 19, 2020) (emphasis added).

167. The Consent Judgment does not mention the Participation Rule, the Clear Cooperation Policy, the Antitrust Division's commitment to close the investigations concerning those rules, or its commitment to withdraw the related CIDs.

168. Similarly, the Stipulation also provided the Antitrust Division with the ability to back out of the relief afforded in the ***Consent Judgment*** only, but like the reservation of rights provision, it did not give the Antitrust Division the ability to back out of the settlement agreement or the closing letter:

> [A] ***Final Judgment*** in the form attached as Exhibit A may be filed with and entered by the Court, upon the motion of the United States or upon the Court's own motion . . . provided that the United States has not withdrawn its consent. The United States may withdraw its consent at any time before the entry of the proposed Final Judgment by serving notice on Defendant and by filing that notice with the Court.

Id. Ex. 8, Stipulation and Order ¶ 2, *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356, Dkt. No. 5 (D.D.C. Nov. 20, 2020).

169. The Stipulation does not mention the Participation Rule, the Clear Cooperation Policy, the Antitrust Division's commitment to close the investigations concerning those rules, or its commitment to withdraw the related CIDs.

II. The Civil Investigative Demand Exceeds the Limits on the Antitrust Division's Statutory Authority

170. Under the Antitrust Civil Process Act, the government may not seek information through a CID that "would be protected from disclosure under . . . the standards applicable to subpenas or subpenas duces tecum issued . . . in aid of a grand jury investigation," or "the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate." 15 U.S.C. § 1312(c)(1) (spelling in original). The Court may set aside or modify any CID that fails to satisfy those standards. *See* 15 U.S.C. § 1314(b), (e). The Act gives courts "broad discretion to protect [CID recipients] from an unreasonable demand." *Hyster Co. v. United States*, 338 F.2d 183, 186 (9th Cir. 1964).

A. The CID Violates the Grand Jury Standards

171. CID No. 30729 violates the grand jury standards incorporated into the Antitrust Civil Process Act.

172. For example, when "the government promise[s], as a part of [a] plea agreement, that it [will] not require [a party] to 'cooperate with law enforcement,'" it may not "[j]ust short of a month later, . . . ha[ve] [the same party] subpoenaed to testify before a grand jury." *United States v. Garcia*, 956 F.2d 41, 42, 44 (4th Cir. 1992).

173. Courts have recognized that such subpoenas, if permitted, would effectively allow the government to unilaterally unwind the terms of an agreement.

174. "If the Government were allowed to issue [a] grand jury subpoena to [a party] and hold him in contempt for refusing to testify, [the party] would not get the full benefit of" a "plea agreement [that] included an affirmative right to refuse to cooperate with the Government." *United States v. Singleton*, 47 F.3d 1177, at *2, *4 (9th Cir. 1995) (unpublished table decision).

175. Grand jury subpoenas issued in those circumstances are not enforceable. *See id*. at *4; *Garcia*, 956 F.2d at 45-46; *see also United States v. Pearce*, 792 F.2d 397, 400 (3d Cir. 1986) ("If the terms of the plea bargain protected Pearce from having to testify, then the order compelling him to testify [before a grand jury] was invalid.").

176. CID No. 30729 contravenes these principles. The CID seeks to re-issue the very CIDs that the Antitrust Division agreed to withdraw. And just as the government cannot seek information through a grand jury subpoena that it promised to forego as part of a binding agreement, *see Garcia*, 956 F.2d at 44-46; *Singleton*, 47 F.3d 1177, at *2-4, the Antitrust Division cannot re-open civil antitrust investigations it agreed to close, unconditionally, as part of a settlement agreement.

B. The CID Violates the Federal Rules of Civil Procedure

177. CID No. 30729 also violates the civil discovery standards that are incorporated into the CID statute because information requests served under the Federal Rules of Civil Procedure are limited to "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1).

178. Judged by that standard, most of the demands in CID No. 30729, including all of the handful that fall outside the scope of the CIDs the Antitrust Division agreed to withdraw as part of the settlement agreement, are far overbroad and would impose substantial, unjustifiable burdens on NAR.[2]

[2] This Petition does not address Request No. 10 in CID No. 30729 because that request was withdrawn by the Antitrust Division on August 27, 2021. *See* Glass Decl. Ex. 24 at 1.

179. ***Requests for "all documents" are overbroad and seek privileged information.*** Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, and 18 seek "all documents" concerning a broad array of subject matters.

180. The problem with requests for "all documents" is "such obviously overbroad discovery . . . [requests] are not designed to capture relevant, unique information; rather, they are designed to capture great swaths of information without regard to whether that information is likely relevant and unique." *United States Equal Emp. Opportunity Comm'n v. George Washington Univ.*, No. 17-cv-1978, 2020 WL 3489478, at *7 (D.D.C. June 26, 2020).

181. That is also the problem with CID No. 30729. Even if Request Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, 17, and 18 sweep in some information that would arguably be relevant to an antitrust investigation, they are designed to "capture great swaths of information without regard to" the information's relevance. *Id.*

182. ***Request No. 4 simply harasses NAR and seeks privileged information.*** Request No. 4 demands documents about NAR's use of an Antitrust Division program called the Business Review. This request is apparently intended to harass NAR, which is not permissible under the Federal Rules. *See Annapolis Citizens Class Overcharged for Water-Sewer, by Loudon Operations, LLC v. Stantec, Inc.*, No. 20-2603, 2021 WL 75766, at *9 (D.D.C. Jan. 8, 2021) (discovery requests may "not [be] interposed for any improper purpose, such as to harass" (quoting Fed. R. Civ. P. 26(g))); *see also Chattanooga Pharm. Ass'n v. United States Dep't of Justice*, 358 F.2d 864, 866-67 (6th Cir. 1966) (setting aside a CID the Antitrust Division issued "to intimidate" and "harass").

183. The Business Review process is intended to "provide[] a way for businesses to determine how the Division may respond to proposed joint ventures or other business conduct."

U.S. Dep't of Justice, *Introduction to Antitrust Division Business Reviews* at 1 (2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf (citing 28 C.F.R. § 50.6).

184. There is no reasonable basis for the Antitrust Division to seek internal documents about a person's decision to seek a business review, and certainly not where, as here, the request for a business review was withdrawn.

185. ***Request Nos. 14 and 15 are unduly burdensome and seek privileged information.*** Request No. 14 seeks "all documents relating to any former or potential withdrawal of any broker from an MLS," *id.* Ex. 2, Spec. 14, and Request No. 15 asks NAR to "[d]escribe all instances in the past 15 years in which any broker has withdrawn from an MLS, and identify each broker," *id.* Ex. 2, Spec. 15.

186. There are hundreds of REALTOR®-association owned multiple listing services spread throughout the country. *Id.* ¶ 39. Some have tens of thousands of members. *Id.*

187. The burdens associated with these requests are untenable, assuming any such information is even within NAR's control.

PRAYER FOR RELIEF

188. NAR respectfully requests that this Court:

a. Set aside CID No. 30729 in its entirety, because it is barred by the Antitrust Division's commitments to close the investigations into the Participation Rule and Clear Cooperation Policy and withdraw the CIDs related to those investigations, and because it exceeds the Antitrust Division's statutory authority; or

b. in the alternative, modify CID No. 30729 to remove all of the overly broad, unduly burdensome, or harassing requests; and

c. grant such other and further relief as is just and proper.

Dated: September 13, 2021

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Ethan C. Glass (D.D.C. Bar No. 1034207)
William A. Burck (D.C. Bar No. 979677)
Michael D. Bonanno (D.C. Bar No. 998208)
1300 I Street NW, Suite 900
Washington, District of Columbia 20005-3314
Tel: (202) 538-8000
Fax: (202) 538-8100
ethanglass@quinnemanuel.com
williamburck@quinnemanuel.com
mikebonanno@quinnemanuel.com

Attorneys for Petitioner National Association of REALTORS®

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF REALTORS®,
430 North Michigan Ave.,
Chicago, IL 60611,

Petitioner,

v.

UNITED STATES OF AMERICA
950 Pennsylvania Avenue, NW
Washington, DC 20530,

U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION
450 Fifth Street NW, Suite 4000
Washington, DC 20530,

RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General, Antitrust Division
450 Fifth Street NW, Suite 4000
Washington, DC 20530,

Respondents.

Case No. 1:21-cv-2406

DECLARATION OF ETHAN GLASS IN SUPPORT OF THE NATIONAL ASSOCIATION OF REALTORS'® PETITION TO SET ASIDE, OR IN THE ALTERNATIVE MODIFY, CIVIL INVESTIGATIVE DEMAND NO. 30729

DECLARATION OF ETHAN GLASS

I, Ethan Glass, declare as follows under 28 U.S.C. § 1746:

1. I am a partner at the law firm of Quinn, Emanuel, Urquhart & Sullivan, LLP, counsel to Petitioner National Association of REALTORS® ("NAR") in the above-captioned matter.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Press Release No. 21-620, issued by the United States Department of Justice on July 1, 2021, and titled, "Justice Department Withdraws from Settlement with the National Association of Realtors." The press release is available at: https://www.justice.gov/opa/pr/justice-department-withdraws-settlement-national-association-realtors.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Civil Investigative Demand No. 30729, issued by the Antitrust Division on July 6, 2021.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a tolling agreement, dated July 25, 2021, and entered into by the Antitrust Division and NAR.

5. Attached hereto as **Exhibit 4** is a true and correct copy of an October 16, 2020 email I sent to attorneys at the Antitrust Division, attaching edits to a draft proposed final judgment.

6. Attached hereto as **Exhibit 5** is a true and correct copy of an October 21, 2020 email from Samer Musallam, Senior Counsel, Office of the Assistant Attorney General, Antitrust Division, to counsel for NAR, attaching edits to a draft proposed final judgment.

7. Attached hereto as **Exhibit 6** is a true and correct copy of an October 26, 2020 email from Mike Bonanno, counsel for NAR, to attorneys at the Antitrust Division, attaching edits to a draft proposed final judgment.

8. Attached hereto as **Exhibit 7** is a true and correct copy of an October 28, 2020 email from Samer Musallam, Senior Counsel, Office of the Assistant Attorney General, Antitrust Division, to counsel for NAR, attaching edits to a draft proposed final judgment.

9. Attached hereto as **Exhibit 8** is a true and correct copy of the Stipulation and Order (Dkt. No. 5) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020).

10. Attached hereto as **Exhibit 9** is a true and correct copy of the Complaint (Dkt. No. 1) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020).

11. Attached hereto as **Exhibit 10** is a true and correct copy of the Proposed Stipulation and Order (Dkt. No. 4-1) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020).

12. Attached hereto as **Exhibit 11** is a true and correct copy of the Proposed Final Judgment (Dkt. No. 4-2) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020).

13. Attached hereto as **Exhibit 12** is a true and correct copy of a November 19, 2020 letter from Makan Delrahim, Assistant Attorney General, Antitrust Division, to counsel for NAR.

14. Attached hereto as **Exhibit 13** is a true and correct copy of the Competitive Impact Statement (Dkt. No. 11) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. Dec. 10, 2020).

15. By January 4, 2021, NAR had "(i) appoint[ed] an Antitrust Compliance Officer and (ii) identif[ied] to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address." Ex. 11 § VI.A. NAR had "furnish[ed] notice of [the

Complaint and Consent Judgment in *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C.)] to all its Member Boards and MLS Participants." *Id.* § VI.B. And NAR had "submit[ted] to the United States . . . Rule changes that NAR propose[d] to adopt to comply with Paragraphs V.C-I of [the Consent Judgment in *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C.)]." *Id.* § V.A.

16. The Antitrust Division has not approved, rejected, or sought changes to NAR's proposed rule changes.

17. On April 15, 2021, Antitrust Division Staff contacted me and other counsel for NAR to schedule a time to discuss the Consent Judgment. I participated in the requested discussion by telephone on April 19, 2021.

18. On April 19, 2021, Antitrust Division Staff conveyed, for the first time, that the Antitrust Division wanted to change the reservation of rights clause in the proposed Consent Judgment that had been filed in *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-03556 (D.D.C.). Antitrust Division Staff asked for NAR's consent to change the reservation of rights clause, and read aloud the following replacement language: "The final judgment shall only terminate the claims expressly raised in the complaint. The final judgment shall not in any way affect any other charges or claims filed by the United States subsequent to the commencement of this action."

19. During the April 19 call, Antitrust Division Staff also indicated that the Antitrust Division would not discuss NAR's proposed rule changes or anything else related to the Consent Judgment with NAR until NAR agreed to change the reservation of rights language in the Consent Judgment. NAR's counsel agreed to discuss the request with NAR, and asked whether the request to change the reservation of rights clause was intended to modify any aspect of the overall

settlement or the Antitrust Division's agreement to close the investigations or withdraw the CIDs. Antitrust Division Staff responded that it was not prepared to answer that question. Antitrust Division Staff also stated that the Antitrust Division generally planned to change the boilerplate reservation of rights language in all consent decrees in civil, non-merger matters.

20. I, along with other counsel for NAR, spoke to Antitrust Division Staff again on April 22, 2021.

21. During the April 22 call, NAR's counsel told Antitrust Division Staff that NAR would consider modifying the reservation of rights clause, but NAR still did not understand the purpose of the change, given that the new language was so similar to the existing language in the Consent Judgment. In response, Antitrust Division Staff indicated that the new language was intended to convey that only the claims asserted in the Complaint against NAR had been released.

22. Also during the April 22 call, NAR's counsel again asked whether the request to change the reservation of rights clause in the Consent Judgment was intended to modify any aspect of the Antitrust Division's commitment to close its investigations or withdraw the related CIDs. In response, Antitrust Division Staff asked NAR's counsel to describe NAR's understanding of the closing letter. NAR's counsel explained that the Antitrust Division's commitments to close the investigations and withdraw the related CIDs were the only benefits that NAR received from the settlement agreement, and thus were a key part of NAR's agreement to enter into the settlement agreement and consent to the Stipulation and Consent Judgment.

23. NAR's counsel also expressly acknowledged that the Antitrust Division's commitments did not mean NAR had immunity from all future investigations. NAR's counsel told Antitrust Division Staff that the effect of the parties' agreement would depend on the nature and scope of any future investigation. NAR's counsel volunteered that if NAR made material

changes to the Participation Rule or Clear Cooperation Policy, the Antitrust Division would be able to investigate those changes. And NAR's counsel acknowledged that, if such an investigation were to be opened, it was possible there could be disagreement between NAR and the Antitrust Division about whether the new investigation breached the parties' agreement, but maintained that it made no sense to address that potential conflict in the abstract. In response, Antitrust Division Staff agreed to discuss the issue internally and indicated that they would contact NAR's counsel within a few days.

24. Almost two months later, on June 1, 2021, the Antitrust Division asked for a third call, and NAR's counsel promptly agreed to have that call the next day. I participated in the June 2 call.

25. During the June 2 call, Antitrust Division Staff claimed that NAR's position was that it would only agree to modify the reservation of rights clause in the Consent Judgment if the Antitrust Division agreed that the closing letter forever barred any investigation of NAR. NAR's counsel explained that NAR never made such a demand. NAR was only seeking to understand how the proposed change to the Consent Judgment's reservation of rights language might impact the closing letter or the Antitrust Division's commitment to close the investigations and withdraw the CIDs. NAR's counsel again affirmed that NAR would consider the change to the reservation of rights clause once it understood the Antitrust Division's position on how that change would impact its commitment, if at all. And NAR's counsel suggested that the Antitrust Division focus on the proposed rule changes that NAR provided approximately six months earlier, and that the parties should avoid trying to resolve a hypothetical dispute that may never arise. Antitrust Division Staff again told NAR's counsel that they would internally discuss NAR's position and get back to NAR promptly.

26. Attached hereto as **Exhibit 14** is a true and correct copy of a June 29, 2021 letter from Miriam Vishio, Assistant Chief, Civil Conduct Task Force, Antitrust Division, to counsel for NAR.

27. Attached hereto as **Exhibit 15** is a true and correct copy of an email thread that includes emails exchanged between counsel for NAR and Antitrust Division Staff from June 29, 2021, though July 1, 2021.

28. Attached hereto as **Exhibit 16** is a true and correct copy of the Notice of Electronic Filing associated with the Notice of Withdrawal of Consent (Dkt. No. 14) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. July 1, 2021).

29. Attached hereto as **Exhibit 17** is a true and correct copy of the Notice of Voluntary Dismissal (Dkt. No. 15) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. July 1, 2021).

30. Attached hereto as **Exhibit 18** is a true and correct copy of the Notice of Withdrawal of Consent (Dkt. No. 14) from *United States v. Nat'l Ass'n of REALTORS®*, No. 1:20-cv-3356 (D.D.C. July 1, 2021).

31. Attached hereto as **Exhibit 19** is a true and correct copy of an article by David McLaughlin, titled "DOJ Ditches Realtor Antitrust Pact Citing Need for Probe," and dated July 1, 2021, 4:00 PM EDT. The article is available at: https://www.bloomberg.com/news/articles/2021-07-01/doj-pulls-out-of-realtor-antitrust-pact-citing-need-for-probe.

32. Attached hereto as **Exhibit 20** is a true and correct copy of Civil Investigative Demand No. 29935, issued by the Antitrust Division on April 12, 2019.

33. Attached hereto as **Exhibit 21** is a true and correct copy of Civil Investigative Demand No. 30360, issued by the Antitrust Division on June 29, 2020.

34. Attached hereto as **Exhibit 22** is a true and correct copy of a chart that compares the information requests in Civil Investigative Demand No. 30729 to the information requests in Civil Investigative Demand Nos. 29935 and 30360.

35. Attached hereto as **Exhibit 23** is a true and correct copy of the United States' Response in Opposition to Defendant's Motion to Dismiss the Superseding Indictment (Dkt. No. 48) from *United States v. Rodgers*, No. 4:20-cr-358-2 (E.D. Tex. July 16, 2021).

36. Attached hereto as **Exhibit 24** is a true and correct copy of an August 30, 2021 email from Miriam Vishio, Assistant Chief, Civil Conduct Task Force, Antitrust Division, to counsel for NAR. The attachments to the email are omitted.

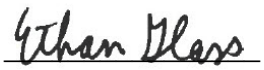
37. Attached hereto as **Exhibit 25** is a true and correct copy of the Consent Decree (Dkt. No. 8) from *United States v. Empire Iron Mining Partnership*, No. 2:19-cv-96 (W.D. Mich. Sept. 4, 2019).

38. Attached hereto as **Exhibit 26** is a true and correct copy of the Consent Decree (Dkt. No. 11) from *United States v. Dyno Nobel, Inc.*, No. 3:19-cv-984 (D. Or. Sept. 20, 2019).

39. According to an interactive map accessible at https://www.nar.realtor/mls-map-of-the-national-association-of-realtors, there are hundreds of REALTOR®-association owned multiple listing services in the United States, and some of the larger multiple listing services have tens of thousands of members.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

This declaration was executed on September 13, 2021, in the District of Columbia.



Ethan Glass

EXHIBIT 1

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 1, 2021

Justice Department Withdraws from Settlement with the National Association of Realtors

Today the Justice Department's Antitrust Division filed a notice of withdrawal of consent to a proposed settlement with the National Association of Realtors (NAR). The department has also filed to voluntarily dismiss its complaint without prejudice. The department determined that the settlement will not adequately protect the department's rights to investigate other conduct by NAR that could impact competition in the real estate market and may harm home sellers and home buyers. The department is taking this action to permit a broader investigation of NAR's rules and conduct to proceed without restriction.

"The proposed settlement will not sufficiently protect the Antitrust Division's ability to pursue future claims against NAR," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "Real estate is central to the American economy and consumers pay billions of dollars in real estate commissions every year. We cannot be bound by a settlement that prevents our ability to protect competition in a market that profoundly affects Americans' financial well-being."

As the real estate industry's leading trade association, NAR has rules and policies that affect millions of real estate brokers and agents and, in turn, impact millions of American home buyers and sellers, who, according to reported industry data, paid over $85 billion in residential real estate commissions last year. The department filed a complaint and proposed settlement on Nov. 19, 2020. The complaint alleged that NAR established and enforced certain rules and policies that illegally restrained competition in residential real estate services. The proposed settlement sought to remedy those illegal practices and encourage greater competition among realtors, but it also prevented the department from pursuing other antitrust claims relating to NAR's rules.

Under a stipulation signed by the parties and entered by the court, the department has sole discretion to withdraw its consent to the proposed settlement. The proposed settlement may also be modified with consent from the department and from NAR. The department sought NAR's agreement to modify the settlement to adequately protect and preserve the department's rights to investigate and challenge additional conduct by NAR, but the department and NAR could not reach an agreement. Because the settlement resolved only some of the department's concerns with NAR's rules, this step ensures that the department can continue to enforce the antitrust laws in this important market.

Topic(s):
Antitrust

Press Release Number:
21-620

Component(s):
Antitrust Division

Updated July 1, 2021

EXHIBIT 2

United States Department of Justice

Antitrust Division
Washington, DC 20530

To: National Association of REALTORS®
430 N. Michigan Ave.
Chicago, IL 60611-4087
c/o Katie Johnson, General Counsel

Civil Investigative Demand Number: **30729**

This civil investigative demand is issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, in the course of an antitrust investigation to determine whether there is, has been, or may be a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 by conduct, activities, or proposed action of the following nature: policies, guidelines, rules, or practices that may unreasonably restrain competition in the provision of residential real estate brokerage services in metropolitan areas throughout the United States.

You are required by this demand to produce all documentary material described in the attached schedule that is in your possession, custody, or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. You are also required to answer the interrogatories on the attached schedule. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in which event the reasons for the objection must be stated in lieu of an answer. Such production of documents and answers to interrogatories shall occur on the 5th day of August, 2021 at 5:00 p.m.

The production of documentary material and the interrogatory answers in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production and/or responsible for answering each interrogatory.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available and the interrogatory answers shall be submitted: Owen Kendler (custodian) and Miriam Vishio (deputy custodian), U.S. Dept. of Justice, Antitrust Division, Financial Services, Fintech, and Banking Section, 450 Fifth Street NW, Suite 4000, Washington, DC 20530.

Inquiries concerning compliance should be directed to Ethan Stevenson at 202-615-4564 or Miriam Vishio at 202-460-6680.

Your attention is directed to 18 U.S.C. § 1505, printed in full on the reverse side of this demand, which makes obstruction of this investigation a criminal offense. The information you provide may be used by the Department of Justice in other civil, criminal, administrative, or regulatory cases or proceedings.

Issued in Washington, D.C., this 6th day of July, 2021.

/s/ Richard A. Powers
Acting Assistant Attorney General

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress -

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Form of Certificate of Compliance*

I/We have read the provisions of 18 U.S.C. § 1505 and have knowledge of the facts and circumstances relating to the production of the documentary material and have responsibility for answering the interrogatories propounded in Civil Investigative Demand No. _____. I/We do hereby certify that all documentary material and all information required by Civil Investigative Demand No. _____ which is in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to a custodian named therein.

If any documentary material otherwise responsive to this demand has been withheld or any interrogatory in the demand has not been fully answered, the objection to such demand and the reasons for the objection have been stated in lieu of production or an answer.

Signature _____

Title _____

Sworn to before me this _____ day of

_____, 20___.

_____

Notary Public

*In the event that more than one person is responsible for producing the documents and answering the interrogatories, the certificate shall identify the documents and interrogatories for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided by 28 U.S.C. § 1746.

CIVIL INVESTIGATIVE DEMAND FOR DOCUMENTS AND INFORMATION ISSUED TO NATIONAL ASSOCIATION OF REALTORS®

Unless otherwise indicated or modified by the Department of Justice, each specification of this Demand requires a complete search of the Association. In the Department's experience, modifications to this Demand may reduce the burden of searching for responsive documents and information in a way that is consistent with the Department's needs. The Association is encouraged to propose such modifications, but all modifications must be agreed to in writing by the Department.

SPECIFICATIONS

1. Submit all minutes (including attachments) of meetings of (a) the Association's Board of Directors or any committees thereof relating to MLS rules or NAR's code of ethics and (b) NAR's Multiple Listing Issues & Policies Committee and any predecessor thereof.

2. Submit all documents relating to any policy, guideline, rule, or practice:

   a. requiring listing brokers to make an offer of compensation to buyer brokers to list a home on an MLS;

   b. conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants;

   c. prohibiting, restricting, or inhibiting display or publication to consumers (including potential home buyers, clients, or customers) of the compensation offered by listing brokers to cooperating brokers;

   d. prohibiting buyer brokers from making the submission of an executed offer to purchase contingent on the listing broker's agreement to modify the offer of compensation or using the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation;

   e. permitting Realtors® to represent their services as free or without cost;

   f. encouraging or requiring MLS members, syndicators, purchasers, or users of MLS data or operators of IDX sites or VOWs, when displaying MLS listings, to separate MLS and non-MLS listings or to treat MLS and non-MLS listings differently any other way;

   g. permitting listing brokers to make offers of compensation to other MLS participants that vary based on the identity of the cooperating broker; and

   h. regulating, inhibiting, restricting, prohibiting, or impeding the negotiation of offers of cooperative compensation between brokers.

For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this Specification, please follow the default Timing instruction articulated below.

3. Submit all documents relating to any policy, guideline, rule, practice, or software enabling or permitting brokers to search for, filter, or exclude MLS listings based on the level or type of cooperative compensation offered by a listing broker.

   For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, practice, or software, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this Specification, please follow the default Timing instruction articulated below.

4. Submit all documents relating to any possible, proposed, or adopted policy, guideline, rule, or practice that restricts a brokers' marketing of off-MLS listings (such as NAR's Clear Cooperation Policy) or increases the incentives for brokers to list all properties with MLSs (such as the proposed policy described in NAR's September 18, 2018, request for a Business Review Letter to the Department of Justice Antitrust Division (subsequently withdrawn)).

   For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this specification, please follow the default Timing instruction articulated below.

5. Submit all documents relating to the purpose or the expected or actual effect of any change in Northwest MLS's rules announced in July 2019 and implemented on October 1, 2019, including all communications relating to any change.

6. Submit all documents relating to brokers steering potential buyers toward or away from homes for sale based on the amount of cooperative compensation offered by a listing broker.

7. Submit all documents relating to any possible or actual rebates of any broker commission or any offer of any gift card or other benefit to any home seller or buyer, including all communications relating to such rebates or offers between NAR and (a) any personnel of any state regulatory agency or legislature or (b) any personnel of any association of Realtors®.

8. Submit all documents relating to the benefits of membership in MLSs and the role of MLSs in the market for real estate brokerage services.

9. Submit all documents relating to or produced by NAR in the *Moehrl* Antitrust Litigation or the *Sitzer* Antitrust Litigation.

10. Submit all documents relating to *United States v. National Association of Realtors®*, Case No. 1:20-sv-3356 (D.D.C.), including all communications with NAR members about the filed Complaint or proposed Final Judgment and any contemplated changes to any NAR policy, guideline, rule, or practice related to the Antitrust Division's investigation into or settlement with NAR.

11. Submit documents sufficient to show all of NAR's policies, guidelines, rules, and practices existing currently or at any time during 2018 or thereafter, relating to:

    a. the retention and destruction of documents, including the retention, storage, deletion, and archiving of electronically stored information, including e-mail; or

    b. the use of personal electronic devices or personal email for NAR business.

12. Submit all documents relating to any allegation that the Association is behaving or has behaved in an anticompetitive manner.

13. Identify all local associations of Realtors® and local MLSs currently affiliated with the Association.

14. Submit all documents relating to any former or potential withdrawal of any broker from an MLS.

15. Describe all instances in the past 15 years in which any broker has withdrawn from an MLS, and identify each broker.

16. Describe any rationale for any policy, guideline, rule, or practice requiring listing brokers to make an offer of compensation to buyer brokers to list a home on an MLS.

17. Submit all studies either performed or commissioned by NAR relating to broker commissions and any underlying data.

18. Submit all documents discussing, relating to, analyzing, or relying on any study produced in response to Specification 17.

DEFINITIONS

The following definitions apply for the purposes of this Demand:

1. The terms "**the Association**" or "**NAR**" means National Association of Realtors®, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of

the foregoing. The terms "parent," "subsidiary," "affiliate," and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between the Association and any other person.

2. The term "**broker**" means a person licensed by a state to provide real-estate brokerage services to either a buyer or seller in a real-estate transaction and includes any listing agent or buyer agent or sales associate who is affiliated with a broker.

3. The term "**Collaborative Work Environment**" means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, Collaborative Work Environments are often configured as separate and closed environments, each one of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative Work Environments include Microsoft SharePoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems ("CMS") (e.g., Drupal), wikis, and blogs.

4. The term "**Data Dictionary**" means documentation of the organization and structure of the databases or data sets that is sufficient to allow their reasonable use by the Department, including, for each table of information: (a) the name of the table; (b) a general description of the information contained; (c) the size in both number of records and megabytes; (d) a list of fields; (e) the format, including variable type and length, of each field; (f) a definition for each field as it used by the Association, including the meanings of all codes that can appear as field values; (g) the fields that are primary keys for the purpose of identifying a unique observation; (h) the fields that are foreign keys for the purpose of joining tables; and (i) an indication of which fields are populated.

5. The term "**documents**" means all written, printed, or electronically stored information ("ESI") of any kind in the possession, custody, or control of the Association, including information stored on social media accounts like Twitter or Facebook, chats, instant messages, text messages, other Messaging Applications, and documents contained in Collaborative Work Environments and other document databases. "Documents" includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, "documents" excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

6. The term "**documents sufficient to show**" means documents sufficient to provide the Department with a true and correct disclosure of the factual matter requested.

7. The term "**identify**" means to state:

   a. in the case of a person other than a natural person: name, principal address, and telephone number; and

b. in the case of a natural person: name, employer, business address, business telephone number, business email, and title or position.

8. The term "**IDX**" means Internet Data Exchange.

9. The term "**Messaging Application**" refers to any electronic method used by the Association and its employees to communicate with each other or entities outside the Association for business purposes. "Messaging Application" include platforms for email, chats, instant messages, text messages, and other methods of group and individual communication (e.g., Microsoft Teams, Slack). "Messaging Application" may overlap with "Collaborative Work Environment."

10. The term "**MLS**" means multiple-listing service.

11. The term "***Moehrl* Antitrust Litigation**" means the lawsuit brought in the United States District Court for the Northern District of Illinois captioned *Moehrl v. National Association of Realtors®*, 19-1610 & 19-2544.

12. The term "**Northwest MLS**" means the Northwest Multiple Listing Service based in Washington.

13. The term "**person**" includes the Association and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

14. The term "**plans**" includes proposals, recommendations, or considerations, whether finalized or adopted.

15. The term "**policy, guideline, rule, or practice**" includes both optional or recommended policies, guidelines, rules, or practices.

16. The terms "**Sensitive Personally Identifiable Information**" or "**Sensitive PII**" mean information or data that would identify an individual, including a person's Social Security Number; or a person's name, address, or phone number in combination with one or more of their (a) date of birth; (b) driver's license number or other state identification number, or a foreign country equivalent; (c) passport number; (d) financial account number; or (e) credit or debit card number.

17. The terms "**Sensitive Health Information**" or "**SHI**" mean information or data about an individual's health, including medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

18. The term "***Sitzer* Antitrust Litigation**" means the lawsuit brought in the United States District Court for the Western District of Missouri captioned *Sitzer v. National Association of Realtors®*, 19-332.

19. The term "**VOW**" means Virtual Office Website.

INSTRUCTIONS

Timing

1. All references to year refer to calendar year. Unless otherwise specified, this Demand calls for documents, data, and other information created, altered, or received since January 1, 2018. For interrogatory responses, submit a separate response for each year or year-to-date unless otherwise specified. If calendar-year data are not available, supply fiscal-year data indicating the twelve-month period covered, and submit the best estimate of calendar-year data.

Production Format

2. Department representatives must approve the format and production method of any documents, data, or other information before the Association makes an electronic production in response to this Demand. Before preparing its production, the Association must contact the Department to explain what materials are available and how they are stored. This discussion must include Association personnel who are familiar with its electronically stored information and databases/data sets.

3. Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Demand, the Association must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Association must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and Association terminology. For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically significant samples of documents categorized as non-responsive documents by the algorithm.

4. If the Department agrees to narrow the scope of this Demand to a limited group of custodians, a search of each custodian's files must include files of their predecessors; files maintained by their assistants or under their control; and common or shared databases or data sources maintained by the Association that are accessible by each custodian, their predecessors, or assistants.

5. Submit responses to this Demand in a reasonably usable format as required by the Department in the letter sent in connection with this Demand. Documents must be complete and unredacted, except for privilege and for any Sensitive Personally Identifiable Information or Sensitive Health Information redacted pursuant to Instruction

6. Documents must be submitted as found and ordered in the Association's files and must not be shuffled or otherwise rearranged. The Association is encouraged to submit copies of hard-copy documents electronically (with color hard copies where necessary to interpret the document) in lieu of producing original hard-copy documents. Unless otherwise agreed to by the Department, produce electronic documents in electronic form only. Electronic productions must be free of viruses. The Department will return any infected media for replacement, which may delay the Association's date of compliance with this Demand.

6. Do not produce any Sensitive PII or SHI before discussing the information with Department representatives. If any document responsive to a particular specification contains Sensitive PII or SHI that is not responsive to that specification, redact the unresponsive Sensitive PII or SHI before producing the document. Provide any index of documents prepared by any person in connection with your response to this Demand that lists such redacted documents by document control number. If the index is available in electronic form, provide it in that form.

7. Provide any index of documents prepared by any person in connection with your response to this Demand. If the index is available in electronic form, provide it in that form.

8. Data called for by this Demand must be submitted electronically in a reasonably useable compilation that will allow the Department to access the information it contains. Producing a database or data set in its entirety often does not satisfy this requirement. For the Department to be able to access and interpret data, the Association must provide, for each database, a description of each database or data set to be produced, including: (1) its software platform; (2) its type (e.g., flat, relational, or enterprise); (3) the sources (e.g., other databases or individuals) used to populate the database; (4) for relational or enterprise databases, documents specifying the relationships among tables (e.g., an entity relationship diagram); (5) any query forms; (6) any regularly prepared reports produced from that database; (7) the entity within the Association that maintains and updates the data; and (8) a Data Dictionary and any other keys that decode or interpret the data, including, for each table in the database:

   a. the name of the table;

   b. a general description of the information contained;

   c. the size in both number of records and megabytes;

   d. a list of fields;

   e. the format, including variable type and length, of each field;

   f. a definition for each field as it is used by the Association, including the meanings of all codes that can appear as field values;

g. the fields that are primary keys for the purpose of identifying a unique observation;

h. the fields that are foreign keys for the purpose of joining tables; and

i. an indication of which fields are populated.

It is likely that only a subset or compilation of the contents of any particular database or data set will need to be produced. After providing the information above, counsel and knowledgeable personnel from the Association should discuss with Department representatives what constitutes a sufficient production from the database or data set in a reasonably useable format.

9. The Association must continue to preserve documents or data contained in disaster recovery systems or backup media that may contain information responsive to this Demand. If you have any questions, please contact the Department representative identified below to discuss your obligation to preserve or search backup media.

10. Produce all non-privileged portions of any responsive document (including non-privileged or redacted attachments) for which a privilege claim is asserted. Each document withheld in whole or in part from production based on a claim of privilege must be assigned a unique privilege identification number and separate fields representing the beginning and ending document control numbers and logged as follows:

a. Each log entry must contain, in separate fields: privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; date of the document; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the anticipated litigation for any work-product claim and the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter sufficiently detailed to enable the Department to assess the privilege claim and the facts relied upon to support that claim.

b. Include a separate legend containing an alphabetical list (by last name) of each name on the privilege log, identifying titles, company or association affiliations, the members of any group or email list on the log (e.g., the Board of Directors) and any name variations used for the same individual.

c. On the log and the legend, list all attorneys acting in a legal capacity with the designation ESQ after their name (include a space before and after the "ESQ").

d. Produce the log and legend in electronic form that is both searchable and sortable. Upon request, the Association must submit a hard copy of the log and legend.

e. Department representatives will provide an exemplar and template for the log and legend upon request.

f. Any document created by the Association's in-house counsel or the Association's outside counsel that has not been distributed outside the Association's in-house counsel's office or the Association's outside counsel's law firm does not have to be logged. But if the document was distributed to any attorney who does not work exclusively in the Association's in-house counsel's office or who has any business responsibilities, it must be logged. Unlogged documents are subject to any preservation obligations the Association or counsel may have.

11. If the Association is unable to answer a question fully, it must supply all available information; explain why such answer is incomplete; describe the efforts made by the Association to obtain the information; and list the sources from which the complete answer may be obtained. If the information that allows for accurate answers is not available, submit best estimates and describe how the estimates were derived. Estimated data should be followed by the notation "est." If there is no reasonable way for the Association to estimate, provide an explanation.

12. If documents, data, or other information responsive to a particular specification no longer exists for reasons other than the Association's document retention policy, describe the circumstances under which it was lost or destroyed, describe the information lost, list the specifications to which it was responsive, and list persons with knowledge of such documents, data, or other information.

13. If the Association previously produced a document responsive to this Demand to the Department, it is not required to produced that document again; however, for any such documents, the Association must identify the document control numbers or other identifying information, if document control numbers are not available.

14. To complete this Demand, the Association must submit the certification on the reverse of the Civil Investigative Demand form, executed by the official supervising compliance with this Demand, and notarized.

Direct any questions the Association has relating to the scope or meaning of anything in this Demand or suggestions for possible modifications thereto Ethan Stevenson at 202-615-4564 or Miriam Vishio at 202-460-6680. The response to this Demand must be addressed to the attention of Miriam Vishio and delivered between 8:30 a.m. and 5:00 p.m. on any business day to 450 Fifth Street, NW, Suite 11100, Washington, DC 20001. If the Association wishes to submit its response by U.S. mail, please call Ethan Stevenson or Miriam Vishio for mailing instructions.

EXHIBIT 3

U.S. Department of Justice

Antitrust Division

Liberty Square Building

450 5th Street, N.W.
Washington, DC 20001

July 25, 2021

Michael D. Bonanno
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW
Suite 900
Washington, DC 20005

Re: Civil Investigative Demand No. 30729

Dear Mike:

This Tolling Agreement ("Agreement") is made between the United States, by and through its counsel, the U.S. Department of Justice Antitrust Division, and the National Association of REALTORS® (NAR), collectively referred to as the "Parties" and each is a "Party".

The United States and NAR agree to toll and extend the deadline for NAR to file a petition to modify or set aside CID No. 30729 pursuant to 15 U.S.C. § 1314 until (and including) September 13, 2021.

The United States agrees it will not oppose a petition filed by NAR to modify or set aside CID No. 30729 that is filed no later than September 13, 2021 on grounds that it is untimely.

The United States agrees to extend the deadline for compliance with CID No. 30729 until (and including) September 13, 2021.

Except as otherwise stated in this Agreement, the United States and NAR expressly acknowledge and agree that by entering into this Agreement they are not modifying or waiving any rights or defenses which they might otherwise possess as of the date of this Agreement, including any argument that CID No. 30729 should be set aside, modified, or enforced.

This Agreement constitutes the entire agreement between the United States and NAR with respect to the subject matter of tolling the deadlines under 15 U.S.C. § 1314 for CID No. 30729, and it supersedes all other agreements concerning the deadlines under 15 U.S.C. § 1314 for CID No. 30729 that may exist, written or oral.

The covenants, obligations and undertakings of the Parties hereto are the sole and only consideration of this Agreement; no representations, promises, or inducements have been made by any of them hereto other than those which appear in this Agreement. Nothing contained herein shall be construed as either a waiver or admission of liability by any Party hereto.

This Agreement will not be admissible in any proceeding or trial, except to enforce the Agreement.

This Agreement may only be modified or amended by a writing signed by both of the Parties.

This Agreement shall become effective when it is signed and dated by a duly authorized representative for each Party. By signing this Agreement, the signatory for the United States attests that he or she is an antitrust investigator who was named in CID No. 30729, as that term is defined under 15 U.S.C. § 1314, and thus is authorized to grant an extension of the deadlines under that statute on behalf of the United States.

* * * * * * *

Please indicate your agreement with the above by signing and returning a copy of this letter.

Sincerely,

/s/ Miriam R. Vishio

Miriam R. Vishio
Assistant Chief, Civil Conduct Task Force
U.S. Department of Justice
Antitrust Division

SO AGREED:

Counsel for National Association of REALTORS®

Signature: _____

Printed Name: William A. Burck

Title: Partner

Date: July 25, 2021

EXHIBIT 4

Peter Benson

From: Ethan Glass
Sent: Friday, October 16, 2020 10:06 AM
To: Musallam, Samer (ATR); William Burck
Cc: Murray, Michael (ATR); Shaw, David (ATR); Mike Bonanno
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Attachments: US v NAR Proposed Final Judgment 2020.10.16.docx

Thank you very much Samer. We think this is very close. We have a few changes based on the intricacies of the business and to more clearly follow the term sheet. Attached is a redline. Can we have a call today (after 2) so we can walk you through these, and to talk about the letter Makan mentioned that gives us relief from the investigations? Best, eg

From: Musallam, Samer (ATR) [mailto:Samer.Musallam@usdoj.gov]
Sent: Wednesday, October 14, 2020 1:09 PM
To: William Burck <williamburck@quinnemanuel.com>; Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>
Subject: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Dear Bill and Ethan – as discussed during last week's conversation with Makan, I am attaching for your review and comment a draft proposed Final Judgment between NAR and the Division, as well as a Stipulation and Order to be filed concurrently with the PFJ. In the interests of expediency, we would appreciate if you could please provide us with any comments to either of these pleadings by the end of the day on Friday.

In the meantime, if you have any questions, please don't hesitate to reach out.

Best,

Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

10/~~13~~16/2020 Draft

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL ASSOCIATION OF REALTORS®,

Defendant.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on _____, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. § 1,

AND WHEREAS, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

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

AND WHEREAS, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to 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. "NAR" and "Defendant" mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. "Broker" means a Person licensed by a state to provide services to a buyer ("buyer Broker") or seller ("listing Broker") 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. ~~The term "Broker" includes any Person who possesses a Broker's license and any other Person (such as an agent or sales associate) who is affiliated with such a Broker.~~

D. "Management" means all officers, directors, committee chairs, and board members of NAR, or any other Person with management or supervisory responsibilities for NAR's operations.

E. "Member Board" means any state or local Board of REALTORS® or Association of REALTORS®, including any city, county, inter-county, or inter-state Board of REALTORS® or Association of REALTORS®, and any MLS owned or controlled by, in whole or in part, or affiliated with, any such Board of REALTORS® or Association of REALTORS®.

F. "MLS Participant" means a member or user of, a participant in, or a subscriber to an MLS owned or controlled, in whole or in part, or affiliated with, a Member Board.

G. "MLS" means a multiple-listing service.

~~H. "Participation Rule" means any NAR Rule requiring a listing Broker to offer compensation to a buyer Broker for each property that a listing Broker lists on an MLS, including NAR's Policy Statement 7.9 ("Definition of MLS Participant") in the 2020 NAR *Handbook on Multiple Listing Policy*, as may be amended, or any other NAR Rule reflecting that requirement, such as Policy Statement 7.23 ("Information Specifying the Compensation on Each Listing Filed with a Multiple Listing Service of an Association of REALTORS®") in the 2020 NAR *Handbook on Multiple Listing Policy*, as may be amended.~~

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

~~J.~~I. "Rule" means any final rule, draft rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR ~~or a Member Board~~.

III. APPLICABILITY

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment, its affiliation with or membership in NAR, or 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

A. NAR ~~and its Member Boards~~ must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying ~~in MLS listings~~ the compensation offered to other MLS Participants~~, such as the 2020 NAR *Handbook on Multiple Listing Policy*: Policy Statement 7.58 ("Internet Data Exchange (IDX) Policy")~~;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to ~~buyers~~ a client at no cost to the ~~buyer~~client~~, such as Standard of Practice 12-1 of the NAR *Code of Ethics and Standards of Practice*~~;

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes ~~or lockbox keys~~ of those properties listed on an MLS~~, including such policies as the 2020 NAR *Handbook on Multiple Listing Policy:* Policy Statement 7.31 ("Lock Box Security Requirements")~~.

V. REQUIRED CONDUCT

A. By not later than ~~thirty~~ ninety days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule NAR proposes to adopt to comply with Paragraphs V.C-I of this proposed Final Judgment. The United States shall promptly review the proposed Rules and respond in writing to either approve the proposed Rule(s) or request modifications to the proposed Rules. If the United States requests modifications to the proposed Rules, it and NAR shall meet-and-confer on the proposed Rules until they come to language that is mutually agreeable.

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States ~~in its sole discretion~~.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this

proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field~~an information field~~ specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers ~~an~~ any MLS database field ~~information field~~ specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that require all NAR-affiliated MLSs and MLS Participants to publish to ~~consumers~~ clients information about the amount of compensation offered to other MLS Participants ~~(i) via MLS listings; and (ii) via real-estate listings or information about real estate provided by any MLS to any third party real-estate listings (e.g., Zillow, Redfin, etc.), including through any Internet Data Exchange~~.

F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that:

1. repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the ~~buyer~~client;
2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the buyer; and
3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to the buyer.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that require all Member Boards and MLSs to:

1. prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker ~~or the name of the brokerage or agent~~; and

2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers~~,~~ based on the level of compensation offered to the buyer Broker~~, or by the name of the brokerage or agent~~.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules~~, the content of which must first have been approved in writing by the United States in its sole discretion,~~ that require all Member Boards and MLSs to amend their rules to prohibit, discourage, or recommend against the eligibility of any licensed real estate agent or agent of a Broker, ~~accessing~~to access, with seller approval, the lockboxes ~~or lockbox keys~~ of those properties listed on an MLS~~, including such policies as the 2020 NAR *Handbook on Multiple Listing Policy*: Policy Statement 7.31 ("Lock Box Security Requirements")~~.

I. By not later than 10 days after entry of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule

or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

~~J. By not later than 30 days after entry of this Final Judgment, NAR must obtain, and retain for the duration of this Final Judgment, a certification from each Member Board that each Member Board has received, read, and, understands this Final Judgment, the NAR Rules adopted in compliance with Section V, and that the Member Board has been advised and understands that the Member Board must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so.~~

~~K. By not later than 60 days after entry of this Final Judgment, NAR must obtain, and retain for the duration of this Final Judgment, a certification from each MLS Participant that each MLS Participant has received, read, and understands this Final Judgment, the NAR Rules adopted in compliance with Section V, and that the MLS Participant has been advised and understands that the MLS Participant must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so.~~

~~L.~~J. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section V.

VI. ANTITRUST COMPLIANCE

A. By not later than thirty days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the

Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. ~~The Defendant's initial appointment and replacement of an Antitrust Compliance Officer is subject to the approval of the United States in its sole discretion.~~ The Antitrust Compliance Officer shall be the General Counsel of NAR or report directly to the General Counsel of NAR.

B. The Antitrust Compliance Officer must personally or through the engagement of experienced outside antitrust counsel:

1. by not later than 30 days after entry of this Final Judgment, furnish to all of Defendant's Management a copy of this Final Judgment, the Competitive Impact Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;
2. by not later than 30 days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide Defendant's Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;
3. annually brief the Defendant's Management on the meaning and requirements of this Final Judgment and the antitrust laws;
4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 days after such succession;

5. obtain from all members of Management, by not later than 30 days after that person's receipt of this Final Judgment, a certification that the person (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that ~~any Person's~~Defendant's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant ~~and any other Person who violates this Final Judgment~~;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to the Defendant's Management and employees that they must disclose to the Antitrust Compliance Officer information concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a ~~potential~~ violation, must cease or modify

the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any ~~potential~~ violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 days of Management's or the Antitrust Compliance Officer's learning of any ~~potential~~ violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the ~~potential~~ violation, including a description of (1) any communications constituting the ~~potential~~ violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2) all steps taken by the Antitrust Compliance Officer or Management to remedy the ~~potential~~ violation.

E. Defendant must have its ~~CEO or CFO, and its~~ General Counsel~~,~~ certify in writing to the United States, ~~45~~ no later than 90 days after the Final Judgement is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant,

Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

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

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may 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, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information, at 28 C.F.R. § 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all

applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant ten (10) calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a

preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional

term of at least four years following the filing of the enforcement action, (2) all appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ~~10~~ 5 years from the date of its entry, except that ~~after five years from the date of its entry,~~ this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the continuation of this Final Judgment no longer is necessary or in the public interest.

~~XI. UNITED STATES' RESERVATION OF RIGHTS~~

~~Nothing in this Final Judgment shall limit the right of the United States to investigate or bring future actions to prevent or enjoin violations of the antitrust laws concerning any NAR Rule, including any rules relating to the payment of Broker commissions or offers of compensation (e.g. NAR's Participation Rule) or any other Rule adopted or enforced by NAR or any Member Board, that is not already specifically enjoined by this Final Judgment.~~

X~~I~~I. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant):

Chief
Office of Decree Enforcement and Compliance
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

XIII. 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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. 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.

Date: _____

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

_____
United States District Judge

EXHIBIT 5

Peter Benson

From: Musallam, Samer (ATR) <Samer.Musallam@usdoj.gov>
Sent: Wednesday, October 21, 2020 11:44 AM
To: Ethan Glass; William Burck
Cc: Murray, Michael (ATR); Shaw, David (ATR); Mike Bonanno
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Attachments: US v NAR Proposed Final Judgment 2020.10.21 (DOJ Redline to NAR 2020.10.16 version).docx

[EXTERNAL EMAIL]

Hi Ethan – I have attached a redline to the edits you sent last Friday. There are likely a few issues we will need to talk through, but I think we are pretty close. Unfortunately, today is pretty jammed up, but I am free tomorrow anytime between 12:30 – 3pm and after 3:30pm if you would like to set up a call.

Best - Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Friday, October 16, 2020 10:06 AM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

Thank you very much Samer. We think this is very close. We have a few changes based on the intricacies of the business and to more clearly follow the term sheet. Attached is a redline. Can we have a call today (after 2) so we can walk you through these, and to talk about the letter Makan mentioned that gives us relief from the investigations? Best, eg

From: Musallam, Samer (ATR) [mailto:Samer.Musallam@usdoj.gov]
Sent: Wednesday, October 14, 2020 1:09 PM
To: William Burck <williamburck@quinnemanuel.com>; Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>
Subject: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Dear Bill and Ethan – as discussed during last week's conversation with Makan, I am attaching for your review and comment a draft proposed Final Judgment between NAR and the Division, as well as a Stipulation and Order to be filed concurrently with the PFJ. In the interests of expediency, we would appreciate if you could please provide us with any comments to either of these pleadings by the end of the day on Friday.

In the meantime, if you have any questions, please don't hesitate to reach out.

Best,

Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

10/~~16~~21/2020 Draft

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL ASSOCIATION OF REALTORS®,

Defendant.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on _____, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. § 1,

AND WHEREAS, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

~~And WHEREAS, Defendant has not admitted and does not admit the truth of the allegations set forth in the Amended Complaint or admit to any liability or wrongdoing;~~

AND WHEREAS, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to 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. "NAR" and "Defendant" mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. "Broker" means a Person licensed by a state to provide services to a buyer ("buyer Broker") or seller ("listing Broker") 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.

D. "Management" means all officers, directors, committee chairs, and board members of NAR, or any other Person with management or supervisory responsibilities for NAR's operations.

E. "Member Board" means any state or local Board of REALTORS® or Association of REALTORS®, including any city, county, inter-county, or inter-state Board of

REALTORS® or Association of REALTORS®, and any MLS owned or controlled by, in whole or in part, or affiliated with, any such Board of REALTORS® or Association of REALTORS®.

F. "MLS Participant" means a member or user of, a participant in, or a subscriber to an MLS owned or controlled, in whole or in part, or affiliated with, a Member Board.

G. "MLS" means a multiple-listing service.

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

I. "Rule" means any final rule, draft rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR or a Member Board.

III. APPLICABILITY

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment~~,~~ or its affiliation with or membership in NAR~~, or 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

A. NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to [a client] at no cost to the [client~~;~~];

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

V. REQUIRED CONDUCT

A. By not later than ~~ninety~~45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule NAR proposes to adopt to comply with Paragraphs V.C-I of this proposed Final Judgment. The United States shall promptly review the proposed Rules and respond in writing to either approve the proposed Rule(s) or ~~request~~require modifications to the proposed

Rules. ~~If the United States requests modifications to the proposed Rules, it and NAR shall meet and confer on the proposed Rules until they come to language that is mutually agreeable.~~

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States in its sole discretion.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this

proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all NAR-affiliated MLSs and MLS Participants to publish to [clients] information about the amount of compensation offered to other MLS Participants (i) via MLS listings; and (ii) via real-estate listings or information about real estate provided by any MLS to any third party real-estate listings (e.g., Zillow, Redfin, etc.), including through any Internet Data Exchange.

~~E.~~F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules ~~that require all NAR-affiliated MLSs and MLS Participants to publish to clients information about the amount of compensation offered to other MLS Participants.~~, the content of which must first have been approved in writing by the United States in its sole discretion, that:

~~F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules that:~~

1. repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the [client~~;~~];
2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the buyer; and

3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to the buyer.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to:

1. prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker~~; and~~ or the name of the brokerage or agent; and
2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to amend their rules to prohibit, discourage, or recommend against the eligibility of any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

I. By not later than 10 business days after entry of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

J. By not later than 30 calendar days after entry of this Final Judgment, NAR must obtain, and retain for the duration of this Final Judgment, a certification from each Member Board that each Member Board has received, read, and, understands this Final Judgment, the NAR Rules adopted in compliance with Section V, and that the Member Board has been advised and understands that the Member Board must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so.

K. By not later than 60 calendar days after entry of this Final Judgment, NAR must obtain, and retain for the duration of this Final Judgment, a certification from each MLS Participant that each MLS Participant has received, read, and understands this Final Judgment, the NAR Rules adopted in compliance with Section V, and that the MLS Participant has been advised and understands that the MLS Participant must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so.

~~J.~~L. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section V.

VI. ANTITRUST COMPLIANCE

A. By not later than ~~thirty~~30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. ~~–~~The Defendant's initial appointment and replacement of an Antitrust Compliance Officer ~~shall be the General Counsel of NAR or report directly~~is subject to the ~~General Counsel~~approval of ~~NAR~~the United States in its sole discretion.

.

B. The Antitrust Compliance Officer must ~~personally or through the engagement of experienced outside antitrust counsel:~~:

1. by not later than 30 calendar days after entry of this Final Judgment, furnish to all of Defendant's Management a copy of this Final Judgment, the Competitive Impact Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;
2. by not later than 30 calendar days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide

Defendant's Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;

3. annually brief the Defendant's Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 calendar days after such succession;

5. obtain from all members of Management, by not later than 30 calendar days after that ~~person's~~Person's receipt of this Final Judgment, a certification that the person (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that ~~Defendant's~~any Person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant and any other Person who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to the Defendant's Management and employees that they must disclose to the Antitrust Compliance Officer information

concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 calendar days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a potential violation, must cease or modify the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 calendar days of Management's or the Antitrust Compliance Officer's learning of any potential violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the potential violation, including a description of (1) any communications constituting the potential violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2) all steps taken by the Antitrust Compliance Officer or Management to remedy the potential violation.

E. Defendant must have its CEO or CFO, and its General Counsel certify in writing to the United States, no later than ~~90~~45 calendar days after the Final Judgement is entered and

then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

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

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may 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, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information, at 28 C.F.R. § 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant ten ~~(10)~~ calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action, (2) all appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire 7 years from the date of its entry, except that after 5 years from the date of its entry, ~~except that~~ this Final Judgment may be terminated upon notice by the United States to the Court and ~~Defendants~~Defendant that the continuation of this Final Judgment no longer is necessary or in the public interest.

~~XI~~XI. UNITED STATES' RESERVATION OF 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.

XII. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant):

Chief
Office of Decree Enforcement and Compliance
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

XIII. 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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. 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.

Date: _____

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

_____

United States District Judge

EXHIBIT 6

Peter Benson

From: Mike Bonanno
Sent: Monday, October 26, 2020 6:29 PM
To: Musallam, Samer (ATR); Ethan Glass; William Burck
Cc: Murray, Michael (ATR); Shaw, David (ATR)
Subject: Re: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Attachments: 2020.10.26 NAR cmts DRAFT US v NAR Proposed Decree.docx

Hi Samer,

I have attached our proposed redlines to the draft decree for your consideration.

When you respond to this round of comments, we would like DOJ to please confirm, in writing, that when NAR agrees to sign the consent decree, DOJ will send a closing letter to NAR that will confirm:

1. the Division has closed its investigation of the Participation Rule;
2. the Division has closed its investigation of the Clear Cooperation Policy;
3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
4. NAR has no obligation to respond to CID No. 30360 (in its entirety).

NAR will not agree to the consent decree without prior written assurances that these provisions will be included in the closing letter from DOJ.

Thanks, and best,

Mike

From: "Musallam, Samer (ATR)" <Samer.Musallam@usdoj.gov>
Date: Friday, October 23, 2020 at 10:52 AM
To: Ethan Glass <ethanglass@quinnemanuel.com>, William Burck <williamburck@quinnemanuel.com>
Cc: "Murray, Michael (ATR)" <Michael.Murray@usdoj.gov>, "Shaw, David (ATR)" <David.Shaw@usdoj.gov>, Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Hi Ethan. Yes, I am free between 2:00 – 3:30 pm today. Please circulate a dial in.
Thank you - Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Friday, October 23, 2020 10:18 AM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; William Burck <williamburck@quinnemanuel.com>

Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: Re: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Hi Samer, thank you for this. Can we talk today?
Ethan Glass
Mobile: (202) 531-2396

From: Musallam, Samer (ATR) <Samer.Musallam@usdoj.gov>
Sent: Wednesday, October 21, 2020 11:44:23 AM
To: Ethan Glass <ethanglass@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
[EXTERNAL EMAIL]

Hi Ethan – I have attached a redline to the edits you sent last Friday. There are likely a few issues we will need to talk through, but I think we are pretty close. Unfortunately, today is pretty jammed up, but I am free tomorrow anytime between 12:30 – 3pm and after 3:30pm if you would like to set up a call.
Best - Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Friday, October 16, 2020 10:06 AM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Thank you very much Samer. We think this is very close. We have a few changes based on the intricacies of the business and to more clearly follow the term sheet. Attached is a redline. Can we have a call today (after 2) so we can walk you through these, and to talk about the letter Makan mentioned that gives us relief from the investigations? Best, eg

From: Musallam, Samer (ATR) [mailto:Samer.Musallam@usdoj.gov]
Sent: Wednesday, October 14, 2020 1:09 PM
To: William Burck <williamburck@quinnemanuel.com>; Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>
Subject: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
[EXTERNAL EMAIL]

Dear Bill and Ethan – as discussed during last week's conversation with Makan, I am attaching for your review and comment a draft proposed Final Judgment between NAR and the Division, as well as a Stipulation and Order to be filed concurrently with the PFJ. In the interests of expediency, we would appreciate if you could please provide us with any comments to either of these pleadings by the end of the day on Friday.
In the meantime, if you have any questions, please don't hesitate to reach out.
Best,
Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990

samer.musallam@usdoj.gov

~~10/21/2020 Draft~~10/26/2020 NAR Cmts
SUBJECT TO FEDERAL RULE OF EVIDENCE 408

Formatted: Font: Times New Roman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATIONAL ASSOCIATION OF REALTORS®,

Defendant.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on _____, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. § 1,

AND WHEREAS, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, ~~and~~ without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law, and without Defendant admitting liability, wrongdoing, or the truth of any allegations in the Complaint;

AND WHEREAS, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to 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. "NAR" and "Defendant" mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. "Broker" means a Person licensed by a state to provide services to a buyer ("buyer Broker") or seller ("listing Broker") 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.

~~C.~~D. "Client" means the person(s) with whom a REALTOR® has an agency relationship with respect to the purchase or sale of real property.

~~D.~~E. "Management" means ~~all officers, directors, committee chairs, and board members of NAR, or any other Person with management or supervisory responsibilities for~~

~~NAR's operations.~~NAR's Leadership Team, which is composed of NAR's President, First Vice President, Treasurer, VP of Advocacy, VP of Association Affairs, and Chief Executive Officer.

~~E.~~F. "Member Board" means any state or local Board of REALTORS® or Association of REALTORS®, including any city, county, inter-county, or inter-state Board of REALTORS® or Association of REALTORS®, and any MLS owned or controlled by~~, in whole or in part, or affiliated with,~~ any such Board of REALTORS® or Association of REALTORS®.

~~F.~~G. "MLS Participant" means a member or user of, a participant in, or a subscriber to an MLS owned or controlled, in whole or in part, or affiliated with, a Member Board.

~~G.~~H. "MLS" means a multiple-listing service.

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

~~I.~~J. "Rule" means any final rule, draft rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR ~~or a Member Board~~.

Commented [A1]: Boards have discretion to adopt their own rules as long as they do not violate the mandatory NAR rules

III. APPLICABILITY

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment or its affiliation with or membership in NAR.

IV. PROHIBITED CONDUCT

A. NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to ~~[~~a Client~~]~~ at no cost to the ~~[~~Client~~]~~;

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

V. REQUIRED CONDUCT

A. By not later than 45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule NAR proposes to adopt to comply with Paragraphs V.C-I of this proposed Final Judgment. The United States shall promptly review the proposed Rules and respond in

writing to either approve the proposed Rule(s) or ~~require modifications to the proposed Rules~~propose modifications.

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States in its sole discretion.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this

proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all ~~NAR-affiliated MLSs and~~ MLS Participants to ~~publish~~ provide to C[~~c~~lients~~]~~ information about the amount of compensation offered to other MLS Participants ~~(i) via MLS listings; and (ii) via real-estate listings or information about real estate provided by any MLS to any third party real estate listings (e.g., Zillow, Redfin, etc.), including through any Internet Data Exchange~~.

F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that:

1. repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the ~~[~~C~~c~~lient~~]~~;
2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the buyer; and
3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to the buyer.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first

Formatted: Not Highlight

Formatted: Not Highlight

have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to:

1. prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and
2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this proposed Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to amend their rules to prohibit, discourage, or recommend against the eligibility of any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

I. By not later than 10 business days after entry of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and

maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

J. By not later than 30 calendar days after entry of this Final Judgment, NAR must publish to all Member Boards ~~obtain, and retain for the duration of this Final Judgment, a certification from each Member Board that each Member Board has received, read, and, understands~~ this Final Judgment and~~,~~ the NAR Rules adopted in compliance with Section V, ~~and that the Member Board, has been advised and understands that the Member Board must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so.~~

K. By not later than 60 calendar days after entry of this Final Judgment, NAR must require all Member Boards to publish to all MLS Participants ~~obtain, and retain for the duration of this Final Judgment, a certification from each MLS Participant that each MLS Participant has received, read, and understands~~ this Final Judgment and~~,~~ the NAR Rules adopted in compliance with Section V~~, and that the MLS Participant has been advised and understands that the MLS Participant must comply with this Final Judgment and may be held in civil or criminal contempt for failing to do so~~.

L. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section V.

VI. ANTITRUST COMPLIANCE

A. By not later than 30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. The Antitrust Compliance Officer must be an attorney with an active bar license who has been admitted to practice for at least ten years. ~~The Defendant's initial appointment and replacement of an Antitrust Compliance Officer is subject to the approval of the United States in its sole discretion. .~~

B. The Antitrust Compliance Officer must:

1. by not later than 30 calendar days after entry of this Final Judgment, furnish to all of Defendant's Management a copy of this Final Judgment, the Competitive Impact Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;
2. by not later than 30 calendar days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide Defendant's Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;
3. annually brief the Defendant's Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 calendar days after such succession;

5. obtain from all members of Management, by not later than 30 calendar days after that Person's receipt of this Final Judgment, a certification that the Pperson (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that ~~any~~ his or her ~~Person's~~ failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant ~~and any other Person who violates this Final Judgment~~;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to the Defendant's Management and employees that they must disclose to the Antitrust Compliance Officer information concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 calendar days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with

the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a ~~potential~~ violation, must cease or modify the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 calendar days of Management's or the Antitrust Compliance Officer's learning of any ~~potential~~ violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the ~~potential~~ violation, including a description of (1) any communications constituting the ~~potential~~ violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2) all steps taken by the Antitrust Compliance Officer or Management to remedy the ~~potential~~ violation.

E. Defendant must have its CEO or CFO, and its General Counsel certify in writing to the United States, no later than ~~45~~ 60 calendar days after the Final Judgement is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

Commented [A2]: Section V.K does not elapse until 60 days after entry of the FJ

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

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

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may 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, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information, at 28 C.F.R. § 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant ten calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the

fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action, (2) all appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire 7 years from the date of its entry, except that after 5 years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of this Final Judgment no longer is necessary or in the public interest.

XI. UNITED STATES' RESERVATION OF 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.

Commented [A3]: NAR will only agree to sign a consent decree including this provision if DOJ provides written confirmation, prior to the execution of the decree, that it will issue a closing letter to NAR upon execution of the decree that confirms:

1.the Division has closed its investigation of the Participation Rule;
2.the Division has closed its investigation of the Clear Cooperation Policy;
3.NAR has no obligation to respond to CID No. 29935 (in its entirety); and
4.NAR has no obligation to respond to CID No. 30360 (in its entirety).

These terms are consistent with what DOJ agreed to in Michael Murray's August 12 letter to Bill Burck and extend the contemplated terms of the closing letter to cover the Clear Cooperation Policy in return for NAR's agreement to provide access to lockboxes.

XII. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant):

Chief
Office of Decree Enforcement and Compliance
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

XIII. 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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. 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.

Date: _____

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

_____
United States District Judge

EXHIBIT 7

From: Musallam, Samer (ATR) <Samer.Musallam@usdoj.gov>
Sent: Wednesday, October 28, 2020 4:12 PM
To: Mike Bonanno; Ethan Glass; William Burck
Cc: Murray, Michael (ATR); Shaw, David (ATR)
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation
Attachments: 2020.10.28 DOJ cmts DRAFT US v NAR Proposed Decree (compare to 10.26).docx

[EXTERNAL EMAIL]

Hi Mike – thank you for sending us your proposed edits. As you will see from the attached version, which compares your 10/26 proposals to our revisions, (I think) we are very close to an agreement. Let's try to set up a call in the next two days to talk through any remaining issues and see if we can finalize this document. In terms of process, once the consent decree is filed, the Division will notify NAR in its closing letter that it has closed its investigation into the Participation Rule and the Clear Cooperation and that NAR will have no obligation to respond to CID Nos. 29935 and 30360.

Thanks - Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Mike Bonanno <mikebonanno@quinnemanuel.com>
Sent: Monday, October 26, 2020 6:29 PM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; Ethan Glass <ethanglass@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>
Subject: Re: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

Hi Samer,

I have attached our proposed redlines to the draft decree for your consideration.

When you respond to this round of comments, we would like DOJ to please confirm, in writing, that when NAR agrees to sign the consent decree, DOJ will send a closing letter to NAR that will confirm:

1. the Division has closed its investigation of the Participation Rule;
2. the Division has closed its investigation of the Clear Cooperation Policy;
3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
4. NAR has no obligation to respond to CID No. 30360 (in its entirety).

NAR will not agree to the consent decree without prior written assurances that these provisions will be included in the closing letter from DOJ.

Thanks, and best,

Mike

From: "Musallam, Samer (ATR)" <Samer.Musallam@usdoj.gov>
Date: Friday, October 23, 2020 at 10:52 AM
To: Ethan Glass <ethanglass@quinnemanuel.com>, William Burck <williamburck@quinnemanuel.com>
Cc: "Murray, Michael (ATR)" <Michael.Murray@usdoj.gov>, "Shaw, David (ATR)" <David.Shaw@usdoj.gov>, Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Hi Ethan. Yes, I am free between 2:00 – 3:30 pm today. Please circulate a dial in.

Thank you - Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Friday, October 23, 2020 10:18 AM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: Re: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

Hi Samer, thank you for this. Can we talk today?

Ethan Glass
Mobile: (202) 531-2396

From: Musallam, Samer (ATR) <Samer.Musallam@usdoj.gov>
Sent: Wednesday, October 21, 2020 11:44:23 AM
To: Ethan Glass <ethanglass@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Hi Ethan – I have attached a redline to the edits you sent last Friday. There are likely a few issues we will need to talk through, but I think we are pretty close. Unfortunately, today is pretty jammed up, but I am free tomorrow anytime between 12:30 – 3pm and after 3:30pm if you would like to set up a call.

Best - Samer

Samer M. Musallam

Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Friday, October 16, 2020 10:06 AM
To: Musallam, Samer (ATR) <Samer.Musallam@ATR.USDOJ.GOV>; William Burck <williamburck@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@ATR.USDOJ.GOV>; Shaw, David (ATR) <David.Shaw@ATR.USDOJ.GOV>; Mike Bonanno <mikebonanno@quinnemanuel.com>
Subject: RE: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

Thank you very much Samer. We think this is very close. We have a few changes based on the intricacies of the business and to more clearly follow the term sheet. Attached is a redline. Can we have a call today (after 2) so we can walk you through these, and to talk about the letter Makan mentioned that gives us relief from the investigations? Best, eg

---

From: Musallam, Samer (ATR) [mailto:Samer.Musallam@usdoj.gov]
Sent: Wednesday, October 14, 2020 1:09 PM
To: William Burck <williamburck@quinnemanuel.com>; Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Murray, Michael (ATR) <Michael.Murray@usdoj.gov>; Shaw, David (ATR) <David.Shaw@usdoj.gov>
Subject: re National Association of Realtors - Draft [Proposed] Final Judgment and Stipulation

[EXTERNAL EMAIL]

Dear Bill and Ethan – as discussed during last week's conversation with Makan, I am attaching for your review and comment a draft proposed Final Judgment between NAR and the Division, as well as a Stipulation and Order to be filed concurrently with the PFJ. In the interests of expediency, we would appreciate if you could please provide us with any comments to either of these pleadings by the end of the day on Friday.

In the meantime, if you have any questions, please don't hesitate to reach out.

Best,

Samer

Samer M. Musallam
Senior Counsel | Office of the Assistant Attorney General
950 Pennsylvania Avenue NW, Washington, DC 20530
U.S. Department of Justice | Antitrust Division
Tel: 202.598.2990
samer.musallam@usdoj.gov

10/~~26~~28/2020 ~~NAR~~DOJ Cmts

SUBJECT TO FEDERAL RULE OF EVIDENCE 408

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on _____, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. § 1,

AND WHEREAS, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law, and without Defendant admitting liability, wrongdoing, or the truth of any allegations in the Complaint;

AND WHEREAS, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to 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. "NAR" and "Defendant" mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. "Broker" means a Person licensed by a state to provide services to a buyer ("buyer Broker") or seller ("listing Broker") 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.

D. "Client" means the person(s) with whom a REALTOR® is contracted with or otherwise has an agency relationship with respect to the purchase or sale of real property.

E. "Management" means NAR's Leadership Team, which is composed of NAR's President, First Vice President, Treasurer, VP of Advocacy, VP of Association Affairs, and Chief

Executive Officer~~.~~, the MLS Committee, and [NAR's Executive Board.- *to the extent it differs from the Leadership team*]

F. "Member Board" means any state or local Board of REALTORS® or Association of REALTORS®, including any city, county, inter-county, or inter-state Board of REALTORS® or Association of REALTORS®, and any MLS owned or controlled by any such Board of REALTORS® or Association of REALTORS®.

G. "MLS Participant" means a member or user of, a participant in, or a subscriber to an MLS owned or controlled, in whole or in part, or affiliated with, a Member Board.

H. "MLS" means a multiple-listing service.

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

J. "Rule" means any final rule, draft rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR.

III. APPLICABILITY

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment or its affiliation with or membership in NAR.

IV. PROHIBITED CONDUCT

A. NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client;

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

V. REQUIRED CONDUCT

A. By not later than 45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule NAR proposes to adopt to comply with Paragraphs V.C-I of this ~~proposed~~ Final Judgment. The United States shall promptly review the proposed Rules and respond in writing to either approve the proposed Rule(s) or ~~propose~~require modifications to the proposed Rules.

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States in its sole discretion.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all MLS

Participants to provide to Clients information about the amount of compensation offered to other MLS Participants (i) via NAR-owned or controlled MLS listings; and (ii) via real-estate listings or information about real estate provided by any NAR-owned or controlled MLS to any third party real-estate listings (e.g., Zillow, Redfin, etc.), including through any Internet Data Exchange.

F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that:

1. repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the Client;
2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to the buyer; and
3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to the buyer.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first

have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to:

1. prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and
2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this ~~proposed~~ Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to amend their rules to prohibit, discourage, or recommend against the eligibility of any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

I. By not later than 10 business days after entry of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and

maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

J. By not later than 30 calendar days after entry of this Final Judgment, NAR must publish to all Member Boards, in a manner subject to approval by the United States in its sole discretion, this Final Judgment and the NAR Rules adopted in compliance with Section V~~,~~.

K. By not later than 60 calendar days after entry of this Final Judgment, NAR must require all Member Boards to publish, in a manner subject to approval by the United States in its sole discretion, to all MLS Participants this Final Judgment and the NAR Rules adopted in compliance with Section V.

L. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section V.

VI. ANTITRUST COMPLIANCE

A. By not later than 30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. ~~-~~The Defendant's initial appointment and

replacement of an Antitrust Compliance Officer ~~must be an attorney with an active bar license who has been admitted~~is subject to ~~practice for at least ten years~~the approval of the United States in its sole discretion.

B. The Antitrust Compliance Officer must:

1. by not later than 30 calendar days after entry of this Final Judgment, furnish to all of Defendant's Management a copy of this Final Judgment, the Competitive Impact Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;

2. by not later than 30 calendar days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide Defendant's Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;

3. annually brief the Defendant's Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 calendar days after such succession;

5. obtain from all members of Management, by not later than 30 calendar days after that Person's receipt of this Final Judgment, a certification that the Person (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of

this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that his or her failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant and any other Person bound by the Final Judgment who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to the Defendant's Management and employees that they must disclose to the Antitrust Compliance Officer information concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 calendar days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a potential violation, must cease or modify the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 calendar days of Management's or the Antitrust Compliance Officer's learning of any potential violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the potential violation, including a description of (1) any communications constituting the potential violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2) all steps taken by the Antitrust Compliance Officer or Management to remedy the potential violation.

E. Defendant must have its CEO or CFO, and its General Counsel certify in writing to the United States, no later than 60 calendar days after the Final Judgement is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. to have access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide electronic

copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may 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, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information, at 28 C.F.R. § 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant ten calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action, (2) all appropriate

contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire 7 years from the date of its entry, except that after 5 years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendant that the continuation of this Final Judgment no longer is necessary or in the public interest.

XI. UNITED STATES' RESERVATION OF 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.

XII. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant):

Chief
Office of Decree Enforcement and Compliance
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

XIII. 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 by making

available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. 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.

Date: _____

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

_____
United States District Judge

EXHIBIT 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ASSOCIATION OF REALTORS®, Defendant.	Case No. 1:20-cv-3356

~~[PROPOSED~~] STIPULATION AND ORDER

Plaintiff United States of America and Defendant National Association of REALTORS® (collectively, the "Parties") by and through their attorneys, hereby stipulate, subject to approval and entry by the Court, as follows:

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 District of Columbia. Defendant waives service of summons and the Complaint.

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

3. Defendant agrees to abide by and comply with the provisions of the proposed Final Judgment, pending the Court's entry of the proposed Final Judgment, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and agrees, from the date of the signing of this Stipulation, to comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment as though the same were in full force and effect as a final order of this Court entering the proposed Final Judgment.

4. Defendant agrees to arrange, at its expense, publication as quickly as possible of the newspaper notice required by the APPA, which shall be drafted by the United States in its sole discretion. The publication must be arranged no later than three business days after Defendant's receipt from the United States of the text of the notice and identity of the newspaper or newspapers within which the publication shall be made. Defendant must promptly send to the United States (a) confirmation that publication of the newspaper notice has been arranged, and (b) the certification of the publication prepared by the newspaper or newspapers within which the notice was published.

5. This Stipulation and Order applies with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the Parties and submitted to the Court.

6. In the event that one of the following three conditions occurs, the United States and Defendant are released from all further obligations under this Stipulation and Order, and the making of this Stipulation and Order will be without prejudice to any party in this or any other proceeding:

(a) the United States has withdrawn its consent, as provided in Paragraph 2 above;

(b) the United States voluntarily dismisses the Complaint in this matter; or

(c) the Court declines to enter the proposed Final Judgment, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered compliance with the terms and provisions of the proposed Final Judgment.

7. Defendant represents that the actions it is required to perform pursuant to this Stipulation and Order and the proposed Final Judgment can and will be performed and Defendant will later raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

Date: November 19, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/ Samer M. Musallam
Samer M. Musallam (DC Bar 986077)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., N.W., Suite 3110
Washington, DC 20530
Tel. 202.598.2990
Fax: 202.514.9033
samer.musallam@usdoj.gov

FOR DEFENDANT
National Association of REALTORS®

/s/ William A. Burck
William A. Burck (DDC Bar Id. 979677)
Ethan C. Glass (DDC Bar Id. MI0018)
Michael Bonanno (DDC Bar Id. 998208)
Quinn Emanuel Urquhart & Sullivan LLP
1300 I Street NW
Suite 900
Washington, DC 20005
Tel. 202.538.8000
Fax. 202.538.8100
williamburck@quinnemanuel.com
ethanglass@quinnemanuel.com
michaelbonanno@quinnemanuel.com

ORDER

IT IS SO ORDERED by the Court, this 20th day of November, 2020.

/s/ Timothy J. Kelly
United States District Judge

EXHIBIT 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Department of Justice, Antitrust Division 450 Fifth Street NW, Suite 4000 Washington, DC 20530, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS® 430 North Michigan Ave. Chicago, IL 60611, *Defendant*.	Case No. 1:20-cv-3356

COMPLAINT

The United States of America brings this civil antitrust action to obtain equitable relief against Defendant National Association of REALTORS®. The United States alleges as follows:

I. NATURE OF THE ACTION

1. Defendant National Association of REALTORS® ("NAR") has adopted a series of rules, policies, and practices governing, among other things, the publication and marketing of real estate, real estate broker commissions, as well as real estate broker access to lockboxes, that have been widely adopted by NAR's members resulting in a lessening of competition among real estate brokers to the detriment of American home buyers. These NAR rules, policies, and practices include:

(a) prohibiting NAR-affiliated multiple-listing services ("MLSs") from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS;

(b) allowing buyer brokers to misrepresent to buyers that a buyer broker's services are free;

(c) enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers; and

(d) limiting access to the lockboxes that provide licensed brokers with physical access to a home that is for sale to only brokers who are members of a NAR-affiliated MLS.

2. These NAR rules, policies, and practices have been widely adopted and enforced by NAR-affiliated MLSs, and are, therefore, agreements among competing real estate brokers each of which reduce price competition among brokers and lead to lower quality service for American home buyers and sellers. Together, the agreements also have a cumulative anticompetitive effect. The agreements individually and collectively unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and should be enjoined.

3. Accordingly, the United States seeks an order requiring NAR to cease its activities with respect to these rules, policies, and practices and providing additional relief.

II. JURISDICTION AND VENUE

4. NAR is engaged in interstate commerce and in activities substantially affecting interstate commerce. NAR transacts business throughout the United States. NAR's membership includes brokers and agents that conduct business across the United States in the local areas in

which each member operates. NAR's rules, policies, and practices govern the conduct of its members in all 50 states, including the conduct of all of NAR's individual member brokers and their affiliated agents and sales associates ("REALTORS®"). The anticompetitive rules, policies, and practices alleged in this Complaint violate the Sherman Act and affect home buyers and sellers located throughout the United States. The Court has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, to prevent and restrain NAR from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

5. NAR has consented to venue and personal jurisdiction in this District. Venue is also proper in this judicial district under 28 U.S.C. § 1391(b)(1).

III. THE DEFENDANT

6. NAR is a trade association organized under the laws of Illinois with its principal place of business in Chicago. It is the leading national trade association of real estate brokers and agents. Among its members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers ("listing brokers"), home buyers ("buyer brokers"), or both (collectively "residential brokers").

IV. INDUSTRY BACKGROUND

7. Among other activities, NAR establishes and enforces rules, policies, and practices, that are adopted by NAR's 1,400+ local associations (also called "Member Boards") and their affiliated MLSs that govern the conduct of NAR's approximately 1.4 million-member REALTORS® who are engaged in residential real estate brokerages across the United States.

8. The real estate brokerage business by its nature tends to be local. Most buyers and sellers prefer to work with a broker who is familiar with local market conditions. As a result,

NAR's member brokers and agents compete with one another in local listing broker and buyer broker service markets to provide real estate brokerage services to home sellers and home buyers.

9. MLSs are joint ventures among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS's service area. The geographic coverage of the MLS serving an area normally establishes the geographic market in which competition among brokers occurs, although meaningful competition among brokers may also occur in smaller areas, like a particular area of a city, in which case that smaller area may also be a relevant geographic market.

10. In each area an MLS serves, the MLS will include or "list" the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area's home listings. Listing brokers will use the MLS to market sellers' properties to other broker and agent participants in the MLS and, through those other brokers and agents, to potential home buyers. By virtue of nearly industry-wide participation and control over important data, brokers offering MLSs possess and exercise market power in the markets for the provision of real estate brokerage services to home buyers and sellers in local markets throughout the country.

11. NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* ("Handbook"). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs "must conform their governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under the

master professional liability insurance program." National Association of REALTORS®, Handbook on Multiple Listing Policy 2020 (32nd ed. 2020), at iii.

12. NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook's rules, policies, and practices as well as the rules, policies, and practices codified in NAR's Code of Ethics. NAR's Code of Ethics states that "[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership in the National Association." National Association of REALTORS®, Procedures for Consideration of Alleged Violations of Article IV, Section 2, Bylaws.

V. THE UNLAWFUL AGREEMENTS

13. NAR's Handbook and NAR's Code of Ethics impose certain rules, policies, and practices on NAR-affiliated MLSs that affect competition for the provision of buyer broker services among those participating in a given MLS. In addition, some MLSs employ certain practices that are not directly required by a NAR rule or policy, but that similarly affect competition for the provision of buyer broker services among those participating in an MLS.

14. These rules, policies, and practices include: prohibiting an MLS from disclosing to prospective buyers the amount of commission that the buyer broker will earn if the buyer purchases a home listed on the MLS ("NAR's Commission Concealment Rules"); allowing buyer brokers to mislead buyers into thinking that buyer broker services are free ("NAR's Free-Service Rule"); enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers ("NAR's Commission-Filter Rules and Practices"); and limiting access to lockboxes that

provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS ("NAR's Lockbox Policy").

15. NAR's and its affiliated MLSs' adoption and enforcement of these rules, policies, and practices which are described in more detail below, reflect concerted action between horizontal competitors and constitute agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and lower quality service for American home buyers and sellers.

A. NAR's Commission-Concealment Rules

16. NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to prospective buyers the total commissions offered to buyer brokers. Such concealment likely leads to higher prices and lower quality for buyer broker services. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property—a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays—MLSs conceal this fee from home buyers.

17. The Commission-Concealment Rules are laid out in several places in NAR's *Handbook*, including Policy Statement 7.58, Policy Statement 7.23, Policy Statement 7.3; Section IV.1.a of the Virtual Office Websites Policy; and Sections 18.3.1 and 19.15 of the Model MLS Rules.

18. NAR's Commission-Concealment Rules relieve buyer brokers from the necessity of competing against each other by offering rebates or offering to accept lower commissions. NAR's Commission-Concealment Rules also make home buyers both less likely and less able to

negotiate a discount or rebate off the offered commission. Finally, NAR's Commission-Concealment Rules encourage and perpetuate the setting of persistently high commission offers by sellers and their listing agents. The result is higher prices for buyer broker services.

19. Buyer brokers may, in fact, steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When buyers cannot see commission offers, they cannot detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having buyers steered away from a property is also a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

B. NAR's Free-Service Rule

20. Because commissions are offered by home sellers, and buyers do not pay their buyer brokers directly, it can be difficult for buyers to appreciate that they are nevertheless sharing with the seller the cost of the buyer broker's services. NAR's Free-Services Rule, which has been widely adopted by NAR-affiliated MLSs, compounds this problem by allowing buyer brokers to mislead buyers into thinking that the buyer broker's services are free when they are not. Under the NAR Code of Ethics, "Unless they are receiving no compensation from any source for their time and service, REALTORS® may use the term 'free' and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose: (1) by whom they are being, or expect to be, paid; (2) the amount of the payment or anticipated payment; (3) any condition

associated with the payment, offered product or service, and; (4) any other terms relating to their compensation." (See NAR Code of Ethics, Standard of Practice 12-1).

21. NAR's Free-Services Rule allows brokers to mislead buyers by obscuring the fact that buyers have a stake in what their buyer brokers are being paid for their services. Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If buyers are told that buyer broker services are "free," buyers are less likely to think to negotiate a lower buyer broker commission or to view buyer broker rebate offers as attractive. In these ways, NAR's Free-Services Rule likely leads to higher prices for services provided by buyer brokers.

C. NAR'S Commission-Filter Rules and Practices

22. NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where a buyer broker will receive less than 2.5% commission on the home sale. The buyer broker would then provide to its home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

23. According to Policy Statement 7.58 of NAR's Handbook, for example, "Participants may select the IDX listings they choose to display based only on objective criteria including . . . cooperative compensation offered by listing brokers." Handbook, at 24 (Policy Statement 7.58); see also id. at 43 (VOW Policy) ("A VOW may exclude listings from display

based only on objective criteria, including . . . cooperative compensation offered by listing broker, or whether the listing broker is a Realtor®.").

24. NAR's Commission-Filter Rules and Practices, which have been widely adopted by NAR-affiliated MLSs, facilitates steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. As alleged above, the practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of home buyers.

D. NAR's Lockbox Policy

25. NAR and its members have also adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of a NAR-affiliated MLS. Lockboxes hold the keys to a house to allow brokers and potential buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are accessed by a real estate broker using a numerical code or digital Bluetooth® 'key' enabling the real estate broker to show buyers homes that are listed for sale.

26. NAR and its affiliated MLSs have adopted a series of rules (set forth in the NAR Handbook, Policy Statement 7.31) that limit access to lockboxes only to those real estate brokers that are members of NAR and subscribe to the NAR-affiliated MLS. Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes, thereby depriving those brokers the ability to show homes listed for sale. This policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers, thereby lessening competition for buyer broker services.

VI. VIOLATION OF SECTION 1 OF THE SHERMAN ACT

27. NAR's real estate broker members are direct competitors for the provision of listing-broker and buyer broker services. Through the rules, policies, and practices alleged above and challenged in this action, NAR has coordinated and enforced anticompetitive agreements, which have likely contributed to reduced price competition among buyer brokers and a lower quality of buyer broker services for home buyers.

28. When adopted by NAR Member Boards, the NAR rules, policies, and practices alleged above and challenged in this action are horizontal agreements that govern and enforce the conduct of competing MLS brokers and agents that deny prospective home buyers access to relevant information resulting in higher prices and lower quality for buyer broker services.

29. The NAR rules, policies, and practices alleged above and challenged in this action have an anticompetitive effect in the relevant markets and unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

VII. REQUESTED RELIEF

30. The United States requests that this Court:

(a) adjudge that the NAR rules, policies, and practices challenged in this action are unreasonable restraints of trade and interstate commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

(b) enjoin and restrain NAR from promulgating, enforcing, or adhering to any rules, policies, or practices that unreasonably restrict competition;

(c) permanently enjoin and restrain NAR from establishing the same or similar rules, policies, or practices as those challenged in this action in the future, except as prescribed by the Court;

(d) award the United States such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violations and to dissipate the anticompetitive effects of the illegal agreements entered into by NAR; and

(e) award the United States the costs of this action.

Respectfully submitted,

COUNSEL FOR PLAINTIFF UNITED STATES

Dated: November 19, 2020

/s/ Makan Delrahim
MAKAN DELRAHIM (D.C. Bar #457795)
Assistant Attorney General
Antitrust Division

/s/ Michael F. Murray
MICHAEL F. MURRAY (D.C. Bar #1001680)
Deputy Assistant Attorney General

/s/ Owen M. Kendler
OWEN M. KENDLER
Chief

/s/ Lisa A. Scanlon
LISA A. SCANLON
Assistant Chief
Media, Entertainment, and Professional Services Section
U.S. DOJ, Antitrust Division
450 Fifth St., NW, Suite 4000
Washington, DC 20001
Tel. 202.305.8376
owen.kendler@usdoj.gov
lisa.scanlon@usdoj.gov

/s/ Samer M. Musallam
Samer M. Musallam* (DC Bar # 986077)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW, Suite 3110
Washington, DC 20530
Tel. 202.598.2990
Fax: 202.514.9033
samer.musallam@usdoj.gov

Attorneys for the United States

*LEAD ATTORNEY TO BE NOTICED

EXHIBIT 10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ASSOCIATION OF REALTORS®, Defendant.	Case No. 1:20-cv-3356

[PROPOSED] STIPULATION AND ORDER

Plaintiff United States of America and Defendant National Association of REALTORS® (collectively, the "Parties") by and through their attorneys, hereby stipulate, subject to approval and entry by the Court, as follows:

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 District of Columbia. Defendant waives service of summons and the Complaint.

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

3. Defendant agrees to abide by and comply with the provisions of the proposed Final Judgment, pending the Court's entry of the proposed Final Judgment, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and agrees, from the date of the signing of this Stipulation, to comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment as though the same were in full force and effect as a final order of this Court entering the proposed Final Judgment.

4. Defendant agrees to arrange, at its expense, publication as quickly as possible of the newspaper notice required by the APPA, which shall be drafted by the United States in its sole discretion. The publication must be arranged no later than three business days after Defendant's receipt from the United States of the text of the notice and identity of the newspaper or newspapers within which the publication shall be made. Defendant must promptly send to the United States (a) confirmation that publication of the newspaper notice has been arranged, and (b) the certification of the publication prepared by the newspaper or newspapers within which the notice was published.

5. This Stipulation and Order applies with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the Parties and submitted to the Court.

6. In the event that one of the following three conditions occurs, the United States and Defendant are released from all further obligations under this Stipulation and Order, and the making of this Stipulation and Order will be without prejudice to any party in this or any other proceeding:

(a) the United States has withdrawn its consent, as provided in Paragraph 2 above;

(b) the United States voluntarily dismisses the Complaint in this matter; or

(c) the Court declines to enter the proposed Final Judgment, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered compliance with the terms and provisions of the proposed Final Judgment.

7. Defendant represents that the actions it is required to perform pursuant to this Stipulation and Order and the proposed Final Judgment can and will be performed and Defendant will later raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

Date: November 19, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/ Samer M. Musallam

Samer M. Musallam (DC Bar 986077)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., N.W., Suite 3110
Washington, DC 20530
Tel. 202.598.2990
Fax: 202.514.9033
samer.musallam@usdoj.gov

FOR DEFENDANT
National Association of REALTORS®

/s/ William A. Burck

William A. Burck (DDC Bar Id. 979677)
Ethan C. Glass (DDC Bar Id. MI0018)
Michael Bonanno (DDC Bar Id. 998208)
Quinn Emanuel Urquhart & Sullivan LLP
1300 I Street NW
Suite 900
Washington, DC 20005
Tel. 202.538.8000
Fax. 202.538.8100
williamburck@quinnemanuel.com
ethanglass@quinnemanuel.com
michaelbonanno@quinnemanuel.com

ORDER

IT IS SO ORDERED by the Court, this ____ day of _____.

_____
United States District Judge

EXHIBIT 11

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.	Case No. 1:20-cv-3356

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on November 19, 2020, alleging that Defendant, National Association of REALTORS®, violated Section 1 of the Sherman Act, 15 U.S.C. § 1,

AND WHEREAS, the United States and Defendant have consented to the entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law, and without Defendant admitting liability, wrongdoing, or the truth of any allegations in the Complaint;

AND WHEREAS, Defendant agrees to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to 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. "NAR" and "Defendant" mean the National Association of REALTORS®, a non-profit trade association with its headquarters in Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

B. "Agreement" means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more Persons.

C. "Broker" means a Person licensed by a state to provide services to a buyer ("buyer Broker") or seller ("listing Broker") 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.

D. "Client" means the person(s) with whom a REALTOR® is contracted with or otherwise has an agency or legally recognized non-agency relationship with respect to the purchase or sale of real property.

E. "Management" means NAR's President, President Elect, First Vice President, Treasurer, VP of Advocacy, VP of Association Affairs, Chief Executive Officer, and Executive Committee.

F. "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®.

G. "MLS Participant" means a member or user of, a participant in, or a subscriber to an MLS.

H. "MLS" means a multiple-listing service owned or controlled by a Member Board.

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

J. "Rule" means any final rule, model rule, ethical rule, bylaw, policy, definition, standard, or guideline, and any interpretation of any Rule issued or approved by NAR.

III. APPLICABILITY

A. This Final Judgment applies to NAR, as defined above, and all other Persons, including all Member Boards and MLS Participants, in active concert or participation with NAR who receive actual notice of this Final Judgment. A Member Board or MLS Participant shall not be deemed to be in active concert with NAR solely as a consequence of its receipt of actual notice of this Final Judgment or its affiliation with or membership in NAR.

IV. PROHIBITED CONDUCT

NAR and its Member Boards must not adopt, maintain, or enforce any Rule, or enter into or enforce any Agreement or practice, that directly or indirectly:

1. prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying the compensation offered to other MLS Participants;

2. permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client;

3. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; or

4. prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, the lockboxes of those properties listed on an MLS.

V. REQUIRED CONDUCT

A. By not later than 45 calendar days after entry of the Stipulation and Order in this matter, NAR must submit to the United States, for the United States' approval in its sole discretion, any Rule changes that NAR proposes to adopt to comply with Paragraphs V.C-I of this Final Judgment.

B. By not later than thirty calendar days after entry of the Stipulation and Order in this matter, NAR must furnish notice of this action to all its Member Boards and MLS Participants in a form to be approved by the United States in its sole discretion.

C. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

D. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion that require all Member Boards and MLSs to repeal any Rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS database field specifying compensation offered to other MLS Participants.

E. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all MLS Participants to provide to Clients information about the amount of compensation offered to other MLS Participants.

F. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that:

1. repeal any Rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients;
2. require all Member Boards and MLSs to repeal any Rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their Clients; and
3. prohibit all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their Clients.

G. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to:

1. prohibit MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and
2. repeal any Rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the

level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

H. By not later than five business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must adopt one or more Rules, the content of which must first have been approved in writing by the United States in its sole discretion, that require all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS.

I. By not later than 10 business days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must furnish notice of this action to all its Member Boards and MLS Participants through (i) a direct communication, in a form to be approved by the United States in its sole discretion, that must contain this Final Judgment; the new Rule or Rules NAR devises in compliance with Paragraphs V.E., V.H., and V.I; and the Competitive Impact Statement; and (ii) the creation and maintenance of a page on NAR's website, that must be posted for no less than one year after the date of entry of this Final Judgment, and must contain links to this Final Judgment; the new Rule or Rules NAR devises in compliance with Section V; the Competitive Impact Statement; and the Complaint in this matter.

J. By not later than 30 calendar days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment,

NAR must publish to all Member Boards, in a manner subject to approval by the United States in its sole discretion, this Final Judgment and the NAR Rules adopted in compliance with Section V.

K. By not later than 60 calendar days after the later of the entry of this Final Judgment or the United States' approval of the Rules proposed in Paragraph V.A of this Final Judgment, NAR must require all Member Boards to publish, in a manner subject to approval by the United States in its sole discretion, to all MLS Participants this Final Judgment and the NAR Rules adopted in compliance with Section V.

L. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section V.

VI. ANTITRUST COMPLIANCE

A. By not later than 30 calendar days after entry of the Stipulation and Order in this matter, Defendant must (i) appoint an Antitrust Compliance Officer and (ii) identify to the United States the Antitrust Compliance Officer's name, business address, telephone number, and email address. Within thirty days after the Antitrust Compliance Officer position becomes vacant, the Defendant must (i) appoint a replacement Antitrust Compliance Officer and (ii) must identify to the United States the replacement Antitrust Compliance Officer's name, business address, telephone number, and email address. The Defendant's initial appointment and replacement of an Antitrust Compliance Officer is subject to the approval of the United States in its sole discretion.

B. The Antitrust Compliance Officer must:

1. by not later than 30 calendar days after entry of this Final Judgment, furnish to all of Management a copy of this Final Judgment, the Competitive Impact

Statement filed by the United States in connection with this matter, and a cover letter in a form attached as Exhibit 1;

2. by not later than 30 calendar days after entry of this Final Judgment, in a form and manner to be approved by the United States in its sole discretion, provide Management and employees with reasonable notice of the meaning and requirements of this Final Judgment;

3. annually brief Management on the meaning and requirements of this Final Judgment and the antitrust laws;

4. brief any person who succeeds a Person in any Management position on the meaning and requirements of this Final Judgment by not later than 30 calendar days after such succession;

5. obtain from all members of Management, by not later than 30 calendar days after that Person's receipt of this Final Judgment, a certification that the Person (i) has read and, to the best of his or her ability, understands and agrees to abide by the terms of this Final Judgment; (ii) has reported any violation of this Final Judgment to Defendant or is not aware of any violation of this Final Judgment that has not been reported to the Defendant; and (iii) understands that his or her failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against the Defendant and any other Person bound by the Final Judgment who violates this Final Judgment;

6. maintain a record of certifications received pursuant to this Section and a copy of each certification;

7. annually communicate to Management and employees that they must disclose to the Antitrust Compliance Officer information concerning any potential violation of this Final Judgment or the antitrust laws and that any such disclosure will be without reprisal by Defendant; and

8. by not later than 90 calendar days after entry of this Final Judgment and annually thereafter, the Antitrust Compliance Officer must file reports with the United States describing that Defendant has met its obligations under this Paragraph.

C. Immediately upon Management's or the Antitrust Compliance Officer's learning of any violation or potential violation of any of the terms of this Final Judgment, NAR must take appropriate action to investigate and, in the event of a potential violation, must cease or modify the activity so as to comply with this Final Judgment. NAR must maintain all documents related to any potential violation of this Final Judgment for the term of this Final Judgment.

D. Within 30 calendar days of Management's or the Antitrust Compliance Officer's learning of any potential violation of any of the terms of this Final Judgment, Defendant must file with the United States a statement describing the potential violation, including a description of (1) any communications constituting the potential violation, the date and place of the communication, the persons involved in the communication, and the subject matter of the communication, and (2)

all steps taken by the Antitrust Compliance Officer or Management to remedy the potential violation.

E. Defendant must have its CEO or CFO, and its General Counsel certify in writing to the United States, no later than 60 calendar days after the Final Judgement is entered and then annually on the anniversary of the date of the entry of this Final Judgment, that the Defendant has complied with the provisions of this Final Judgment.

F. The United States, in its sole discretion, may agree to one or more extensions of each of the time periods set forth in this Section VI.

VII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendant, Defendant must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

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

2. to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendant must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section VII may 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, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If a third party requests disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information, at 28 C.F.R. § 16.7. Defendant submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendant furnishes information or documents to the United States pursuant to this Section VII, Defendant represents and identifies in writing information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to

claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendant ten calendar days' notice before divulging such material in any legal proceeding, other than a grand jury proceeding.

VIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the 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. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendant agrees that in a civil contempt action, a motion to show cause, or a similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendant waives any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleged was harmed by the challenged conduct. Defendant agrees that it may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and

in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendant has violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with any successful effort by the United States to enforce this Final Judgment against Defendant, whether litigated or resolved before litigation, Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs, including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

D. For a period of four years following the expiration or termination of this Final Judgment, if the United States has evidence that Defendant violated this Final Judgment before it expired, the United States may file an action against Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action, (2) all appropriate contempt remedies, (3) any additional relief needed to ensure the Defendant complies with the terms of this Final Judgment, and (4) fees or expenses as called for in this Section IX.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire 7 years from the date of its entry, except that after 5 years from the date of its entry, this Final Judgment may be

terminated upon notice by the United States to the Court and Defendant that the continuation of this Final Judgment no longer is necessary or in the public interest.

XI. UNITED STATES' RESERVATION OF 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.

XII. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be provided to the United States must be sent to the person at the address set forth below (or such other address as the United States may specify in writing to Defendant):

Chief
Office of Decree Enforcement and Compliance
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

XIII. 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 by making available to the public copies of this Final Judgment and the Competitive Impact Statement, any public comments thereon, and any response to comments by the United States. 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.

Date: _____

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

_____
United States District Judge

EXHIBIT 12

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MAKAN DELRAHIM
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401 / (202) 616-2645 (Fax)

November 19, 2020

VIA E-MAIL
William Burck
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Dear Mr. Burck:

This letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.

No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.

Sincerely,

/s/ Makan Delrahim

Makan Delrahim

EXHIBIT 13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.	Case No. 1:20-cv-03356-TJK

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) ("APPA" or "Tunney Act"), 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 PROCEEDING

On November 19, 2020, the United States filed a civil antitrust Complaint against Defendant National Association of REALTORS® ("NAR") alleging that a series of rules, policies, and practices promulgated by NAR resulted in a lessening of competition among real estate brokers and agents to the detriment of American home buyers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [Dkt. No. 1.]

The Complaint alleges that certain NAR rules, policies, and practices have been widely adopted by NAR's members, including the multiple listing services ("MLSs") affiliated with NAR that facilitate the publishing and sharing of information about local homes for sale, resulting in a

lessening of competition among real estate brokers and agents to the detriment of American home buyers. These NAR rules, policies, and practices include those that:

a. prohibit MLSs affiliated with NAR from disclosing to potential home buyers the amount of commission that the buyer's real estate broker or agent will earn if the buyer purchases a home listed on the MLS;

b. allow brokers for home sellers ("buyer brokers") to misrepresent to potential home buyers that a buyer broker's services are free;

c. enable buyer brokers to filter the listings of homes for sale via an MLS based on the level of buyer broker commissions offered and exclude homes with lower commissions from consideration by potential home buyers; and

d. limit access to lockboxes, which provide physical access to homes for sale, only to real estate brokers or agents working with a NAR-affiliated MLS.

At the same time the Complaint was filed, the United States filed a Stipulation and Order and proposed Final Judgment, which are designed to remedy the anticompetitive effects alleged in the Complaint. [Dkt. No. 4.] On November 20, 2020, the Court entered the Stipulation and Order. [Dkt. No. 5.]

Under the proposed Final Judgment, NAR is required to repeal, eliminate, or modify its rules, practices, and policies that the Division alleges in the Complaint violate the Sherman Act. Specifically, NAR and NAR-affiliated MLSs must not (1) adopt, maintain, or enforce any rule, practice, or policy or (2) enter into any agreement or practice that directly or indirectly:

a. prohibits, discourages, or recommends against an MLS or real estate broker or agent working with a NAR-affiliated MLS ("MLS Participant[1] or REALTOR®") publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants, such as buyer brokers;

b. permits or requires MLS Participants, including buyer brokers, to represent or suggest that their services are free or available to a home buyer at no cost to the home buyer;

[1] Under the proposed Final Judgment, an "MLS Participant" is defined as "a member or user of, a participant in, or a subscriber to an MLS." (*See* Proposed Final Judgment, Section II – Definitions.)

c. permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer broker or the name of the brokerage or brokers or agents; or

d. prohibits, discourages, or recommends against allowing any licensed real estate broker or agent to access, with approval from the home seller, the lockboxes of properties listed on an MLS.

As discussed in further detail below, the proposed Final Judgment requires NAR to take affirmative steps to remedy the competitive harm alleged in the Complaint. The Stipulation and Order requires NAR to abide by and comply with the provisions of the proposed Final Judgment until the proposed Final Judgment is entered by the Court or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment. [Dkt. No. 5.]

The United States and NAR have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. [Dkt. No. 4-2.]

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendant and its Members

Defendant NAR is a trade association organized under the laws of Illinois with its principal place of business in Chicago. NAR is the leading national trade association of real estate brokers and agents. Among NAR's members are licensed residential real estate brokers, including brokers who provide real estate brokerage services to home sellers, home buyers, or both.

Among other activities, NAR establishes and enforces rules, policies, and practices that are then adopted by NAR's more than 1,400 local associations (also known as the "Member Boards") and their affiliated MLSs. These rules, policies, and practices govern the conduct of the

approximately 1.4 million MLS Participants or REALTORS® affiliated with NAR who are engaged in residential real estate brokerages across the United States.

An MLS is a joint venture among competing brokers to facilitate the publishing and sharing of information about homes for sale in a geographic area. The membership of an MLS is generally comprised of nearly all residential real estate brokers and their affiliated agents in an MLS's service area. In each area an MLS serves, the MLS will include or "list" the vast majority of homes that are for sale through a residential real estate broker in that area. In most areas, the local MLS provides the most up-to-date, accurate, and comprehensive compilation of the area's home listings. Listing brokers use the MLS to market sellers' properties to other broker and agent participants in the MLS and, through those other brokers and agents, to potential home buyers. By virtue of nearly industry-wide participation and control over important data, MLSs possess and exercise market power in the markets for the provision of real estate brokerage services to home buyers and sellers in local markets throughout the country.

As alleged in the Complaint, NAR's member brokers and agents compete with one another in local listing broker and buyer service markets to provide real estate brokerage services to home sellers and home buyers. The geographic coverage of the MLS serving an area normally establishes the geographic market in which competition among brokers occurs, although meaningful competition among brokers may also occur in smaller areas, like a particular area of a city, in which case that smaller area may also be a relevant geographic market.

NAR, through its Member Boards, controls a substantial number of the MLSs in the United States. NAR promulgates rules, policies, and practices governing the conduct of NAR-affiliated MLSs that are set forth annually in the *Handbook on Multiple Listing Policy* ("Handbook"). Under the terms of the Handbook, affiliated REALTOR® associations and MLSs "must conform their

governing documents to the mandatory MLS policies established by [NAR's] Board of Directors to ensure continued status as member boards and to ensure coverage under the master professional liability insurance program." (National Association of REALTORS®, Handbook on Multiple Listing Policy 2020 (32nd ed. 2020), at iii).[2]

NAR and its affiliated REALTOR® associations and MLSs enforce the Handbook's rules, policies, and practices as well as the rules, policies, and practices set forth in NAR's Code of Ethics. NAR's Code of Ethics states that "[a]ny Member Board which shall neglect or refuse to maintain and enforce the Code of Ethics with respect to the business activities of its members may, after due notice and opportunity for hearing, be expelled by the Board of Directors from membership" in NAR. (National Association of REALTORS®, Procedures for Consideration of Alleged Violations of Article IV, Section 2, Bylaws).[3]

B. Description of the Challenged Rules, Policies, and Practices and their Anticompetitive Effects

NAR's Handbook and NAR's Code of Ethics impose certain rules, policies, and practices on NAR-affiliated MLSs that affect competition for the provision of buyer broker services among those participating in a given MLS. In addition, some MLSs employ certain practices that are not directly required by a NAR rule or policy, but that similarly affect competition for the provision of buyer broker services among those participating in an MLS.

These rules, policies, and practices, discussed in more detail below, include: prohibiting an MLS from disclosing to potential home buyers the amount of commission that the buyer broker

[2] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).

[3] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/duty-to-adopt-and-enforce-the-code-of-ethics#:~:text=Any%20Member%20Board%20which%20shall,membership%20in%20the%20National%20Association.* (Last visited on 12/2/2020).

will earn if the buyer purchases a home listed on the MLS ("NAR's Commission Concealment Rules"); allowing buyer brokers to mislead potential home buyers into thinking that buyer broker services are free ("NAR's Free-Service Rule"); enabling buyer brokers to filter MLS listings based on the level of buyer broker commissions offered and to exclude homes with lower commissions from consideration by potential home buyers ("NAR's Commission-Filter Rules and Practices"); and limiting accesses to lockboxes that provide licensed brokers physical access to a home that is for sale to only those real estate brokers who are members of a NAR-affiliated MLS ("NAR's Lockbox Policy").

These rules, policies, and practices constitute agreements that reduce price competition among brokers and lead to lower quality service for American home buyers and sellers.

1. NAR's Commission-Concealment Rules

NAR's Commission-Concealment Rules recommend that MLSs prohibit disclosing to potential home buyers the total commission offered to buyer brokers. All or nearly all of NAR-affiliated MLSs have adopted a prohibition on disclosing commissions offered to buyer brokers. This means that while buyer brokers can see the commission that is being offered to them if their home buyer purchases a specific property – a commission that will ultimately be paid through the home purchase price that the home buyer, represented by the buyer broker, pays – MLSs conceal this fee from potential home buyers.

NAR's Commission-Concealment Rules lessen competition among buyer brokers by reducing their incentives to compete against each other by offering rebates. These rules also make potential home buyers both less likely and less able to negotiate a rebate off the offered commission. NAR's Commission-Concealment Rules encourage and perpetuate the setting of

persistently high commission offers by sellers and their listing agents. This contributes to higher prices for buyer broker services.

As alleged in the Complaint, NAR's Commission-Concealment Rules can also lead to other anticompetitive effects. Because of the Commission-Concealment Rules, buyer brokers may steer potential home buyers away from properties with low commission offers by filtering out, failing to show, or denigrating homes listed for sale that offer lower commissions than other properties in the area. When potential home buyers can't see commission offers, they can't detect or resist this type of steering. Steering not only results in higher prices for buyer broker services, it also reduces the quality of the services that are rendered to the potential home buyer, making it less likely that the buyer will ultimately be matched with the optimal home choice. Fear of having potential home buyers steered away from a property is a strong deterrent to sellers who would otherwise offer lower buyer broker commissions, which further contributes to higher prices for buyer broker services.

2. NAR's Free-Service Rule

Because commissions are offered by home sellers – and home buyers do not pay their buyer brokers directly – it can be difficult for buyers to appreciate that they are nevertheless sharing with the seller the cost of the buyer broker's services. NAR's Free-Service Rule, which has been widely adopted by NAR-affiliated MLSs, compounds this problem by allowing buyer brokers to mislead buyers into thinking the buyer broker's services are free and hide the fact that buyers have a stake in what their buyer brokers are being paid. Under NAR's Code of Ethics, "Unless they are receiving no compensation from any source for their time and service, REALTORS® may use the term 'free' and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose: (1) by whom they are being, or expect to be, paid; (2) the amount of

the payment or anticipated payment; (3) any condition associated with the payment, offered product or service, and; (4) any other terms relating to their compensation." (NAR Code of Ethics, Standard of Practice 12-1.[4])

Buyer broker fees, though nominally paid by the home's seller, are ultimately paid out of the funds from the purchase price of the house. If potential home buyers are told that buyer broker services are "free," buyers are less likely to think to negotiate a lower buyer-broker commission or to view the buyer broker rebate offers as attractive. In these ways, NAR's Fee-Service Rule likely leads to higher prices for services provided by buyer brokers.

3. NAR's Commission-Filter Rules and Practices

NAR's Commission-Filter Rules and Practices allow buyer brokers to filter MLS listings that will be shown to potential home buyers based on the level of buyer broker commissions offered. Once this filtering is performed, some MLSs further permit buyer brokers to affirmatively choose not to show certain homes to potential home buyers if the buyer broker will make less money because of lower commissions. Homes may be filtered out in this manner even if they otherwise meet the buyer's home search criteria. For example, buyer brokers or agents may use an MLS's software to filter out any listing where buyer brokers will receive less than 2.5% commission on the home sale. The buyer broker would then provide to his home buyer customer only those listings where the buyer broker would be paid a 2.5% commission or more if the home sale is completed.

According to Policy Statement 7.58 of NAR's Handbook, for example, "[p]articipants may select the IDX listings they choose to display based only on objective criteria

[4] Available at *https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice*. (Last visited on 12/2/2020).

including…cooperative compensation offered by listing brokers." (Handbook, at 24, Policy Statement 7.58; *see* NAR's VOW Policy, *id.* at 43 ("A VOW may exclude listings from display based only on objective criteria, including…cooperative compensation offered by the listing broker, or whether the listing broker is a Realtor®."))[5]

NAR's Commission-Filter Rules and Practices, which have been widely adopted by NAR-affiliated MLSs, are anticompetitive because they facilitate steering by helping buyer brokers conceal from potential home buyers any property listings offering lower buyer broker commissions. The practice of steering buyers away from homes with lower buyer broker commissions likely reduces the quality of buyer broker services and raises prices for buyer broker services, both at the expense of buyers.

4. NAR's Lockbox Policy

Lockboxes hold the keys to a house to allow brokers and potential home buyers to access homes for sale, with permission from the selling home owner, while continuing to keep the homes secure. Such lockboxes are typically accessed by a real estate broker using a numerical code or digital Bluetooth® "key" enabling the real estate broker to show buyer homes that are listed for sale.

NAR and its affiliated MLSs have adopted a policy and practice that limits access to lockboxes to only those real estate brokers who are members of NAR and subscribe to the NAR-affiliated MLS. (*See* Handbook, Policy Statement 7.31).[6] Licensed, but non-NAR-affiliated brokers are not allowed to access the lockboxes. Because only real estate brokers that are members

[5] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).
[6] Available at *cdnr.nar.realtor/sites/default/files/document/NAR-HMLP-2020-v2.pdf*. (Last visited on 12/2/2020).

of NAR and subscribe to the NAR-affiliated MLS are permitted access to lockboxes, this policy and practice effectively deprives licensed real estate brokers that are not members of NAR from accessing properties for sale to show potential home buyers. This lessens competition for buyer broker services as real estate brokers that are not members of NAR cannot access lockboxes and show properties to their clients.

C. The Challenged Rules, Policies, and Practices Violate the Antitrust Laws

NAR's challenged rules, policies and practices violate Section 1 of the Sherman Act, 15 U.S.C. §1, which prohibits unreasonable restraints on competition. NAR's real estate broker members are direct competitors for the provision of listing broker and buyer broker services. NAR and its affiliated MLSs have widely adopted the challenged rules, policies, and practices. Adoption by NAR and its affiliated MLSs of these rules, policies, and practices reflects concerted action between horizontal competitors and constitutes agreements among competing real estate brokers that reduce price competition among brokers and lead to higher prices and a lower quality of service for American home buyers. *See, e.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 828-29 (6th Cir. 2011) (holding that association of real-estate brokers was a contract, combination, or conspiracy with respect to allegedly anticompetitive policies).

When adopted by NAR Member Boards, the NAR rules, policies, and practices alleged above and challenged in this action are horizontal agreements that govern and enforce the conduct of competing MLS brokers and agents that deny potential home buyers access to relevant information resulting in higher prices and lower quality for buyer broker services.

The NAR rules, policies, and practices challenged in this action have anticompetitive effects in the relevant market for local listing broker and buyer broker services in the United States

that outweigh any purported pro-competitive benefits. Accordingly, they unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment prohibits NAR and its Member Boards from undertaking certain conduct and affirmatively requires NAR to take certain actions to remedy the antitrust violations alleged in the Complaint.

A. Prohibited and Required Conduct

1. Commission-Concealment Rules

Paragraph IV.1 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly "prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying the compensation offered to other MLS Participants."

Paragraphs V.C.-E. of the proposed Final Judgment further require NAR to adopt new rules, the content of which must be approved by the United States, that:

a. repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants;

b. repeal any rule that prohibits, discourages, or recommends against an MLS or MLS Participant publishing or displaying to consumers any MLS data specifying compensation offered to other MLS Participants; or

c. require all MLS Participants to provide to their clients with information about the amount of compensation offered to other MLS Participants.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns related to NAR's Commission-Concealment rules as alleged in the Complaint.

2. Free-Service Rule

Paragraph IV.2 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement, that directly or indirectly "permits or requires MLS Participants, including buyer Brokers, to represent or suggest that their services are free or available to a Client at no cost to the Client."

Paragraph V.F. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States, that:

a. repeals any rule that permits all MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients;

b. requires all Member Boards and MLSs to repeal any rule that permits MLSs and MLS Participants, including buyer Brokers, to represent that their services are free or available at no cost to their clients; and

c. prohibits all MLSs and MLS Participants, including buyer Brokers, from representing that their services are free or available at no cost to their clients.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Free-Service Rule as alleged in the Complaint.

3. Commission-Filter Rules and Practices

Paragraph IV.3 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement that directly or indirectly "permits or enables MLS Participants to filter, suppress, hide, or not display or distribute MLS listings based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent."

Paragraph V.G. of the proposed Final Judgment further requires NAR to adopt new rules, the content of which must be approved by the United States that:

a. prohibits MLS Participants from filtering or restricting MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker or the name of the brokerage or agent; and

b. repeals any rule that permits or enables MLS Participants to filter or restrict MLS listings that are searchable by or displayed to consumers based on the level of compensation offered to the buyer Broker, or by the name of the brokerage or agent.

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Commission-Filter Rules and Practices as alleged in the Complaint.

4. Lockbox Policy

Paragraph IV.4 of the proposed Final Judgment prohibits NAR and its Member Boards from adopting, maintaining, or enforcing any rule, or from entering into or enforcing any agreement or practice, that directly or indirectly "prohibits, discourages, or recommends against the eligibility of any licensed real estate agent or agent of a Broker, from accessing, with seller approval, he lockboxes of those properties listed on an MLS."

Paragraph V.H. of the proposed Final Judgment further requires NAR to adopt one or more rules, the content of which must be approved by the United States, that "requires all Member Boards and MLSs to allow any licensed real estate agent or agent of a Broker, to access, with seller approval, the lockboxes of those properties listed on an MLS."

These provisions, as set forth in the proposed Final Judgment, are designed to resolve the competitive concerns with NAR's Lockbox Policy as alleged in the Complaint.

B. Other Provisions

Notice to Member Boards, MLS Participants and Public. Paragraph V.I. of the proposed Final Judgment requires NAR to furnish notice of this action to all of its Member Boards and MLS Participants through (1) a communication, in a form to be approved by the United States, that must contain the Final Judgment, the new rules NAR proposes to issue to comply with the proposed

Final Judgment, and this Competitive Impact Statement; and (2) the creation and maintenance of a page on NAR's website, to be posted for no less than one year, that contains links to the Final Judgment, the new rules NAR proposes to issue to comply with the proposed Final Judgment, this Competitive Impact Statement; and the Complaint. Notification to NAR's Member Boards and MLS Participants is required to ensure compliance with the Final Judgment by NAR and its Member Boards and MLS Participants, while publication of this action on NAR's website will provide notice to the public of all prohibited and required conduct.

Antitrust Compliance Officer. The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph VI requires NAR to appoint an Antitrust Compliance Officer who is responsible for, among other things, annually briefing NAR's management on the meaning and requirements of the Final Judgment and the antitrust laws, providing NAR's management and employees with reasonable notice of the meaning and requirements of the Final Judgment, and obtaining and maintaining certification from all members of NAR's management that they understand and agree to abide by the terms of the Final Judgment. The Antitrust Compliance Officer is also required to (1) annually communicate to NAR's management and employees that they must disclose to the Antitrust Compliance Officer any information concerning any potential violation of the Final Judgment of which they are aware and (2) file a report with the United States describing that NAR has met its obligations under the Final Judgment.

Enforcement of Final Judgment. Paragraph IX.A. provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, NAR has agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States

regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that NAR has waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph IX.B. provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the competition the United States alleges was harmed by the challenged conduct. NAR agrees that it will abide by the proposed Final Judgment and that it may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph IX.C. of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that NAR has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph IX.C. provides that, in any successful effort by the United States to enforce the Final Judgment against NAR, whether litigated or resolved before litigation, NAR will reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph IX.D. states that the United States may file an action against NAR for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the

Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Expiration of Final Judgment. Paragraph X of the proposed Final Judgment provides that the Final Judgment will expire seven years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and NAR that the continuation of the Final Judgment is no longer necessary or in the public interest.

Reservation of Rights. Paragraph XI of the proposed Final Judgment reserves the rights of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any rule, policy, or practice adopted or enforced by NAR or any of its Member Boards and that nothing in the Final Judgment shall limit those rights.

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 neither impairs nor assists 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.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants 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 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 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 U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*.

Written comments should be submitted to:

Chief, Media, Entertainment and Professional Services Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 8000
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.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against NAR. The United States could have continued the litigation and sought preliminary and permanent injunctions against NAR for the challenged conduct. The United States is satisfied, however, that the prohibited and required conduct described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, increasing competition for buyer broker services in the United States. Thus, the proposed Final Judgment is designed to achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE 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 60-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:

> (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 government 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); *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 117 (8th Cir. 1976) ("It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest."); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. 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 in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "'make *de novo* determination of facts and issues.'" *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quoting *United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*; *see also United States v. Mid-Am. Dairymen, Inc.*, No. 73 CV 681-W-1, 1977 WL 4352, at *9 (W.D. Mo. May 17, 1977) ("It was the intention of Congress in enacting [the] APPA to preserve consent decrees as a viable enforcement option in antitrust cases.").

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A

district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"); *see also Mid-Am. Dairymen*, 1977 WL 4352, at *9 ("The APPA codifies the case law which established that the Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

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; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). 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. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added 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); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first 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 Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

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.

Dated: December 10, 2020

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/ Samer M. Musallam

SAMER M. MUSALLAM (DC Bar # 986077)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW, Suite 3110
Washington, DC 20530
Tel: (202) 598-2990
Fax: (202) 514-9033
Email: samer.musallam@usdoj.gov

EXHIBIT 14

U.S. Department of Justice

Antitrust Division

450 5th Street, NW, Suite 11100
Washington, D.C. 20530

June 29, 2021

VIA E-MAIL

Mr. Ethan Glass, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Re: *United States v. National Association of REALTORS®*,
1:20-cv-03356-TJK (D.D.C.)

Dear Ethan:

We write to follow up from our discussions on April 19, April 22, and June 2, regarding amending the proposed Final Judgment in the above-referenced case. Specifically, we sought consent from your client, the National Association of REALTORS® ("NAR"), to modify the Reservation of Rights provision in Section XI to eliminate any potential limitation on the future ability of the Division to investigate and challenge conduct by NAR that is not covered by the proposed Final Judgment.

NAR, however, has conditioned its consent on the Division agreeing that a revised Reservation of Rights in no way limits NAR from arguing against any future investigation by the Division based on the letter that was sent to your colleague, Mr. William Burck, on November 19, 2020, where the Division informed you that it was closing its investigation. We cannot accept NAR's condition. The Division does not agree that the letter in any way provides a legal defense for NAR with respect to our ability to investigate NAR's conduct in the future. As we pointed out, there is nothing in the letter that imposes on the Division any such restriction. It states in full:

> This letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.

> No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.[1]

Given the Division's firm position on this issue, please advise by July 1, 2021 at 12:00 p.m. EDT whether NAR will remove its condition and consent to modifying the Reservation of Rights provision in the proposed Final Judgment.

Sincerely,

/s/ Miriam R. Vishio

Miriam R. Vishio
Assistant Chief, Civil Conduct Task Force
202-460-6680
miriam.vishio@usdoj.gov

[1] Letter from AAG Makan Delrahim to William Burck (Nov. 19, 2020).

EXHIBIT 15

Peter Benson

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Thursday, July 1, 2021 2:45 PM
To: Mike Bonanno; Ethan Glass
Cc: Kendler, Owen (ATR); Scanlon, Lisa (ATR); William Burck
Subject: RE: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Mike,

As we made clear in our initial call on April 19 and in subsequent discussions, we sought NAR's approval to jointly modify the decree based on the Division's concerns about the agreement's reservation of rights. We explained that the current reservation does not adequately protect the Division's ability to investigate in the future NAR rules that may harm competition. We also explained we could not address the draft rules implementing the proposed decree until we resolved this threshold issue. It should be no surprise to you that, as we are at an impasse on amending the proposed decree, we need to move forward to resolve this matter in order to protect consumers and the Department's interests.

Thanks,
Mimi

From: Mike Bonanno <mikebonanno@quinnemanuel.com>
Sent: Thursday, July 1, 2021 1:57 PM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>; Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; William Burck <williamburck@quinnemanuel.com>
Subject: Re: NAR

Mimi,

As Ethan said, he is tied up until 3 pm, so I will respond to meet your artificial 2 pm deadline.

The purpose of the Front Office meeting NAR has requested is to discuss the unprecedented step the Division is contemplating—withdrawing from a consent decree, not because of intervening changes in the market, but because the Division has second thoughts about a settlement a prior Senate-confirmed Assistant Attorney General negotiated and accepted. As far as we are aware, this has never happened before. And we had no idea that this course of action was being contemplated before you said so last night. That was the first time in our months-long discussions that the prospect of DOJ withdrawal from the consent decree has even been mentioned.

Since the consent decree was filed in November 2020, and the Division has had NAR's proposed rule changes for more than six months and has yet to provide a substantive response to that proposal, your insistence that this all needs to be resolved in 24 hours makes absolutely no sense. Presumably if there was some exigency here, you would have raised this concern sometime in the past six months. We are not going to capitulate to the Division's unilateral demands, including your demand that our client must make a decision of this magnitude on such short notice.

If you file a notice of withdrawal with the Court before we have an opportunity to discuss this matter with the Front Office, we will expect you to attach this chain of email correspondence in your submission to the Court. The Court deserves to know how DOJ has handled this matter.

-Mike

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Date: Thursday, July 1, 2021 at 1:18 PM
To: Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>, Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>, Mike Bonanno <mikebonanno@quinnemanuel.com>, William Burck <williamburck@quinnemanuel.com>
Subject: RE: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Ethan,

Richard is available to meet with you tomorrow morning a 9 a.m., but before he agrees to the meeting, he would first like to know what the purpose of the meeting is for him to assess whether it is worth holding. Please respond by 2 p.m. today, as the Division is prepared to file the notice to withdraw depending on your response.

Is this meeting about how you can resolve the issue in a manner that allows the Division to investigate and potentially challenge in the future NAR's rules, policies and conduct unencumbered by the current decree or any deal you think you had with the Division? Or does NAR have some other reason for this meeting? For the Front Office meeting to occur tomorrow, we need assurances from you that NAR is committed to resolving our concerns regarding the proposed settlement.

Thanks,
Mimi

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Thursday, July 1, 2021 12:49 PM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: Re: NAR

Hi Mimi, I cannot talk until 3. If that time works for you, I'll get you a call in.

Ethan Glass
Mobile: (202) 531-2396

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Thursday, July 1, 2021 12:39:41 PM
To: Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: RE: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Hi Ethan.

We're trying to reach you. We just tried your cell, but there was no answer. Can you please provide me a number (or a call-in number, if that's easier) for us to call you within the next hour?

Thanks,
Mimi

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Thursday, July 1, 2021 11:27 AM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: RE: NAR

Hi Mimi,

Your threat to withdraw from the proposed consent decree is not something that DOJ has mentioned prior to your email of 7:19pm last night—less than 24 hours before your noon deadline.

Due to the significance of that threat, the fact that the "condition" you mention is simply that the DOJ abide by its agreement, and the reality that we are a membership organization that must involve several busy people in significant decisions, we cannot substantively respond to your letter today.

With those facts, and the intervening holiday, we can commit to give you a response by July 16. Please let us know if you still think we need a call.

We also request that you schedule a Front Office meeting for some time after July 16, but before the DOJ makes a decision on whether to withdraw from the proposed consent decree. Please let us know the dates that work for the Acting AAG.

Best, eg

From: Vishio, Miriam (ATR) [mailto:Miriam.Vishio@usdoj.gov]
Sent: Wednesday, June 30, 2021 7:19 PM
To: Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: RE: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Ethan,

We have discussed with you several times the Division's need to modify the reservation of rights clause to make clear that the Division may investigate and potentially challenge other NAR rules and policies not remedied by the proposed Final Judgment. Our request for your prompt response to our letter is not unreasonable and should not be a surprise given our prior conversations regarding this issue.

We understand NAR is insisting on a condition for its consent to which we cannot agree. If this remains NAR's position despite our request to remove the condition or we do not receive an answer to the contrary, then the Division will

conclude that NAR does not agree to modify the decree unencumbered by its condition. In such an event, we will take steps towards withdrawing our consent for the proposed Final Judgment starting at noon tomorrow.

Nevertheless, if you request—and we can agree on—a reasonable extension by noon tomorrow, NAR can have that additional time to consider its response. We are available for a call tomorrow morning.

In answer to your question regarding NAR's prior submissions, and as explained previously, we view resolution on the reservation of rights clause to be a gating issue before we engage on other issues, including NAR's proposed rule changes that you submitted.

Best,
Mimi

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Wednesday, June 30, 2021 2:36 PM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: Re: NAR

Hi Mimi,

We are not asking DOJ to consider anything; we are telling you that we need more than 48 hours to respond to your letter.

Nonetheless, the reason for more time is that your unilaterally imposed deadline is unreasonable, especially in light of the facts that it has been many months since the comment period ended, NAR has complied with all its obligations and DOJ has not responded to our 2020 submissions, and we have not heard from DOJ at all for over a month.

Finally, we do not understand the purpose of your note: what is DOJ planning to do at noon tomorrow for which we need your consent to extend that deadline?

Best, eg

Ethan Glass
Mobile: (202) 531-2396

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Wednesday, June 30, 2021 2:14 PM
To: Ethan Glass
Cc: Kendler, Owen (ATR); Scanlon, Lisa (ATR); Mike Bonanno; William Burck
Subject: RE: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Thanks for confirming receipt, Ethan. As we consider whether to grant you additional time, could you please provide us a date for when we can expect a response and an explanation for why you will not be able to respond by tomorrow?

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Wednesday, June 30, 2021 1:40 PM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>

Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Mike Bonanno <mikebonanno@quinnemanuel.com>; William Burck <williamburck@quinnemanuel.com>
Subject: Re: NAR

Hi Mimi, received. However, we will not be able to respond substantively by your July 1 deadline. We will respond as soon as we can. Best, eg

Ethan Glass
Mobile: (202) 531-2396

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Tuesday, June 29, 2021 9:01 AM
To: Ethan Glass
Cc: Kendler, Owen (ATR); Scanlon, Lisa (ATR); Mike Bonanno; William Burck
Subject: NAR

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Ethan,

Please see the attached correspondence.

Best regards,
Mimi

Miriam (Mimi) R. Vishio | Assistant Chief, Civil Conduct Task Force
U.S. Department of Justice | Antitrust Division
450 Fifth Street, NW | Washington, DC 20530
Direct: 202-307-0158 | Mobile: 202-460-6680 | Miriam.Vishio@usdoj.gov

EXHIBIT 16

Peter Benson

From: DCD_ECFNotice@dcd.uscourts.gov
Sent: Thursday, July 1, 2021 3:57 PM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:20-cv-03356-TJK UNITED STATES OF AMERICA v. NATIONAL ASSOCIATION OF REALTORS Notice (Other)

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered by Kendler, Owen on 7/1/2021 at 3:57 PM and filed on 7/1/2021

Case Name: UNITED STATES OF AMERICA v. NATIONAL ASSOCIATION OF REALTORS
Case Number: 1:20-cv-03356-TJK
Filer: UNITED STATES OF AMERICA
Document Number: 14

Docket Text:

NOTICE *of Withdrawal of Consent to Entry of Proposed Final Judgment* by UNITED STATES OF AMERICA (Kendler, Owen)

1:20-cv-03356-TJK Notice has been electronically mailed to:

Ethan Charles Glass ethanglass@quinnemanuel.com

Michael D. Bonanno mikebonanno@quinnemanuel.com

Owen M. Kendler owen.kendler@usdoj.gov

William A. Burck williamburck@quinnemanuel.com, sonayahamza@quinnemanuel.com

1:20-cv-03356-TJK Notice will be delivered by other means to::

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:suppressed
Electronic document Stamp:
[STAMP dcecfStamp_ID=973800458 [Date=7/1/2021] [FileNumber=7216333-0]
[62626603c39f847cc92b6087d9de1ed074995cfec40184795592da1a1b3fb13171a00
38a86f765fc7aabc31eb301e749be887c4c517db051a601d1da2b46c2a9]]

EXHIBIT 17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.	Case No. 1:20-CV-03356-TJK

NOTICE OF VOLUNTARY DISMISSAL

Pursuant to Fed. R. Civ. P. 41, Plaintiff United States of America notices dismissal of this action. Rule 41(a)(1)(A)(i) provides that a plaintiff may voluntarily dismiss an action without a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Defendant National Association of REALTORS® has not served an answer or motion for summary judgment in this action. The United States accordingly notices voluntary dismissal of this action, without prejudice. *See* Fed. R. Civ. P. 41(a)(1)(B).

Date: July 1, 2021

Respectfully submitted,

/s/ Owen M. Kendler

Owen M. Kendler, Chief
U.S. Department of Justice
Antitrust Division
Financial Services, Fintech & Banking Section
450 Fifth Street, N.W., Suite 4000
Washington DC 20530
Phone: 202-305-8376
Facsimile: 202-5407308
Email: owen.kendler@usdoj.gov

EXHIBIT 18

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. NATIONAL ASSOCIATION OF REALTORS®, *Defendant*.	Case No. 1:20-CV-03356-TJK

NOTICE OF WITHDRAWAL OF CONSENT TO ENTRY OF PROPOSED FINAL JUDGMENT

PLEASE TAKE NOTICE that, pursuant to Paragraph 2 of the Stipulation and Order entered by the Court on November 20, 2020 (Dkt. 5),[1] Plaintiff United States of America, by and through its attorneys of record, hereby withdraws its consent to entry of the proposed Final Judgment in the above-captioned matter.

After filing the Complaint and proposed Final Judgment, the United States sought Defendant's consent to amend the Reservation of Rights provision in Section XI of the proposed Final Judgment to eliminate any potential limitation on the future ability of the United States to

[1] Paragraph 2 states:

> The Parties stipulate that the Final Judgment in the form attached as Exhibit A may be filed with and entered by the Court, upon the motion of the United States or upon the Court's own motion, after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16) ("APPA"), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent. The United States may withdraw its consent at any time before the entry of the proposed Final Judgment by serving notice on Defendant and by filing that notice with the Court.

Stipulation and Order, Dkt. 5 at 1.

investigate and challenge additional potential antitrust violations committed by Defendant. Defendant declined to consent. As a result, the United States has chosen to exercise its right under Paragraph 2 of the Stipulation and Order to withdraw its consent to entry of the proposed Final Judgment.

Date: July 1, 2021

Respectfully submitted,

/s/ Owen M. Kendler

Owen M. Kendler, Chief
U.S. Department of Justice
Antitrust Division
Financial Services, Fintech & Banking Section
450 Fifth Street, N.W., Suite 4000
Washington DC 20530
Phone: 202-305-8376
Facsimile: 202-5407308
Email: owen.kendler@usdoj.gov

EXHIBIT 19

Markets

DOJ Ditches Realtor Antitrust Pact Citing Need for Probe

By David McLaughlin
July 1, 2021, 4:00 PM EDT
Updated on July 1, 2021, 7:07 PM EDT

- 2020 settlement had been reached with Trump administration
- Realtors' association calls decision 'unprecedented breach'

The U.S. Justice Department said it was pulling out of an antitrust settlement reached during the Trump administration with the National Association of Realtors that resolved a government lawsuit accusing the trade group of inhibiting competition among brokers.

The department's antitrust division said Thursday that it was withdrawing from the November 2020 agreement because its terms prevent the division from continuing to investigate association rules that may harm homebuyers and sellers.

The government said it intends to proceed with a probe of the organization and that abandoning the settlement would allow the inquiry to move forward "without restriction."

"Consumers pay billions of dollars in real estate commissions every year," said Richard Powers, the acting head of the antitrust division, said in a statement. "We cannot be bound by a settlement that prevents our ability to protect competition in a market that profoundly affects Americans' financial well-being."

The Justice Department last year said the settlement, which was awaiting court approval, would provide greater transparency to consumers about commissions and increase competition among brokers. The settlement was filed in federal court in Washington along with a lawsuit against the group. The government filed a notice to dismiss the case Thursday.

The Realtors association said in a statement that the Justice Department's decision was an "unprecedented breach" of the settlement.

"NAR has fulfilled all of our obligations under the settlement agreement, and now DOJ is inexplicably backing out," the association said.

(Updates with statement from National Association of Realtors, starting in sixth paragraph.)

EXHIBIT 20

Civil Investigative Demand—Documentary Material and Written Interrogatories

United States Department of Justice

Antitrust Division
Washington, DC 20530

To: National Association of Realtors®
c/o Katie Johnson, General Counsel
430 N. Michigan Ave.
Chicago, IL 60611-4087

Civil Investigative Demand Number: -29935

This civil investigative demand is issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, in the course of an antitrust investigation to determine whether there is, has been, or may be a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 by conduct, activities, or proposed action of the following nature: Policies, bylaws, rules, guidelines, or practices that may unreasonably restrain competition in the provision of residential real-estate brokerages services in Las Vegas, Nevada and in other metropolitan areas throughout the United States.

You are required by this demand to produce all documentary material described in the attached schedule that is in your possession, custody, or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. You are also required to answer the interrogatories on the attached schedule. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in which event the reasons for the objection must be stated in lieu of an answer. Such production of documents and answers to interrogatories shall occur on the 13th day of May, 2019 at 5:00 p.m.

The production of documentary material and the interrogatory answers in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production and/or responsible for answering each interrogatory.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available and the interrogatory answers shall be submitted: Owen Kendler (custodian) and Steven Kramer and Ethan Stevenson (deputy custodians), U.S. Dept. of Justice, Antitrust Division, Media, Entertainment, and Professional Services Section, 450 Fifth Street NW, Suite 4000, Washington, DC 20530.

Inquiries concerning compliance should be directed to Steven Kramer at 202-307-0997 or Ethan Stevenson at 202-598-8091.

Your attention is directed to 18 U.S.C. § 1505, printed in full on the reverse side of this demand, which makes obstruction of this investigation a criminal offense.

Issued in Washington, D.C., this 12th day of April, 2019.

Assistant Attorney General

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress -

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Form of Certificate of Compliance*

I/We have read the provisions of 18 U.S.C. § 1505 and have knowledge of the facts and circumstances relating to the production of the documentary material and have responsibility for answering the interrogatories propounded in Civil Investigative Demand No. _____. I/We do hereby certify that all documentary material and all information required by Civil Investigative Demand No. _____ which is in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to a custodian named therein.

If any documentary material otherwise responsive to this demand has been withheld or any interrogatory in the demand has not been fully answered, the objection to such demand and the reasons for the objection have been stated in lieu of production or an answer.

Signature _____

Title _____

Sworn to before me this _____ day of

_____, 20___.

_____

Notary Public

*In the event that more than one person is responsible for producing the documents and answering the interrogatories, the certificate shall identify the documents and interrogatories for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided by 28 U.S.C. § 1746.

CIVIL INVESTIGATIVE DEMAND FOR DOCUMENTS AND ANSWERS TO INTERROGATORIES
ISSUED TO NATIONAL ASSOCIATION OF REALTORS

Unless otherwise indicated or modified by the Department of Justice, each document demand and interrogatory included in this Civil Investigative Demand requires a complete search of the documents and information in your possession, custody, or control. In the Department's experience, modifications to this Demand may reduce the burden of searching for responsive documents and information in a way that is consistent with the Department's needs. The Association is encouraged to propose such modifications, but all modifications must be agreed to in writing by the Department.

DOCUMENT DEMANDS

1. Submit all documents relating to the Department's investigation of GLVAR and the Civil Investigative Demand (CID) to the GLVAR , including all communications with GLVAR, the Nevada Association of Realtors®, or any other person relating to the CID or investigation.

2. Submit all documents relating to any Guidance or software:
   (a) prohibiting, restricting, or inhibiting display or publication to consumers (including potential sellers, buyers, clients, or customers) of compensation offered by listing brokers to cooperating brokers;
   (b) requiring listing brokers to make an offer of compensation to buyer brokers in order to list a home on an MLS or conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants;
   (c) prohibiting buyer brokers from making the submission of an executed offer to purchase contingent on the listing broker's agreement to modify the offer of compensation or using the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation;
   (d) permitting listing brokers, after full disclosure and informed consent of both parties, to simultaneously represent a seller and buyer in a single transaction and receive the offer of compensation;
   (e) permitting realtors® to represent their services as free, provided that the potential for the realtor® to obtain a benefit from a third party is clearly defined;
   (f) restricting or inhibiting any relationship or interaction between MLSs and third-party real-estate platforms that provide information to consumers, such as Zillow;
   (g) enabling or permitting brokers to search for, filter, or exclude MLS listings based on the level or type of cooperative compensation offered by a listing broker;
   (h) prohibiting or restricting brokers from including identification of the listing broker in photographs of a residence listed for sale or in client views of listings;
   (i) inhibiting, restricting, prohibiting, or impeding the negotiation of offers of cooperative compensation between brokers;
   (j) requiring MLS members or participants to be a member of a local association of realtors®;
   (k) restricting, limiting, or prohibiting the copyrighting, distribution, sale, resale or syndication of MLS data;
   (l) encouraging or requiring syndicators, purchasers, or users of MLS data or

operators of IDX sites, when displaying MLS listings, to separate MLS and non-MLS listings or discriminate between MLS and non-MLS listings;
(m) restricting, limiting, or allowing the restriction or limitation of information contained in listings or entire listings displayed by IDX sites or VOWs; or
(n) affecting any fiduciary duty owed by brokers to customers (including potential buyers, sellers, clients, or customers).

The Association's response to this document demand must include all documents relating to (a) any possible or actual reason, rationale, or basis for adoption, approval, maintenance, revision, or retention of any such Guidance regardless of the date that such documents were prepared, created, sent, altered, or received by the Association; (b) any complaint about or any request to change, eliminate, or not enforce any such Guidance; (c) any possible or actual implementation or enforcement of any such Guidance; (d) any possible or actual benefit, drawback, advantage, disadvantage, or effect of any such Guidance; (e) any discussion or communication relating to any such Guidance; (f) any training session, video, or materials relating to any such Guidance; or (g) any possible or actual antitrust or other legal or ethical issue relating to any such Guidance.

3. Submit all documents relating to lower, reduced, or discounted real-estate brokers' offers of compensation or commissions, or to any particular real-estate broker's lower, reduced, or discounted offer of compensation or commissions, whether the lower, reduced, or discounted commission pertains to a listing broker or to a buyer broker, or to both, including all documents relating to:
   (a) discouraging or inhibiting lowering, reducing, or discounting commissions, including suggesting that a particular compensation amount is appropriate;
   (b) boycotting, refusing or declining to deal with brokers that offer lower, reduced, or discounted offers of compensation to buyer brokers;
   (c) any buyer broker declining or refusing to display, present, or provide information on any property to any buyer client because of the amount of compensation the buyer broker would receive; or
   (d) any buyer broker using a residential purchase agreement to demand or require that the listing broker increase or otherwise change the listing commission or amount of compensation offered.

4. Submit all documents relating to encouraging or recommending that buyer brokers contract or reach agreement with any client who is a potential buyer of real estate, including all documents relating to any:
   (a) possible or actual reason, rationale, or basis for encouraging or recommending that buyer brokers contract or reach agreement with any client who is a potential buyer of real estate; or
   (b) training session, video, or materials relating to encouraging or recommending that buyer brokers contract or reach agreement with any client who is a potential buyer of real estate.

5. Submit all documents relating to possible or actual rebates of any listing- or buyer-broker commission or any offer of any gift card to any home seller or buyer, including all documents relating to communications relating to such rebates or gift-card offers with any personnel of any state regulatory agency or legislature, or of any personnel of any association of realtors®.

6. Submit all documents prepared, sent, or received since January 1, 2014, relating to any prohibition, restriction, or inhibition by REcolorado of the display or publication to consumers (including potential sellers, buyers, clients, or customers) of compensation offered by listing brokers to cooperating brokers.

7. Submit all communications between NAR and REcolorado, sent or received since January 1, 2014, regarding REcolorado's enforcement of MLS rules to prohibit, restrict, or inhibit the display or publication to consumers (including potential sellers, buyers, clients, or customers) of compensation offered by listing brokers to cooperating brokers.

8. Submit one copy of each edition of NAR's publication titled, "The Answer Book – The Source for Realtor® Association Management Leaders" published or in effect since January 1, 2012.

9. For each MLS or association of realtors® affiliated with the Association identified in your answer to Interrogatory 1, submit the latest documents in your Association's possession, custody, or control stating, estimating, or analyzing the percentage of real-estate brokers in the MLS's or association's service area that are either members of that association of realtors® or participants in the that local MLS.

10. Submit all studies either performed or commissioned by NAR relating to broker commissions and all documents discussing or relying on any such study.

11. Submit all documents, regardless of the date that they were prepared, created, sent, altered, or received by the Association, relating to possibly or actually decoupling or uncoupling the listing broker and buyer broker, or to the necessity or purpose of coupling the listing broker and buyer broker.

12. Submit documents sufficient to show all of NAR's rules, policies, and practices existing currently or at any time during 2018 and 2019, relating to:
    (a) the retention and destruction of documents, including the retention, storage, deletion, and archiving of electronically stored information, including e-mail; or
    (b) the use of personal electronic devices for NAR business.

WRITTEN INTERROGATORIES

1. Identify all local associations of realtors® and local MLSs currently affiliated with the Association, including the address for each local association identified.

2. To the extent not fully reflected in documents produced in response to this Demand, describe NAR's rules, policies, and practices existing currently or at any time during 2018 and 2019, relating to:

   (a) the retention and destruction of documents, including the retention, storage, deletion, and archiving of electronically stored information, including e-mail; or
   (b) the use of personal electronic devices for NAR business.

DEFINITIONS

The following definitions apply for the purposes of this Demand:

A. The terms "**the Association**," or "NAR" mean the National Association of Realtors®, and all present and former officers, directors, agents, employees, consultants, or other persons acting for or on behalf of any of it.

B. The term "**agreement**" means any understanding, formal or informal, written or unwritten.

C. The term "**any**" means each and every.

D. The term "**broker**" means a person licensed by a state to provide real-estate brokerage services to either a buyer or seller in a real-estate transaction and includes any listing agent or buyer agent or sales associate who is affiliated with a broker.

E. The term "**collaborative work environment**" means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, collaborative work environments are often configured as separate and closed environments, each one of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative work environments include Microsoft Sharepoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems (CMS) (e.g., Drupal), wikis, and blogs.

F. The term "**communication**" means any formal or informal disclosure, transfer, or exchange of information or opinion, however made.

G. The term "**documents**" means all written, printed, or electronically stored information ("ESI") of any kind in the possession, custody, or control of the Association, including information stored on social media accounts like Twitter or Facebook, chats, instant messages, and documents contained in collaborative work environments and other document databases. "Documents" includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, "documents" excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

H. The term "**documents sufficient to show**" means documents sufficient to provide the Department with a true and correct disclosure of the factual matter requested.

I. The term "**GLVAR**" means the Greater Las Vegas Association of Realtors, each of its subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part,

owned or controlled by it, including the Greater Las Vegas Association of Realtor Multiple Listing Service, Inc. (GLVARMLS), and each partnership or joint venture to which any of them is a party, and all present and former officers, directors, agents, employees, consultants, or other persons acting for or on behalf of any of them.

J. The term "**Guidance**" means any policy, guideline, bylaw, rule, or practice.

K. The term "**IDX**" means Internet Data Exchange.

L. The term "**including**" means including but not limited to.

M. The term "**MLS**" means multiple-listing service.

N. The term "**person**" includes the Association and means any natural person, corporate entity, partnership, firm, association, sole proprietorship, joint venture, governmental entity, or trust.

O. The term "**REcolorado**" means REcolorado, each of its subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it, and each partnership or joint venture to which any of them is a party, and all present and former officers, directors, agents, employees, consultants, or other persons acting for or on behalf of any of it.

P. The term "**relating to**" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, reflecting, commenting or reporting on, mentioning, identifying, stating, or referring or alluding to.

Q. The term "**VOW**" means Virtual Office Website.

R. The terms "**and**" and "**or**" have both conjunctive and disjunctive meanings. The singular form of a noun or pronoun includes within its meaning the plural form of the noun or pronoun, and vice versa; and the past tense shall include the present tense where the clear meaning is not distorted.

INSTRUCTIONS

Timing

A. All references to year refer to calendar year. Unless otherwise specified, this Demand calls for documents, data, and other information prepared, created, sent, altered, or received by the Company since January 1, 2017.

For interrogatory responses, submit a separate response for each year or year-to-date unless otherwise specified. If calendar-year data are not available, supply the Association's fiscal-year data indicating the twelve-month period covered, and submit the Association's best estimate of calendar-year data.

Production Format

B. Department representatives must approve the format and production method of any documents, data, or other information before the Association makes an electronic production in response to this Demand. Before preparing its production, the Association must contact the Department to explain what materials are available and how they are stored. This discussion must include Association personnel who are familiar with its electronically stored information and databases/data sets.

C. Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Demand, the Association must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Association must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and Association terminology. For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically significant samples of documents categorized as non-responsive documents by the algorithm.

D. If the Department agrees to narrow the scope of this Demand to a limited group of custodians, a search of each custodian's files must include files of their predecessors; files maintained by their assistants or under their control; and common or shared databases or data sources maintained by the Association that are accessible by each custodian, their predecessors, or assistants.

E. Submit responses to this Demand in a reasonably usable format as required by the Department in the letter sent in connection with this investigation. Documents must be complete and unredacted, except for privilege. Documents must be submitted as found and ordered in the Association's files and must not be shuffled or otherwise rearranged. The Association is encouraged to submit copies of hard-copy documents electronically (with color hard copies where necessary to interpret the document) in lieu of producing original hard-copy documents. Absent a Department request, produce electronic documents in electronic form only. Electronic productions must be free of viruses. The Department will return any infected media for replacement, which may delay the Association's date of compliance with this Demand.

F. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") before discussing the information with the Department representatives. If any document responsive to a particular request contains Sensitive PII or SHI that is not responsive to that request, redact the unresponsive Sensitive PII or SHI before producing the document. To avoid any confusion about the reason for the redaction, produce a list of such redacted

documents by document control number. Sensitive PII includes a person's Social Security Number; or a person's name, address, or phone number in combination with one or more of their: (a) date of birth; (b) driver's license number or other state identification number, or a foreign country equivalent; (c) passport number; (d) financial account number; or (e) credit or debit card number. Sensitive Health Information includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

G. Provide any index of documents prepared by any person in connection with your response to this Demand. If the index is available in electronic form, provide it in that form.

H. The Association must continue to preserve documents or data contained in disaster recovery systems or back-up media that may contain information responsive to this Demand. Please contact the Division's representative to discuss your obligation to preserve back up media.

I. Produce all non-privileged portions of any responsive document (including non-privileged or redacted attachments) for which a privilege claim is asserted. Each document withheld in whole or in part from production based on a claim of privilege must be assigned a unique privilege identification number and separate fields representing the beginning and ending document control numbers and logged as follows:

    a. Each log entry must contain, in separate fields: privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; date of the document; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the anticipated litigation for any work-product claim and the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter sufficiently detailed to enable the Department to assess the privilege claim and the facts relied upon to support that claim.

    b. Include a separate legend containing an alphabetical list (by last name) of each name on the privilege log, identifying titles, company affiliations, the members of any group or email list on the log (e.g., the Board of Directors) and any name variations used for the same individual.

    c. On the log and the legend, list all attorneys acting in a legal capacity with the designation ESQ after their name (include a space before and after the "ESQ").

d. Produce the log and legend in electronic form that is both searchable and sortable. Upon request, the Association must submit a hard copy of the log and legend.

e. Department representatives will provide an exemplar and template for the log and legend upon request.

Any responsive document asserted to be privileged in its entirety created by the Association's in-house counsel or the Association's outside counsel that has not been distributed outside the Association's in-house counsel's office or the Association's outside counsel's law firm does not have to be logged. But if the document was distributed to any attorney who does not work exclusively in the Association's in-house counsel's office or who has any business responsibilities, it must be logged. Unlogged documents are subject to any preservation obligations the Association or counsel may have.

J. If the Association is unable to answer a question fully, it must supply all available information; explain why such answer is incomplete; describe the efforts made by the Association to obtain the information; and list the sources from which the complete answer may be obtained. If the information that allows for accurate answers is not available, submit best estimates and describe how the estimates were derived. Estimated data should be followed by the notation "est." If there is no reasonable way for the Association to estimate, provide an explanation.

K. If documents, data, or other information responsive to a particular request no longer exists for reasons other than the Association's document-retention policy, describe the circumstances under which it was lost or destroyed, describe the information lost, list the specifications to which it was responsive, and list persons with knowledge of such documents, data, or other information.

L. To complete this Demand, the Association must submit the certification on the reverse of the Civil Investigative Demand form, executed by the official supervising compliance with this Demand, and notarized.

Direct any questions you have relating to the scope or meaning of anything in this Demand or suggestions for possible modifications thereto to Steven Kramer at (202) 307-0997 or Ethan Stevenson at (202) 598-8091. The response to this Demand must be addressed to the attention of Steven Kramer and delivered between 8:30 a.m. and 5:00 p.m. on any business day to 450 Fifth Street, NW, Suite 4000, Washington, DC 20001. If the Association wishes to submit its response by U.S. mail, please call Steven Kramer or Ethan Stevenson for mailing instructions.

EXHIBIT 21

United States Department of Justice

Antitrust Division
Washington, DC 20530

To: National Association of REALTORS®
c/o Katie Johnson, General Counsel
430 N. Michigan Ave.
Chicago, IL 60611-4087

Civil Investigative Demand Number: **30360**

This civil investigative demand is issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, in the course of an antitrust investigation to determine whether there is, has been, or may be a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 by conduct, activities, or proposed action of the following nature: policies, bylaws, rules, guidelines, or practices that may unreasonably restrain competition in the provision of residential real-estate brokerages services in areas throughout the United States.

You are required by this demand to produce all documentary material described in the attached schedule that is in your possession, custody, or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. You are also required to answer the interrogatories on the attached schedule. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in which event the reasons for the objection must be stated in lieu of an answer. Such production of documents and answers to interrogatories shall occur on the 29th day of July, 2020 at 5:00 p.m.

The production of documentary material and the interrogatory answers in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production and/or responsible for answering each interrogatory.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available and the interrogatory answers shall be submitted: Owen Kendler (custodian) and Steven Kramer and Mona Haar (deputy custodians), U.S. Dept. of Justice, Antitrust Division, Media, Entertainment, and Professional Services Section, 450 Fifth Street NW, Suite 4000, Washington, DC 20530.

Inquiries concerning compliance should be directed to Steven Kramer at 202-307-0997 or Mona Haar at 202-598-8295.

Your attention is directed to 18 U.S.C. § 1505, printed in full on the reverse side of this demand, which makes obstruction of this investigation a criminal offense.

Issued in Washington, D.C., this 29th day of June, 2020.

/s/ Makan Delrahim

Assistant Attorney General

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress -

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

Form of Certificate of Compliance*

I/We have read the provisions of 18 U.S.C. § 1505 and have knowledge of the facts and circumstances relating to the production of the documentary material and have responsibility for answering the interrogatories propounded in Civil Investigative Demand No. _____. I/We do hereby certify that all documentary material and all information required by Civil Investigative Demand No. _____ which is in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to a custodian named therein.

If any documentary material otherwise responsive to this demand has been withheld or any interrogatory in the demand has not been fully answered, the objection to such demand and the reasons for the objection have been stated in lieu of production or an answer.

Signature _____

Title _____

Sworn to before me this _____ day of

_____, 20___.

_____

Notary Public

*In the event that more than one person is responsible for producing the documents and answering the interrogatories, the certificate shall identify the documents and interrogatories for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided by 28 U.S.C. § 1746.

CIVIL INVESTIGATIVE DEMAND FOR DOCUMENTS AND ANSWERS TO INTERROGATORIES ISSUED TO THE NATIONAL ASSOCIATION OF REALTORS®

Unless otherwise indicated or modified by the Department of Justice, each document demand and interrogatory included in this Civil Investigative Demand ("Demand") requires a complete search of the documents and information in your possession, custody, or control. In the Department's experience, modifications to this Demand may reduce the burden of searching for responsive documents and information in a way that is consistent with the Department's needs. The Association is encouraged to propose such modifications, but all modifications must be agreed to in writing by the Department.

DOCUMENT DEMANDS

1. Submit all documents prepared, created, sent, altered, or received since January 1, 2013, relating to off-MLS residential-property listings, including pocket listings or "coming soon" listings, or to public marketing of residential properties that are not listed on an MLS.

2. Submit all documents relating to any possible, proposed, or adopted rule or policy either restricting brokers' public marketing of off-MLS listings (such as NAR's Clear Cooperation Policy) or increasing incentives for brokers to list all properties with MLSs (such as the proposed policy described in NAR's September 18, 2018, request for a Business Review Letter (subsequently withdrawn)), including all communications and other documents relating to:

   a. NAR's consideration of, implementation of, and reasons for the rule or policy;

   b. the possible or actual effect of the rule or policy on cooperation among NAR members or competition;

   c. any pro-competitive benefits of the rule or policy; or

   d. the claim that, without such rule or policy, NAR members would list only less attractive homes on an MLS.

3. Submit all documents relating to any communication indicating, in substance, in whole or in part, to NAR, to any counsel representing NAR, or to anyone else that NAR is aware of that:

   a. if offers of compensation were prohibited, that person, or any other person, would not vote for or otherwise support the prohibition becoming part of NAR rules or policy, would continuing offering compensation including through other means, or would otherwise not accept the prohibition;

   b. if MLS members or participants were prohibited from offering or accepting compensation, that person, or any other person, would stop participating in any MLS in which the person presently participates;

c. if NAR members were prohibited from offering compensation, that person, or any other person, would end their membership in NAR or any other association of realtors;

d. membership in NAR or in a NAR-affiliated MLS is not more important or not greater than having the ability to offer compensation;

e. if NAR-affiliated MLS members were prohibited from offering compensation, that person, or any other person, would seek to offer compensation by other means, including potentially by using off-MLS listings or by forming non-NAR-affiliated MLSs or other services for exchanging listings information; or

f. if NAR-affiliated MLS members were prohibited from offering compensation, buyers or sellers of homes would be harmed.

4. Submit all documents relating to each instance in which the NAR or a state regulatory body reviewed a complaint, considered acting, or acted against any residential real-estate broker or agent for violating or potentially violating:

a. any NAR or state regulatory rule or ethical standard by misrepresenting or suppressing information concerning, or otherwise persuading, dissuading, or steering a client to or away from, a listing or a shown property, based on the level of compensation offered in the property's listing data; or

b. NAR's Code of Ethics Article 12, Standard of Practice 12-1 or former 12-2, or any other provision of NAR's ethical standards that permit (or permitted) REALTORS® to represent their services as free, provided certain conditions are (or were) satisfied.

5. Submit all documents, including documents prepared by any governmental, financial, or lending institution or association, relating to NAR's claims, in substance, in whole or in part, that:

a. the requirement that the seller offer compensation encourages home ownership by people who might otherwise not be able to afford it if they also had to bear the cost of the buyer-broker commission directly out of pocket;

b. if buyers were to bear the cost of compensating buyer brokers, some home buyers, such as low-income or first-time home buyers, would be unable to afford purchasing a home; or

c. if offers of compensation were prohibited, some buyers or potential buyers of residential real estate may be unable to obtain financing to pay for buyer-broker services or may be unable to pay for buyer-broker services directly out of pocket.

6. Submit all documents relating to the purpose, or the expected or actual effect of any of Northwest MLS's rules changes announced in July 2019 and implemented on October 1, 2019, including all documents relating to any communications relating to any of the changes.

7. Submit all documents, including PowerPoint or other slides and any audio or video recording, relating to:

   a. Katie Johnson's presentation on March 4, 2020, at the Chicago Agent Magazine's Accelerate Summit 2020; or

   b. the post-presentation interview of Ms. Johnson at the same conference by Chicago Agent Magazine's Senior Managing Editor, Meg White.

INTERROGATORIES

1. To the extent not disclosed in documents produced in response to Document Demand 3, identify each person, including each broker, that communicated, in substance, in whole or in part, to NAR, to any counsel representing NAR, or to anyone else that NAR is aware of, that:

   a. if offers of compensation were prohibited that person, or any other person, would not vote for or otherwise support the prohibition becoming part of NAR rules or policy, would continuing offering compensation including through other means, or would otherwise not accept the prohibition;

   b. if MLS members or participants were prohibited from offering or accepting compensation that person, or any other person, would stop participating in any MLS in which the person presently participates;

   c. if NAR members were prohibited from offering compensation, that person, or any other person, would end their membership in NAR or any other association of realtors;

   d. membership in NAR or in a NAR-affiliated MLS is not more important or not greater than having the ability to offer compensation;

   e. if NAR-affiliated MLS members were prohibited from offering compensation, that person, or any other person, would seek to offer compensation by other means, including potentially by using off-MLS listings or by forming non-NAR-affiliated MLSs or other services for exchanging listings information; or

   f. if NAR-affiliated MLS members were prohibited from offering compensation, buyers or sellers of homes would be harmed.

2. To the extent not disclosed in documents produced in response to Document Demand 4, identify each instance in which NAR or a state regulatory body reviewed a complaint, considered acting, or acted against a NAR member or any residential real-estate broker or agent for violating or potentially violating:

   a. any NAR or state regulatory rule or ethical standard by misrepresenting or suppressing information concerning, or otherwise persuading, dissuading, or steering a client to or away from a listing or a shown property, based on the level of compensation offered in the property's listing data; or

   b. NAR's Code of Ethics Article 12, Standard of Practice 12-1 or former 12-2, or any other provision of the NAR's ethical standards that permits (or permitted) REALTORS® to represent their service as free, provided certain conditions are (or were) satisfied.

      In identifying each instance, provide:

      (i) the member(s) and other real estate agent(s) involved;

      (ii) the rule or duties at issue;

      (iii) a summary of the violation(s) or potential violation(s) alleged;

      (iv) the date the violation or potential violation occurred;

      (v) the result of the action taken by NAR or the regulatory body, which could include no action; and

      (vi) the date of the action or decision to take no action by NAR or the regulatory body.

3. To the extent not disclosed in documents produced in response to Document Demand 5, identify each person who communicated, in substance, in whole or in part, to NAR, to any counsel representing NAR, or to anyone else that NAR is aware of, that:

   a. if offers of compensation were prohibited, some home buyers, such as low-income or first-time home buyers, would be unable to afford purchasing a home, may be unable to obtain financing to pay for buyer-broker services, and/or may be unable to pay for buyer-broker services directly out of pocket;

   b. the requirement that the seller offer compensation encourages home ownership by people who might otherwise not be able to afford it if they also had to bear the cost of the buyer-broker commission directly out of pocket; or

   c. if offers of compensation were prohibited, some buyers or potential buyers of residential real estate may be unable to obtain financing to pay for buyer-broker services or may be unable to pay for buyer-broker services directly out of pocket.

DEFINITIONS

The following definitions apply for the purposes of this Demand:

A. The terms "**the Association**," "**NAR**," "**you**," or "**your**" mean the National Association of Realtors®, and all present and former officers, directors, agents, employees, consultants, or other persons acting for or on behalf of any of it.

B. The terms "**any**" or "**each**" means each and every.

C. The term "**broker**" means a real-estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity and all present and former officers, directors, agents (including attorneys), employees, consultants, or other persons acting for or on behalf of a broker.

D. The term "**collaborative work environment**" means a platform used to create, edit, review, approve, store, organize, share, and access documents and information by and among authorized users, potentially in diverse locations and with different devices. Even when based on a common technology platform, collaborative work environments are often configured as separate and closed environments, each one of which is open to a select group of users with layered access control rules (reader vs. author vs. editor). Collaborative work environments include Microsoft Sharepoint sites, eRooms, document management systems (e.g., iManage), intranets, web content management systems (CMS) (e.g., Drupal), wikis, and blogs.

E. The term "**communication**" means any formal or informal disclosure, transfer, or exchange of information or opinion, however made.

F. The term "**documents**" means all written, printed, or electronically stored information ("ESI") of any kind in the possession, custody, or control of the Association, including information stored on social media accounts like Twitter or Facebook, chats, instant messages, text messages, and documents contained in collaborative work environments and other document databases. "Documents" includes metadata, formulas, and other embedded, hidden, and bibliographic or historical data describing or relating to any document. Unless otherwise specified, "documents" excludes bills of lading, invoices in non-electronic form, purchase orders, customs declarations, and other similar documents of a purely transactional nature; architectural plans and engineering blueprints; and documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

G. The term "**identify**" means to state:

(1) in the case of a person other than a natural person: name, principal address, and telephone number;

(2) in the case of a natural person other than a former employee of the Association: name, employer, business address, business telephone number, business email, and title or position;

(3) in the case of a former employee of the Association: name, current address, telephone number and email address, and the date that the employment with the Association ended; and

(4) in the case of a communication: a detailed statement of the substance of the communication; the names of all participants in the communication; the identity of witnesses to the communication; and the date, time, and place of the communication.

H. The term "**including**" means including but not limited to.

I. The term "**MLS**" means multiple-listing service.

J. The term "**person**" includes the Association and means any natural person, corporate entity, partnership, firm, association, sole proprietorship, joint venture, governmental entity, or trust.

K. The term "**relating to**" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, reflecting, commenting or reporting on, mentioning, identifying, stating, or referring or alluding to.

L. The terms "**and**" and "**or**" have both conjunctive and disjunctive meanings. The singular form of a noun or pronoun includes within its meaning the plural form of the noun or pronoun, and vice versa; and the past tense shall include the present tense where the clear meaning is not distorted.

M. The terms "**Sensitive Personally Identifiable Information**" or "**Sensitive PII**" mean information or data that would identify an individual, including a person's Social Security Number; or a person's name, address, or phone number in combination with one or more of their (a) date of birth; (b) driver's license number or other state identification number, or a foreign country equivalent; (c) passport number; (d) financial account number; or (e) credit or debit card number.

N. The terms "**Sensitive Health Information**" or "**SHI**" mean information or data about an individual's health, including medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

INSTRUCTIONS

Timing

A. All references to year refer to calendar year. Unless otherwise specified, this Demand calls for documents, data, and other information prepared, created, sent, altered, or received by the Association since January 1, 2017.

Production Format

B. Department representatives must approve the format and production method of any documents, data, or other information before the Association makes an electronic production in response to this Demand. Before preparing its production, the Association must contact the Department to explain what materials are available and how they are stored. This discussion must include the Association's personnel who are familiar with its electronically-stored information and databases/data sets.

C. Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Demand, the Association must submit a written description of the method(s) used to conduct any part of its search. In addition, for any process that relies on search terms to identify or eliminate documents, the Association must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) a list of stop words and operators for the platform being used; and (d) a glossary of industry and organization terminology. For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) confirmation that subject-matter experts will be reviewing the seed set and training rounds; (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) a validation process that allows for Department review of statistically-significant samples of documents categorized as non-responsive documents by the algorithm.

D. If the Department agrees to narrow the scope of this Demand to a limited group of custodians, a search of each custodian's files must include files of their predecessors; files maintained by their assistants or under their control; and common or shared databases or data sources maintained by the Association that are accessible by each custodian, their predecessors, or assistants.

E. Submit responses to this Demand in a reasonably usable format as required by the Department in the letter sent in connection with this investigation. Documents must be complete and unredacted, except for privilege and for any Sensitive Personally Identifiable Information or Sensitive Health Information redacted pursuant to Instruction F. Documents must be submitted as found and ordered in the Association's files and must not be shuffled or otherwise rearranged. The Association is encouraged to submit copies of hard-copy documents electronically (with color hard copies where necessary to interpret the document) in lieu of producing original hard-copy documents. Absent a Department request, produce electronic documents in electronic form only. Electronic productions must be free of viruses. The Department will return

any infected media for replacement, which may delay the Association's date of compliance with this Demand.

F. Do not produce any Sensitive PII or SHI before discussing the information with the Department representatives. If any document responsive to a particular request contains Sensitive PII or SHI that is not responsive to that request, redact the unresponsive Sensitive PII or SHI before producing the document. Provide any index of documents prepared by any person in connection with your response to this Demand that lists such redacted documents by document control number. If the index is available in electronic form, provide it in that form.

G. Provide any index of documents prepared by any person in connection with your response to this Demand. If the index is available in electronic form, provide it in that form.

H. The Association must continue to preserve documents or data contained in disaster recovery systems or back-up media that may contain information responsive to this Demand. If you have any questions, please contact the Department representative identified below to discuss your obligation to preserve or search back-up media.

I. Produce all non-privileged portions of any responsive document (including non-privileged or redacted attachments) for which a privilege claim is asserted. Each document withheld in whole or in part from production based on a claim of privilege must be assigned a unique privilege identification number and separate fields representing the beginning and ending document control numbers and logged as follows:

    a. Each log entry must contain, in separate fields: privilege identification number; beginning and ending document control numbers; parent document control numbers; attachments document control numbers; family range; number of pages; all authors; all addressees; all blind copy recipients; all other recipients; date of the document; an indication of whether it is redacted; the basis for the privilege claim (e.g., attorney-client privilege), including the anticipated litigation for any work-product claim and the underlying privilege claim if subject to a joint-defense or common-interest agreement; and a description of the document's subject matter sufficiently detailed to enable the Department to assess the privilege claim and the facts relied upon to support that claim.

    b. Include a separate legend containing an alphabetical list (by last name) of each name on the privilege log, identifying titles, company/organization affiliations, the members of any group or email list on the log (e.g., the Board of Directors) and any name variations used for the same individual.

    c. On the log and the legend, list all attorneys acting in a legal capacity with the designation ESQ after their name (include a space before and after the "ESQ").

d. Produce the log and legend in electronic form that is both searchable and sortable. Upon request, the Association must submit a hard copy of the log and legend.

e. Department representatives will provide an exemplar and template for the log and legend upon request.

Any responsive document asserted to be privileged in its entirety that was created by the Association's in-house counsel or the Association's outside counsel that has not been distributed outside the Association's in-house counsel's office or the Association's outside counsel's law firm does not have to be logged. But if the document was distributed to any attorney who does not work exclusively in the Association's in-house counsel's office or who has any business responsibilities, it must be logged. Unlogged documents are subject to any preservation obligations the Association or counsel may have.

J. If you are unable to answer a question fully, you must supply all available information; explain why such answer is incomplete; describe the efforts you made to obtain the information; and list the sources from which the complete answer may be obtained. If the information that allows for accurate answers is not available, submit best estimates and describe how the estimates were derived. Estimated data should be followed by the notation "est." If there is no reasonable way for you to estimate, provide an explanation.

K. If documents, data, or other information responsive to a particular Demand or Interrogatory no longer exists for reasons other than the Association's document-retention policy, describe the circumstances under which it was lost or destroyed, describe the information lost, list the specifications to which it was responsive, and list persons with knowledge of such documents, data, or other information.

L. If the Association previously produced a document responsive to this Demand to the Department during this investigation, it is not required to produced that document again; however, for any such documents, the Association must identify the document control numbers or other identifying information, if document control numbers are not available.

M. To complete this Demand, the Association must submit the certification on the reverse of the Civil Investigative Demand form, executed by the official supervising compliance with this Demand, and notarized.

Direct any questions you have relating to the scope or meaning of anything in this Demand or suggestions for possible modifications thereto to Steven Kramer at (202) 307-0997 or Mona Haar at (202) 598-8295. The response to this Demand must be addressed to the attention of Steven Kramer and delivered between 8:30 a.m. and 5:00 p.m. on any business day to 450 Fifth Street, NW, Suite 4000, Washington, DC 20001. If the Association wishes to submit its response by U.S. mail, please call Steven Kramer or Mona Haar for mailing instructions.

EXHIBIT 22

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
1	Submit all minutes (including attachments) of meetings of (a) the Association's Board of Directors or any committees thereof relating to MLS rules or NAR's code of ethics and (b) NAR's Multiple Listing Issues & Policies Committee and any predecessor thereof.		N/A	
2 (preamble)	Submit all documents relating to any policy, guideline, rule, or practice:	CID No. 29935: Demand 2 (preamble)	Submit all documents relating to any Guidance or software:	Submit all documents relating to any ~~Guidance~~policy, guideline, rule, or ~~software~~practice:
2(a) and 2(b)	requiring listing brokers to make an offer of compensation to buyer brokers to list a home on an MLS; conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants;	CID No. 29935: Demand 2(b)	requiring listing brokers to make an offer of compensation to buyer brokers in order to list a home on an MLS or conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants;	requiring listing brokers to make an offer of compensation to buyer brokers ~~in order~~ to list a home on an MLS ~~or~~ ; b. conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants;
2(c)	prohibiting, restricting, or inhibiting display or publication to consumers (including potential home buyers, clients, or customers) of the compensation offered by listing brokers to cooperating brokers;	CID No. 29935: Demand 2(a)	prohibiting, restricting, or inhibiting display or publication to consumers (including potential sellers, buyers, clients, or customers) of compensation offered by	prohibiting, restricting, or inhibiting display or publication to consumers (including potential ~~sellers,~~home buyers, clients, or customers) of the compensation offered by

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
			listing brokers to cooperating brokers	listing brokers to cooperating brokers;
2(d)	prohibiting buyer brokers from making the submission of an executed offer to purchase contingent on the listing broker's agreement to modify the offer of compensation or using the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation;	CID No. 29935: Demand 2(c)	prohibiting buyer brokers from making the submission of an executed offer to purchase contingent on the listing broker's agreement to modify the offer of compensation or using the terms of an offer to purchase to attempt to modify the listing broker's offer of compensation;	No changes.
2(e)	permitting Realtors® to represent their services as free or without cost;	CID No. 29935: Demand 2(e)	permitting realtors® to represent their services as free, provided that the potential for the realtor® to obtain a benefit from a third party is clearly defined;	permitting ~~realtors~~Realtors® to represent their services as free~~, provided that the potential for the realtor® to obtain a benefit from a third party is clearly defined~~ or without cost;
2(f)	encouraging or requiring MLS members, syndicators, purchasers, or users of MLS data or operators of IDX sites or VOWs, when displaying MLS listings, to separate MLS and non-MLS listings or to treat MLS and non-MLS listings differently any other way;	CID No. 29935: Demand 2(l)	encouraging or requiring syndicators, purchasers, or users of MLS data or operators of IDX sites, when displaying MLS listings, to separate MLS and non-MLS listings or discriminate between MLS and non-MLS listings;	encouraging or requiring MLS members, syndicators, purchasers, or users of MLS data or operators of IDX sites or VOWs, when displaying MLS listings, to separate MLS and non-MLS listings or ~~discriminate between~~to treat MLS and non-MLS listings differently any other way;

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
2(g)	permitting listing brokers to make offers of compensation to other MLS participants that vary based on the identity of the cooperating broker; and		N/A	
2(h)	regulating, inhibiting, restricting, prohibiting, or impeding the negotiation of offers of cooperative compensation between brokers.	CID No. 29935: Demand 2(i)	inhibiting, restricting, prohibiting, or impeding the negotiation of offers of cooperative compensation between brokers;	regulating, inhibiting, restricting, prohibiting, or impeding the negotiation of offers of cooperative compensation between brokers~~;~~.
2 (closing)	For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this Specification, please follow the default Timing instruction articulated below.	CID No. 29935: Demand PR 2 (closing)	The Association's response to this document demand must include all documents relating to (a) any possible or actual reason, rationale, or basis for adoption, approval, maintenance, revision, or retention of any such Guidance regardless of the date that such documents were prepared, created, sent, altered, or received by the Association; (b) any complaint about or any request to change, eliminate, or not enforce any such Guidance; (c) any possible or actual implementation or enforcement of any such	~~The Association's response~~For documents responsive to this ~~document demand must include all documents~~ Specification relating to ~~(a)~~ any possible or actual ~~reason,~~ rationale, reason, or basis for the adoption, approval, maintenance, ~~revision,~~ or retention of any ~~such Guidance~~ policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received ~~by the Association; (b) any complaint about or any request to change, eliminate, or not~~

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
			Guidance; (d) any possible or actual benefit, drawback, advantage, disadvantage, or effect of any such Guidance; (e) any discussion or communication relating to any such Guidance; (f) any training session, video, or materials relating to any such Guidance; or (g) any possible or actual antitrust or other legal or ethical issue relating to any such Guidance.	~~enforce any such Guidance; (e) any possible or actual implementation or enforcement of any such Guidance; (d) any possible or actual benefit, drawback, advantage, disadvantage, or effect of any such Guidance; (e) any discussion or communication relating to any such Guidance; (f) any training session, video, or materials relating to any such Guidance; or (g) any possible or actual antitrust or~~. For all other ~~legal or ethical issue relating to any such Guidance~~documents responsive to this Specification, please follow the default Timing instruction articulated below.
3	Submit all documents relating to any policy, guideline, rule, practice, or software enabling or permitting brokers to search for, filter, or exclude MLS listings based on the level or type of	CID No. 29935: Demand 2 (preamble), (g), (closing)	Submit all documents relating to any Guidance or software: . . . enabling or permitting brokers to search for, filter, or exclude MLS listings based on the level or type of cooperative	Submit all documents relating to any ~~Guidance~~policy, guideline, rule, practice, or software~~: . . .~~ enabling or permitting brokers to search for, filter, or exclude MLS listings based on the level or type of cooperative

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
	cooperative compensation offered by a listing broker. For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, practice, or software, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this Specification, please follow the default Timing instruction articulated below.		compensation offered by a listing broker . . . . The Association's response to this document demand must include all documents relating to (a) any possible or actual reason, rationale, or basis for adoption, approval, maintenance, revision, or retention of any such Guidance regardless of the date that such documents were prepared, created, sent, altered, or received by the Association	compensation offered by a listing broker~~. . . .~~. ~~The Association's response~~For documents responsive to this ~~document demand must include all documents~~ Specification relating to ~~(a)~~ any possible or actual ~~reason,~~ rationale, reason, or basis for the adoption, approval, maintenance, ~~revision,~~ or retention of any ~~such Guidance~~ policy, guideline, rule, practice, or software, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received ~~by the Association . . .~~. For all other documents responsive to this Specification, please follow the default Timing instruction articulated below.
4	Submit all documents relating to any possible, proposed, or adopted policy, guideline, rule, or practice that restricts a	CID No. 30360: Demand 2	Submit all documents relating to any possible, proposed, or adopted rule or policy either restricting brokers' public	Submit all documents relating to any possible, proposed, or adopted ~~rule or~~ policy ~~either restricting~~, guideline, rule, or

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
	brokers' marketing of off-MLS listings (such as NAR's Clear Cooperation Policy) or increases the incentives for brokers to list all properties with MLSs (such as the proposed policy described in NAR's September 18, 2018, request for a Business Review Letter to the Department of Justice Antitrust Division (subsequently withdrawn)). For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this specification, please follow the default Timing instruction articulated below.		marketing of off-MLS listings (such as NAR's Clear Cooperation Policy) or increasing incentives for brokers to list all properties with MLSs (such as the proposed policy described in NAR's September 18, 2018, request for a Business Review Letter (subsequently withdrawn)), including all communications and other documents relating to: a. NAR's consideration of, implementation of, and reasons for the rule or policy; b. the possible or actual effect of the rule or policy on cooperation among NAR members or competition; c. any pro-competitive benefits of the rule or policy; or d. the claim that, without such rule or policy, NAR members would list only less attractive homes on an MLS.	practice that restricts a brokers' ~~public~~ marketing of off-MLS listings (such as NAR's Clear Cooperation Policy) or ~~increasing~~increases the incentives for brokers to list all properties with MLSs (such as the proposed policy described in NAR's September 18, 2018, request for a Business Review Letter to the Department of Justice Antitrust Division (subsequently withdrawn~~)),~~ ~~including all communications and other documents relating to:~~)). ~~a. NAR's consideration of, implementation of, and reasons for the rule or policy;~~ ~~b. the possible or actual effect of the rule or policy on cooperation among NAR members or competition;~~ ~~c. any pro-competitive benefits of the rule or policy; or~~

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
				~~d. the claim that, without such rule or policy, NAR members would list only less attractive homes on an MLS.~~For documents responsive to this Specification relating to any possible or actual rationale, reason, or basis for the adoption, approval, maintenance, or retention of any policy, guideline, rule, or practice, submit all documents regardless of the date that such documents were prepared, created, sent, altered, or received. For all other documents responsive to this specification, please follow the default Timing instruction articulated below.
5	Submit all documents relating to the purpose or the expected or actual effect of any change in Northwest MLS's rules announced in July 2019 and implemented on October 1, 2019, including all communications relating to any change.	CID No. 30360: Demand 6	Submit all documents relating to the purpose, or the expected or actual effect of any of Northwest MLS's rules changes announced in July 2019 and implemented on October 1, 2019, including all documents relating to any	Submit all documents relating to the purpose~~,~~ or the expected or actual effect of any ~~of~~change in Northwest MLS's rules ~~changes~~ announced in July 2019 and implemented on October 1, 2019, including all ~~documents relating to any~~

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
			communications relating to any of the changes.	communications relating to any ~~of the changes~~change.
6	Submit all documents relating to brokers steering potential buyers toward or away from homes for sale based on the amount of cooperative compensation offered by a listing broker.	CID No. 30360: Demand 4	Submit all documents relating to each instance in which the NAR or a state regulatory body reviewed a complaint, considered acting, or acted against any residential real-estate broker or agent for violating or potentially violating: a. any NAR or state regulatory rule or ethical standard by misrepresenting or suppressing information concerning, or otherwise persuading, dissuading, or steering a client to or away from, a listing or a shown property, based on the level of compensation offered in the property's listing data; or b. NAR's Code of Ethics Article 12, Standard of Practice 12-1 or former 12-2, or any other provision of NAR's ethical standards that permit (or permitted) REALTORS® to represent	Submit all documents relating to ~~each instance in which the NAR or a state regulatory body reviewed a complaint, considered acting, or acted against any residential real-estate broker or agent for violating or potentially violating:~~ ~~a. any NAR or state regulatory rule or ethical standard by misrepresenting or suppressing information concerning, or otherwise persuading, dissuading, or~~brokers steering ~~a client to~~potential buyers toward or away from~~, a listing or a shown property,~~ homes for sale based on the ~~level~~amount of cooperative compensation offered ~~in the property's~~by a listing ~~data; or~~ ~~b. NAR's Code of Ethics Article 12, Standard of Practice 12-1 or former 12-2, or any other provision of~~

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
			their services as free, provided certain conditions are (or were) satisfied.	~~NAR's ethical standards that permit (or permitted) REALTORS® to represent their services as free, provided certain conditions are (or were) satisfied.~~broker
7	Submit all documents relating to any possible or actual rebates of any broker commission or any offer of any gift card or other benefit to any home seller or buyer, including all communications relating to such rebates or offers between NAR and (a) any personnel of any state regulatory agency or legislature or (b) any personnel of any association of Realtors®.	CID No. 29935: Demand 5	Submit all documents relating to possible or actual rebates of any listing- or buyer-broker commission or any offer of any gift card to any home seller or buyer, including all documents relating to communications relating to such rebates or gift-card offers with any personnel of any state regulatory agency or legislature, or of any personnel of any association of realtors®.	Submit all documents relating to any possible or actual rebates of any ~~listing- or buyer-~~broker commission or any offer of any gift card or other benefit to any home seller or buyer, including all ~~documents relating to~~ communications relating to such rebates or ~~gift-card~~ offers ~~with~~between NAR and (a) any personnel of any state regulatory agency or legislature~~,~~ or ~~of~~(b) any personnel of any association of ~~realtors~~Realtors®.
8	Submit all documents relating to the benefits of membership in MLSs and the role of MLSs in the market for real estate brokerage services.		N/A	
9	Submit all documents relating to or produced by NAR in the		N/A	

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
	Moehrl Antitrust Litigation or the *Sitzer* Antitrust Litigation.			
10	Submit all documents relating to *United States v. National Association of Realtors*®, Case No. 1:20-sv-3356 (D.D.C.), including all communications with NAR members about the filed Complaint or proposed Final Judgment and any contemplated changes to any NAR policy, guideline, rule, or practice related to the Antitrust Division's investigation into or settlement with NAR.		N/A	
11 (preamble)	Submit documents sufficient to show all of NAR's policies, guidelines, rules, and practices existing currently or at any time during 2018 or thereafter, relating to:	CID No. 29935: Demand 12 (preamble)	Submit documents sufficient to show all of NAR's rules, policies, and practices existing currently or at any time during 2018 and 2019, relating to:	Submit documents sufficient to show all of NAR's ~~rules,~~ policies, guidelines, rules, and practices existing currently or at any time during 2018 ~~and 2019~~or thereafter, relating to:
11(a)	the retention and destruction of documents, including the retention, storage, deletion, and archiving of electronically stored information, including e-mail; or	CID No. 29935: Demand 12(a)	the retention and destruction of documents, including the retention, storage, deletion, and archiving of electronically stored information, including e-mail; or	No changes.
11(b)	the use of personal electronic devices or personal email for NAR business.	CID No. 29935:	the use of personal electronic devices for NAR business.	the use of personal electronic devices or personal email for NAR business.

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
		Demand 12(b)		
12	Submit all documents relating to any allegation that the Association is behaving or has behaved in an anticompetitive manner.		N/A	
13	Identify all local associations of Realtors® and local MLSs currently affiliated with the Association.	CID No. 29935: Interrogatory 1	Identify all local associations of realtors® and local MLSs currently affiliated with the Association, including the address for each local association identified.	Identify all local associations of ~~realtors~~Realtors® and local MLSs currently affiliated with the Association~~, including the address for each local association identified~~.
14	Submit all documents relating to any former or potential withdrawal of any broker from an MLS.		N/A	
15	Describe all instances in the past 15 years in which any broker has withdrawn from an MLS, and identify each broker.		N/A	
16	Describe any rationale for any policy, guideline, rule, or practice requiring listing brokers to make an offer of compensation to buyer brokers to list a home on an MLS.	CID No. 29935: Demand 2(b), (closing)	all documents relating to [] any possible or actual reason, rationale, or basis for adoption, approval, maintenance, revision, or retention of any such Guidance	~~all documents relating to []~~Describe any ~~possible or actual reason,~~ rationale~~, or basis~~ for ~~adoption, approval, maintenance, revision, or retention of~~ any ~~such Guidance . . . .~~

Comparison between CID No. 30729 and Withdrawn CID Nos. 29935 and 30360

Specification Number	CID No. 30729 Specification	Request Number	Withdrawn CID No. 29935 or No. 30360 Document Demand or Interrogatory	Redline
			requiring listing brokers to make an offer of compensation to buyer brokers in order to list a home on an MLS or conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants	policy, guideline, rule, or practice requiring listing brokers to make an offer of compensation to buyer brokers ~~in order~~ to list a home on an MLS ~~or conditioning MLS membership or participation on offering or accepting compensation to and from other MLS participants~~.
17 and 18	Submit all studies either performed or commissioned by NAR relating to broker commissions and any underlying data. Submit all documents discussing, relating to, analyzing, or relying on any study produced in response to Specification 17.	CID No. 29935: Demand 10	Submit all studies either performed or commissioned by NAR relating to broker commissions and all documents discussing or relying on any such study.	Submit all studies either performed or commissioned by NAR relating to broker commissions and any underlying data. Submit all documents discussing, relating to, analyzing, or relying on any ~~such~~ study produced in response to Specification 17.

EXHIBIT 23

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:20-CR-358-2
	§	JUDGE MAZZANT
JOHN RODGERS (2)	§	
	§	

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT JOHN RODGERS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Defendant John Rodgers' motion to dismiss the First Superseding Indictment (the "Indictment") is based on a false premise: that the United States orally granted him a non-prosecution agreement in exchange for cooperation. Rodgers fails to inform the Court that he and his counsel ("Counsel") reached two *written* agreements with the United States that specifically acknowledged and preserved the United States' ability to prosecute Rodgers. Each one was an unambiguous no-direct-use agreement—not a non-prosecution agreement—and each contained a merger clause by which Rodgers and Counsel acknowledged that the agreement constituted Rodgers' entire understanding with the United States. Those were the only agreements between the United States and Rodgers. As a result, Rodgers' motion fails.

Rodgers also moves to dismiss Count One of the Indictment, adopting Defendant Neeraj Jindal's arguments (Dkt. #45). Rodgers' motion to dismiss Count One should be denied for the same reasons as Jindal's motion (Dkt. #46).[1]

II. FACTUAL BACKGROUND

A. No-Direct-Use Agreements and Non-Prosecution Agreements

The United States Department of Justice Antitrust Division ("Division") may enter into no-direct-use agreements ("NDU"s), commonly referred to as "proffer letters," with subjects of criminal investigations who sit for voluntary interviews (Ex. 1, at 1). An NDU generally provides, with limits and exceptions, that the United States will not directly use the subject's statements against the subject (*e.g.*, Ex. 2, at 1; Ex. 3, at 1). The limits and exceptions generally include that statements may be directly used to impeach the subject's testimony, to rebut evidence offered on the subject's behalf, and to prosecute the subject for certain offenses (e.g., obstruction of justice)

[1] The United States adopts its response to Jindal's motion (Dkt. #46) in response to Rodgers' motion to dismiss Count One.

(*e.g.*, Ex. 2, at 1; Ex. 3, at 1). While the subject may choose to end the interview or decline to answer a question, an NDU requires the subject to be "truthful, fully candid, and complete" as to any question the subject chooses to answer (*e.g.*, Ex. 2, at 1; Ex. 3, at 1). NDUs are generally executed on a per-interview basis when, as with Rodgers, the subject and the Division have not negotiated or entered into any other agreements that protect the subject from prosecution or direct use of inculpatory statements.

Non-prosecution agreements differ markedly from NDUs. Unlike NDUs, non-prosecution agreements clearly state that, with limits and exceptions, the individual entering the agreement will be protected from prosecution—not merely from direct use of statements (Ex. 1, at 1). Non-prosecution agreements require supervisory approval (Ex. 1, at 1). The Division's general practice is that both NDUs and non-prosecution agreements are to be in writing (Ex. 1, at 1).

B. Rodgers' No-Direct-Use Agreements with the United States

Before Rodgers' first interview with both the Federal Bureau of Investigation ("FBI") and the Division on December 12, 2019,[2] Rodgers, Counsel, and the Division entered into an NDU setting forth the terms that would govern the interview (Ex. 2). The NDU included a provision requiring Rodgers to be "truthful, fully candid, and complete in providing information concerning the matters about which [he was] asked," and chose to answer, during the interview (Ex. 2, at 1). While generally protecting Rodgers from direct use of his statements, the NDU authorized the United States to use Rodgers' statements "in any [legal] proceeding to impeach [his] testimony or to rebut evidence offered on [his] behalf" (Ex. 2, at 1). The NDU also provided that "the United States may use any statements made in the interview in a prosecution of [Rodgers] for making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503,

[2] The FBI had previously interviewed Rodgers (Ex. 1, at 2).

et seq.), or perjury (18 U.S.C. § 1621)" (Ex. 2, at 1). The NDU specifically contemplated a future prosecution of Rodgers: "The United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and *in any subsequent prosecution of you* or others" (Ex. 2, at 1 (emphasis added)). And the NDU contained a merger clause: "This letter constitutes the entire understanding between the United States and you" (Ex. 2, at 2).

In December 2020, the Grand Jury indicted Jindal for price fixing in violation of 15 U.S.C. § 1 and obstruction in violation of 18 U.S.C. § 1505 (Dkt. #1). The Division contacted Counsel on December 9, 2020, to inform him of the indictment and that the United States anticipated Rodgers would need to testify at trial (Ex. 1, at 2).[3]

On a January 12, 2021 phone call, the Division and Counsel discussed the fact that Jindal had been charged with both antitrust and obstruction offenses, and the Division asked to interview Rodgers in preparation for trial (Ex. 1, at 2). During this call, Counsel inquired as to Rodgers' status, and the Division told Counsel, among other things, that Rodgers was a subject of the investigation and there was no indication that Rodgers or Counsel had ever been told that Rodgers would not be prosecuted (Ex. 1, at 2). Counsel acknowledged Rodgers' status as a subject (Ex. 1, at 2).

Before Rodgers' second interview with both the FBI and the Division on January 27, 2021, Rodgers, Counsel, and the Division executed another NDU requiring Rodgers to be "truthful, fully candid, and complete in providing information concerning the matters about which [he was] asked," and chose to answer, during the interview (Ex. 3, at 1). Like the first NDU, the second NDU generally protected Rodgers from direct use of his statements but authorized the United

[3] Rodgers and Counsel misidentify the attorney who called Counsel on December 9, 2020 (Dkt. #45, at 5–6; Dkt. #45-8 (Ex. G) ¶ 9). The attorney with whom Counsel spoke is a counsel of record for the United States in this case (Ex. 1, at 2).

States to use his statements "in any [legal] proceeding to impeach [his] testimony or to rebut evidence offered on [his] behalf" and "in a prosecution of [Rodgers] for making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or perjury (18 U.S.C. § 1621)" (Ex. 3, at 1). Also like the first NDU, the second NDU specifically contemplated a future prosecution of Rodgers: "The United States is free to use any information directly or indirectly derived from the interview to pursue its investigation and *in any subsequent prosecution of you* or others" (Ex. 3, at 1 (emphasis added)). And the second NDU also contained a merger clause: "This letter and the attached Addendum [with video teleconference provisions] constitute the entire understanding between the United States and you in connection with this interview" (Ex. 3, at 2).

C. Rodgers' Change in Status

On a March 1, 2021 phone call, the Division notified Counsel that Rodgers' status had changed from subject to target because of Rodgers' culpability and failure to be truthful, fully candid, or complete (Ex. 1, at 3). On a March 30, 2021 phone call, the Division informed Counsel that it would likely recommend prosecution of Rodgers for committing a criminal antitrust offense and for obstructing justice by endeavoring to cover up that offense (Ex. 1, at 3). On that call, the Division gave Counsel an overview of Rodgers' false statements and obstruction, and the Division extended a plea offer (Ex. 1, at 3).

On April 9, 2021, Counsel notified the Division that Rodgers rejected the plea offer (Ex. 1, at 3). Five days later, the Grand Jury returned the Indictment that Rodgers now moves to dismiss (Dkt. #21). Count One of the Indictment charges Jindal and Rodgers with knowingly entering into and engaging in a conspiracy to suppress competition by agreeing to fix prices paid to home-healthcare workers (Dkt. #21 ¶¶ 1–13). Count Two charges Jindal and Rodgers with conspiring to obstruct and make false statements in a Federal Trade Commission ("FTC") investigation of

their conduct (Dkt. #21 ¶¶ 14–20). And Counts Three and Four charge Jindal and Rodgers, respectively, with endeavoring to obstruct the FTC investigation (Dkt. #21 ¶¶ 21–26).

III. LEGAL STANDARD

A defendant claiming to have a non-prosecution agreement bears the burden of "prov[ing] that such an agreement existed." *United States v. Jimenez*, 256 F.3d 330, 347 & n.23 (5th Cir. 2001). "Non-prosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law." *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998). "[Courts] look to the language of the contract, unless ambiguous, to determine the intention of the parties." *In re Conte*, 206 F.3d 536, 538 (5th Cir. 2000). "'[P]arol evidence is inadmissible to prove the meaning of an unambiguous [contractual] agreement.' Thus, when a contract is unambiguous, [courts] generally will not look beyond the four corners of the document." *United States v. Long*, 722 F.3d 257, 262 (5th Cir. 2013) (quoting *United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994)).[4]

IV. ARGUMENT

A. Rodgers' Unambiguous Written Agreements with the United States Do Not Constitute a Non-Prosecution Agreement.

Rodgers and Counsel fail to apprise the Court that Rodgers had two written NDUs with the United States; that those agreements constituted the Division's entire agreement with him; and that those agreements were unambiguously not a non-prosecution agreement. These written agreements conclusively establish that Rodgers did not have any non-prosecution agreement, and he and Counsel could not have reasonably believed that such an agreement existed.

[4] The only exception to the parol evidence rule is for "a cover letter attached to the plea agreement," which courts have construed "together." *Long*, 722 F.3d at 263. This exception does not apply here as Rodgers does not point to any cover letter attached to his NDUs (Dkt. #45).

In *Jimenez*, the Fifth Circuit found that "a letter proposing to meet with [the defendant]" and providing that "any statement which [the defendant] makes in this meeting will not be used against him in a future prosecution" was not a non-prosecution agreement. 256 F.3d at 347–48. The Eighth Circuit similarly held that an NDU did not constitute a non-prosecution agreement:

> The proffer letter was not a non-prosecution agreement. The letter contained an agreement to "engage in negotiations involving specific concessions" by the Government in exchange for further cooperation *if* the Government believed the information in the proffer was "truthful, candid and meritorious." The letter also provided use immunity (with some limitations). However, these provisions do not amount to a non-prosecution agreement.

United States v. Hyles, 521 F.3d 946, 953 (8th Cir. 2008) (emphasis in original).

Before each of the December 2019 and January 2021 interviews with the FBI and the Division, Rodgers and Counsel executed a written NDU with the United States (Ex. 2; Ex. 3). Yet neither Rodgers' motion nor Counsel's declaration makes a single mention of these NDUs (Dkt. #45; Dkt. #45-8 (Ex. G)). The NDUs included terms defining Rodgers' obligations and—with specified limits and exceptions—prohibiting the United States from using Rodgers' statements directly against him in a future prosecution (Ex. 2, at 1; Ex. 3, at 1). Each NDU "clearly stated that its terms were conditioned on [Rodgers'] giving complete and truthful information." *Ballis*, 28 F.3d at 1410 (*see* Ex. 2, at 1; Ex. 3, at 1). The NDUs also acknowledged that Rodgers was a subject of the investigation and accordingly defined circumstances under which Rodgers' statements and information could be used, including *in a prosecution of Rodgers* (Ex. 2, at 1; Ex. 3, at 1). The NDUs thus unambiguously contemplated a future prosecution of Rodgers and expressly provided that the United States *could* prosecute such a case.

Rodgers consulted with Counsel before signing each NDU (Ex. 2, at 1; Ex. 3, at 1). Rodgers and Counsel signed the first NDU on December 12, 2019 (Ex. 2). That was after the November 26, 2019 call between Counsel and the Division during which, Counsel declares, the

Division represented that it did not anticipate charging Rodgers if he continued to cooperate (Dkt. #45-8 (Ex. G) ¶ 2). Yet Counsel does not declare that he asked for or negotiated any change or addition to the terms of the first NDU, much less that he requested inclusion of any agreement not to prosecute Rodgers (*see* Dkt. #45-8 (Ex. G)). Counsel and Rodgers signed the second NDU on January 26, 2021 (Ex. 3). That was after the January 12, 2021 call between Counsel and the Division during which Counsel declares that he felt the Division "was threatening that Rodgers could be charged in this case" (Dkt. #45-8 (Ex. G) ¶ 10). Yet Counsel does not declare that he asked for or negotiated any change or addition to the terms of the second NDU, much less that he requested inclusion of any agreement not to prosecute Rodgers (*see* Dkt. #45-8 (Ex. G)). Nor does Counsel declare that he lacked the capacity and experience to know the difference between an NDU and a non-prosecution agreement, to explain the difference to his client, or to understand the NDU terms to which he and his client agreed (*see* Dkt. #45-8 (Ex. G)).

Rodgers points to no terms—because there are none—in his agreements with the United States indicating that the Division was prohibited from re-evaluating Rodgers' status or from prosecuting him (Dkt. #45).[5] Moreover, each agreement included a merger clause.[6] The first NDU stated: "This letter constitutes the entire understanding between the United States and you" (Ex. 2, at 2). The second NDU stated: "This letter and attached Addendum [with video teleconference

[5] Indeed, Counsel acknowledges that on more than one occasion he asked the Division about Rodgers' status, yet these inquiries would have been unnecessary if, as Counsel now declares, a non-prosecution agreement already existed (*see* Dkt. #45-8 (Ex. G) ¶¶ 7, 9, 10).

[6] "A merger clause is a 'provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.' A merger clause . . . 'achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negating the apparent authority of an agent to later modify the contract's terms.'" *People's Cap. & Leasing Corp. v. McClung*, No. 4:18-CV-00877, 2020 WL 4464503, at *8 (E.D. Tex. Aug. 4, 2020) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 334 (Tex. 2011); *IKON Off. Sols., Inc. v. Eifert*, 125 S.W.3d 113, 126 n.6 (Tex. App. 2003)).

provisions] constitute the entire understanding between the United States and you in connection with this interview" (Ex. 3, at 2). Therefore, each NDU "clearly state[d] that it reflect[ed] the entire agreement of the parties." *Ballis*, 28 F.3d at 1410. The NDUs included nothing indicating that "the government waived its right to prosecute [Rodgers]." *Id.*

The NDUs are the only agreements Rodgers executed with the United States. They are unambiguous, they contemplate Rodgers' potential prosecution, and they contain merger clauses. They do not constitute a non-prosecution agreement. *See Jimenez*, 256 F.3d at 347–48; *Hyles*, 521 F.3d at 953. And they foreclose any contention that there was a non-prosecution agreement at the time of their signing. *See, e.g.*, *United States v. Casares*, No. CR 2:14-653, 2019 WL 1243617, at *4–5 (S.D. Tex. Mar. 18, 2019) (rejecting claim that the government violated movant's Fifth Amendment right to due process when it breached its agreement not to prosecute him, "[b]ecause no such agreement existed," where proffer agreement "merely provided that 'no statements made or other information provided by [the movant] during the proffer will be used directly against [him] in any criminal case'" and "did not preclude the Government from prosecuting him"). In sum, Rodgers' motion fails at its outset because there was *no* non-prosecution agreement between the United States and Rodgers.

B. Rodgers Cannot Meet His Burden to Prove the Existence of a Non-Prosecution Agreement Because There Was None.

Because parol evidence is inadmissible to prove the meaning of the unambiguous NDUs, Rodgers cannot use extrinsic evidence to circumvent their "four corners." *Long*, 722 F.3d at 262. Following "general principles of contract law," *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999), the NDUs conclusively establish that no non-prosecution agreement existed, *see Long*, 722 F.3d at 262–63; *Ballis*, 28 F.3d at 1410. Moreover, when a formal agreement contains a "merger clause stating that the written . . . agreement constitutes the complete agreement among the

Government, [the defendant], and [the defendant's] counsel," any reliance on alleged external promises is "unreasonable." *Long*, 722 F.3d at 264. Here, as in *Long*, each formal agreement that Rodgers, Counsel, and the Division executed stated that it constituted the entire agreement among the signatories at the time of their signing (Ex. 2; Ex. 3). It would therefore have been unreasonable for Rodgers and Counsel to rely on alleged oral promises external to the agreements. *See Long*, 722 F.3d at 264. Indeed, it is "difficult . . . to accept as true . . . that a seasoned criminal attorney would rely on a 'gentleman's agreement' where his client's liberty . . . w[as] at stake." *United States v. McHan*, 101 F.3d 1027, 1035 (4th Cir. 1996), *abrogated on other grounds by Honeycutt v. United States*, 137 S. Ct. 1626 (2017). And it is impossible to accept as true when, as here, the purported oral agreement conflicts with written agreements. *See Long*, 722 F.3d at 264.

But even if the Court were to accept Rodgers' invitation to disregard the parol evidence rule, Rodgers would remain unable to "demonstrate at least a meeting of the minds that the government would refrain from further prosecuting him in exchange for his cooperation." *McHan*, 101 F.3d at 1034; *accord Jimenez*, 256 F.3d at 347. *McHan* provides an instructive contrast. There, as here, the defendant and his former counsel alleged the existence of an oral non-prosecution agreement. *McHan*, 101 F.3d at 1034–35. Unlike here, in *McHan* the defendant's former counsel "testified that he had told [the AUSA] that [the defendant] would not submit to debriefing *unless the government guaranteed* that there 'wouldn't be any further criminal prosecution'" and "he understood [the AUSA] to *acquiesce in their conditions*." *Id.* at 1034 (emphases added). Even with this testimony, the magistrate judge found counsel's version of events "implausible" because it "'stretch[ed] the bounds of reasonableness to infer' that the government—despite its general practice in that district of reducing all agreements to writings

signed by the parties—'would jeopardize its interest' . . . with an oral agreement." *Id.* at 1035 (alteration in original). Here, the allegation of a non-prosecution agreement is even less plausible because Rodgers and Counsel do not allege that they *ever requested* a non-prosecution agreement, much less that Rodgers refused to be interviewed without a non-prosecution guarantee and that the Division acquiesced to this condition (*see* Dkt. #45-8 (Ex. G)).

Even taken at face value, Counsel's declaration does not show a meeting of the minds that the Division would refrain from prosecuting Rodgers in exchange for his cooperation. Counsel recounts that the Division consistently said that Rodgers was a "subject" of the investigation, not merely a "witness" (Dkt. #45-8 (Ex. G) ¶¶ 2, 7, 10). Counsel admits his understanding that Rodgers' status as "subject" meant that he could be criminally prosecuted, and claims he was "satisfied" with the representation that the Division did not *anticipate* charging Rodgers if he cooperated (Dkt. #45-8 (Ex. G) ¶ 2). Counsel and Rodgers subsequently executed two written agreements with the Division without suggesting that any promise not to prosecute Rodgers should be included (Dkt. #45-8 (Ex. G); Ex. 2; Ex. 3). And it is revealing that in his contemporaneous reaction to Rodgers' change in status, Counsel *did not* assert the change violated any agreement (*see* Dkt. #45-8 (Ex. G) ¶¶ 12–13; Dkt. #45-15 (Ex. N)).

As in *McHan*, here it is "accurate to say that the *only real agreement*" between Rodgers and the Division "was that nothing that [Rodgers] said during the [interviews] would be used against him." 101 F.3d at 1035 (emphasis in original). The NDU provisions were clear that they gave Rodgers certain protections in the event that his status changed: if the United States later prosecuted Rodgers, the United States could not directly use his statements against him, except as specified in the NDU (Ex. 2, at 1; Ex. 3, at 1). But far from guaranteeing against prosecution, the NDUs expressly acknowledged and preserved the possibility of prosecution (Ex. 2, at 1; Ex. 3,

at 1). Thus, the NDUs made it plain that the Division "was unwilling to say that [the United States] would not prosecute." *McHan*, 101 F.3d at 1035.

Rodgers' situation is not unique, and Counsel's declaration reflects this understanding. Counsel does not claim that the Division ever agreed not to prosecute Rodgers, but rather that the Division anticipated Rodgers would remain a subject so long as he cooperated (*see* Dkt. #45-8 (Ex. G)). That *anticipation* does not constitute a non-prosecution *agreement*, and it would be unreasonable to think otherwise. *See Long*, 722 F.3d at 264. As in *McHan*, the "inescapable conclusion" in this case is "that there was no agreement" not to prosecute. 101 F.3d at 1035.

C. Even If There Were a Non-Prosecution Agreement, Rodgers' False Statements and Obstruction Would Preclude Dismissal of the Indictment.

Even if Rodgers had proved the existence of any non-prosecution agreement—which he has not—he still would not be entitled to dismissal of the Indictment. Rather, the United States would then be required to prove that Rodgers violated whatever hypothetical agreement he succeeded in establishing. *See Jimenez*, 256 F.3d at 347 n.23 ("[The defendant] argues that, in order to prosecute him, the government must prove that [he] breached the alleged immunity agreement. *This rule only applies, however, if [the defendant] first proves that such an agreement existed.* (emphasis added)).

If necessary, the United States could readily show a material violation of any non-prosecution agreement. Counsel implicitly admits as much when he declares that Rodgers told the Division and the FBI substantially the same story that he told the FTC (Dkt. #45-8 (Ex. G) ¶ 12), for the Grand Jury found probable cause to believe that much of that story was false, misleading, incomplete, and part of a conspiracy and endeavor to obstruct justice (*see* Dkt. #21 ¶¶ 20(a), (g)–(j), 24–26). Consistently making false statements to different investigators is not cooperation; it is obstruction, as the Division explained to Counsel on March 30, 2021 (Ex. 1, at 3).

V. CONCLUSION

There was no non-prosecution agreement between the United States and Rodgers, and Rodgers' adopted arguments regarding Count One are meritless. The United States accordingly requests that the Court deny Rodger's Motion to Dismiss the Superseding Indictment.

Respectfully submitted,

/s/ Matthew W. Lunder

MATTHEW W. LUNDER
Bar No. MT 8671
Email: matthew.lunder@usdoj.gov

JARIEL A. RENDELL
Bar No. DC 1027023
Email: jariel.rendell@usdoj.gov

DOHA MEKKI
Bar No. NY 5109715
Email: doha.mekki@usdoj.gov

RACHEL KROLL
Bar No. NY 5751748
Email: rachel.kroll@usdoj.gov

Attorneys
U.S. Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 11300
Washington, DC 20530
(202) 476-0275

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I electronically served a true and correct copy of this document on Defendants' counsel of record by means of the Court's CM-ECF system.

/s/ Matthew W. Lunder
Matthew W. Lunder

EXHIBIT 24

Peter Benson

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Monday, August 30, 2021 12:09 PM
To: Ethan Glass
Cc: Kendler, Owen (ATR); Scanlon, Lisa (ATR); William Burck; Mike Bonanno; Peter Benson; Rafi Prober; Tom Moyer
Subject: RE: NAR - follow up
Attachments: 2020.07.06 - NAR Ltr to Delrahim re CID.PDF; 2020-07-13 Letter from DAAG Murray to B Burck.pdf; 7-29-20 Letter to Burck from DAAG Murray re NAR Proposals.pdf; 20-11-19 - CLOSING LETTER (NAR).pdf

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Hi Ethan.

You asked for the factual and legal grounds on which we would rely in opposing your motion. We believe that the CID is valid and reasonable and that NAR will be unable to meet the standard for quashing a CID. *See United States Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245 (D.C. Cir. 2005). Aside from that, we are relying on basic principles of contract law. We were unpersuaded that any of the documents or legal authorities you sent to us established that you have a contract requiring that the Division keep the investigation closed for any length of time. The exchange between the Division and NAR that you sent to us established, at most, that the Division agreed that a letter would be issued closing the investigation. That letter was in fact issued and NAR was given the reprieve from complying with our CIDs that it requested. Furthermore, the Division rejected NAR's proposal to close the investigation into NAR's Participation Rule for a definite length of time (10 years) and informed NAR that such an agreement would violate longstanding department policy against binding the government in the future. (Please see the attached correspondence). The closing letter itself stated, "No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." Given this, we find it hard to believe that NAR thought that the Division was committing to refrain from investigating NAR for an unspecified number of years. As we have stated in our prior conversations, the Division withdrew its complaint and the proposed final judgment and reopened its investigation because the Division has ongoing concerns about practices that may reduce competition in the residential real estate market, and the Division did not and does not intend to foreclose its ability to investigate those practices.

This, of course, reflects our reaction having looked at the cases you cited and the email exchanges you sent over. We have not seen your motion. Our arguments may change based on what you file with the court.

Finally, we have offered on several occasions to work with you on modifying the CID. We understand that you have raised an issue with Spec 10. As we discussed on Friday's call with you, we have offered not to seek compliance on that specification. If there are other modifications to the CID that you would like to discuss, we reiterate our willingness to do so.

Best regards,
Mimi

From: Vishio, Miriam (ATR)
Sent: Tuesday, August 24, 2021 12:59 PM
To: Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; William Burck <williamburck@quinnemanuel.com>; Mike Bonanno <mikebonanno@quinnemanuel.com>; Peter Benson

<peterbenson@quinnemanuel.com>; Rafi Prober <rprober@akingump.com>; Tom Moyer <tmoyer@akingump.com>
Subject: RE: NAR - follow up

Thanks, Ethan. We can use the following call-in information:

Dial-in: 415-527-5035
Access code/Meeting ID number: 199 932 4570

or

One touch: 415-527-5035,,,1999324570#,#

Best regards,
Mimi

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Tuesday, August 24, 2021 12:31 PM
To: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; William Burck <williamburck@quinnemanuel.com>; Mike Bonanno <mikebonanno@quinnemanuel.com>; Peter Benson <peterbenson@quinnemanuel.com>; Rafi Prober <rprober@akingump.com>; Tom Moyer <tmoyer@akingump.com>
Subject: RE: NAR - follow up

Hi Mimi, in those windows we can do 3-330.

From: Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Sent: Tuesday, August 24, 2021 10:56 AM
To: Ethan Glass <ethanglass@quinnemanuel.com>
Cc: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; William Burck <williamburck@quinnemanuel.com>; Mike Bonanno <mikebonanno@quinnemanuel.com>; Peter Benson <peterbenson@quinnemanuel.com>; Rafi Prober <rprober@akingump.com>; Tom Moyer <tmoyer@akingump.com>
Subject: RE: NAR - follow up

[EXTERNAL EMAIL from miriam.vishio@usdoj.gov]

Hi Ethan.

We wanted to get back to you on this. Is your team available for a call with us on Friday? We are available from 11-12 and 2-4, if any of those times work for you. If so, please let us know what works best on your end.

Thanks,
Mimi

From: Vishio, Miriam (ATR)
Sent: Thursday, August 5, 2021 4:11 PM
To: Ethan Glass <ethanglass@quinnemanuel.com>; Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>
Cc: William Burck <williamburck@quinnemanuel.com>; Mike Bonanno <mikebonanno@quinnemanuel.com>; Peter Benson <peterbenson@quinnemanuel.com>; Rafi Prober <rprober@akingump.com>; Tom Moyer <tmoyer@akingump.com>
Subject: RE: NAR - follow up

Thanks, Ethan. We really appreciate your sending these materials and understand that NAR believes that these show a binding agreement not contingent on the entry of the Consent Decree. We will review these materials and be back in touch.

Best regards,
Mimi

Miriam (Mimi) R. Vishio | Assistant Chief, Civil Conduct Task Force
U.S. Department of Justice | Antitrust Division
450 Fifth Street, NW | Washington, DC 20530
Direct: 202-307-0158 | Mobile: 202-460-6680 | Miriam.Vishio@usdoj.gov

---

From: Ethan Glass <ethanglass@quinnemanuel.com>
Sent: Thursday, August 5, 2021 12:26 PM
To: Kendler, Owen (ATR) <Owen.Kendler@usdoj.gov>; Scanlon, Lisa (ATR) <Lisa.Scanlon@usdoj.gov>; Vishio, Miriam (ATR) <Miriam.Vishio@usdoj.gov>
Cc: William Burck <williamburck@quinnemanuel.com>; Mike Bonanno <mikebonanno@quinnemanuel.com>; Peter Benson <peterbenson@quinnemanuel.com>; Rafi Prober <rprober@akingump.com>; Tom Moyer <tmoyer@akingump.com>
Subject: NAR - follow up

Hi Owen, Lisa, and Mimi,

Thank you for the call yesterday.

As you requested, here are facts that show NAR and DOJ had a binding agreement to close the investigations and withdraw the CIDs that was not contingent on the entry of the Consent Judgment. While we spoke with both the Front Office and Staff in the summer of 2020 in an attempt to resolve the investigations, we direct your attention to the discussions between NAR and AAG Delrahim himself, which occurred on October 8, 2020. The next week, on October 14, Samer Musallam wrote to NAR, "as discussed during last week's conversation with Makan, I am attaching for your review and comment a draft proposed Final Judgment between NAR and the Division, as well as a Stipulation and Order to be filed concurrently with the PFJ." *See* 10/16/2020 Email at 1. We responded two days later, providing proposed edits to the draft decree, and asking for "a call . . . to talk about the letter Makan mentioned that gives us relief from the investigations." *Id.*

After another round of edits, we sent Mr. Musallam a redlined version of the decree accompanied by the following message:

> When you respond to this round of comments, we would like DOJ to please confirm, in writing, that when NAR agrees to sign the consent decree, DOJ will send a closing letter to NAR that will confirm:
>
> 1. the Division has closed its investigation of the Participation Rule;
> 2. the Division has closed its investigation of the Clear Cooperation Policy;
> 3. NAR has no obligation to respond to CID No. 29935 (in its entirety); and
> 4. NAR has no obligation to respond to CID No. 30360 (in its entirety).
>
> NAR will not agree to the consent decree without prior written assurances that these provisions will be included in the closing letter from DOJ.

10/26/2020 Email at 1. In response, Mr. Musallam confirmed in writing that: "once the consent decree is filed, the Division will notify NAR in its closing letter that it has closed its investigation into the Participation Rule and the Clear Cooperation [Policy] and that NAR will have no obligation to respond to CID Nos. 29935 and 30360." 10/28/2020 Email at 1.

In response to your inquiry about case law, NAR directs you to the following decisions:

- *United States v. U.S. Currency in the Sum of Six Hundred Sixty Thousand, Two Hundred Dollars ($660,200.00), More or Less*, 423 F. Supp. 2d 14, 19, 25, 33-34 (E.D.N.Y. 2006)
- *W. Watersheds Project v. U.S. Fish & Wildlife Servs.*, No. 06-277, 2008 WL 619336, at *3 (D. Idaho Feb. 29, 2008)
- *Burton v. Adm'r, Gen. Servs. Admin.*, No. 89-2338, 1992 WL 300970, at *3, *6 (D.D.C. July 10, 1992)
- *United States v. McInnes*, 556 F.2d 436, 439 (9th Cir. 1977)
- *Haggart v. United States*, 943 F.3d 943, 946 (Fed. Cir. 2019)
- *United States v. Garcia*, 956 F.2d 41, 42, 44 (4th Cir. 1992)
- *United States v. Minnesota Min. & Mfg. Co.*, 551 F.2d 1106, 1111 (8th Cir. 1977)
- *Ramallo v. Reno*, 931 F. Supp. 884, 895 (D.D.C. 1996)
- *Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 & n.62 (D.C. Cir. 1982)
- *Chattanooga Pharm. Ass'n v. United States Dep't of Justice*, 358 F.2d 864, 866-67 (6th Cir. 1966)

We look forward to DOJ's proposal on how to move forward.

Best Regards,
Ethan

EXHIBIT 25

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA Plaintiff, v. EMPIRE IRON MINING PARTNERSHIP, Defendant.	)	Civil Action No.: 2:19-cv-096

CONSENT DECREE

TABLE OF CONTENTS

I. INTRODUCTION

A. Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint in this action concurrently with this Consent Decree, alleging that Defendant Empire Iron Mining Partnership ("Empire" or "Defendant") violated regulations that EPA has approved under Sections 110 and 112 of the Clean Air Act ("Act"), 42 U.S.C. §§ 7410 and 7412.

B. The Complaint alleges, *inter alia*, that since 2009 the Defendant's iron ore processing plant, located in Palmer, Marquette County, Michigan, has emitted pollutants into the air from various emission sources in amounts that exceed limits established by the Michigan State Implementation Plan ("Michigan SIP"). In addition, the Complaint alleges that Defendant exceeded certain emission limits and/or failed to operate, maintain and monitor certain processes at its plant in violation of the National Emission Standards for Hazardous Air Pollutants ("NESHAP") for the Taconite and Iron Ore Processing Industry, 40 C.F.R. Part 63, Subpart RRRRR.

C. On February 21, 2014, EPA issued a notice to the Defendant alleging violations of the Michigan State Implementation Plan and federal laws related to certain air emissions from its plant ("the February 21, 2014 Notice of Violation").

D. On August 3, 2016, Empire indefinitely idled its mine and processing plant.

E. Defendant does not admit any liability arising out of the transactions, occurrences, or omissions alleged in the Complaint or in the February 21, 2014 Notice of Violation.

F. This Consent Decree is intended to represent a comprehensive resolution of the claims alleged in the Complaint and the claims resolved through Section XIII (Effect of Settlement/Reservation of Rights) and to ensure that when the compliance measures required by this Decree have been fully implemented, Defendant's plant will be operated and maintained to prevent a recurrence of the violations alleged in the Complaint and the violations resolved through Section XIII (Effect of Settlement/Reservation of Rights).

G. EPA and Empire (the "Parties") recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section II, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345 and 1355; and Section 113(b) of the Act, 42 U.S.C. § 7413(b), and over the Parties. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) and 1395(a) and Section 113(b) of the Act, 42 U.S.C. § 7413(b), because the Defendant resides and is found in this District and because the violations alleged in the Complaint are alleged to have occurred within this District. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

2. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to Section 113 of the Act, 42 U.S.C. § 7413.

III. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States and upon Defendant and any successors, assigns, or other entities or persons otherwise bound by law.

4. No transfer of ownership or operation of the Empire Mine shall relieve Defendant of its obligation to ensure that the terms of this Consent Decree are implemented unless and until:

a. the transferee agrees in writing to undertake the applicable obligations required by this Consent Decree, and to intervene as a defendant in this action for the purpose of being bound by the applicable terms of this Consent Decree;

b. the United States, after receiving information sufficient to demonstrate that the transferee has the technical and financial means to comply with the applicable obligations of this Consent Decree, consents in writing to substitute the transferee for the transferring Defendant with respect to such obligations; and

c. the Court approves such substitution.

5. At least 30 Days prior to such transfer of ownership or operation of the Empire Mine, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region 5, the United States Attorney for the Western District of Michigan, and the United States Department of Justice in accordance with Section XV (Notices). Any attempt to transfer ownership or operation of the Empire Mine without complying with this Paragraph constitutes a violation of this Decree.

6. Defendant shall provide a copy of all relevant portions of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under

this Consent Decree. Defendant shall condition any such new contract, and any pending contract that can be modified, upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

IV. DEFINITIONS

8. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

"Act" or "CAA" shall mean the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.

"Complaint" shall mean the complaint filed by the United States in this action.

"Consent Decree" or "Decree" shall mean this Decree.

"Continuous Opacity Monitor" or "COM" shall mean the automated monitor of opacity readings from an ESP stack designed to control emissions from an indurating furnace at the Empire Mine.

"Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

"Defendant" or "Empire" shall mean Empire Iron Mining Partnership.

"EPA" shall mean the United States Environmental Protection Agency.

"Effective Date" shall have the definition provided in Section XVI.

"Electrostatic Precipitator" or "ESP" shall mean the primary particulate emissions control equipment for the indurating furnaces at the Empire Mine.

"Empire Mine" shall mean Defendant's taconite mine and processing plant located in Palmer, Marquette County, Michigan.

"MDEQ" shall mean the Michigan Department of Environmental Quality.

"O&M Plan" shall mean the Operations & Maintenance Plan for each ESP that sets forth operating parameters and maintenance procedures for key and auxiliary equipment associated with each ESP.

"Paragraph" shall mean a portion of this Decree identified by an Arabic numeral.

"Parties" shall mean the United States and Empire.

"Section" shall mean a portion of this Decree identified by a roman numeral.

"United States" shall mean the United States of America, acting on behalf of EPA.

V. CIVIL PENALTY

9. Within 30 Days after the Effective Date, Defendant Empire shall pay the sum of $75,000, as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging.

10. Defendant shall pay the civil penalty due under the preceding Paragraph at https://www.pay.gov to the U.S. Department of Justice account, in accordance with instructions provided to Defendant by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the Western District of Michigan after the Effective Date. The payment instructions provided by the FLU shall include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Douglas A. McWilliams
Squire Patton Boggs (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
douglas.mcwilliams@squirepb.com

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XV (Notices). At the time of payment, Defendant shall send notice that payment has been made to: (i) EPA via email at acctsreceivable@epa.gov or via regular mail at EPA Cincinnati Finance Office, 26 Martin Luther King Drive, Cincinnati, Ohio 45268; and (ii) the United States via email or regular mail in accordance with Section XV. Such notice shall state that the payment is for the civil penalty owed pursuant to this Consent Decree and shall reference the civil action number, the CDCS Number, and DOJ case number 90-5-2-1-11180.

11. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section IX (Stipulated Penalties) in calculating its federal, state or local income tax.

VI. COMPLIANCE REQUIREMENTS

12. None of the requirements set forth in this Section VI shall apply unless and until Empire restarts operations at its processing plant in Palmer, Michigan. Empire shall notify EPA in writing at least 30 Days prior to restarting its processing plant. In the event that Empire restarts its processing plant after the Effective Date of this Consent Decree, all deadlines that Empire must meet to comply with Section VI will replace "Effective Date" with the date on which Empire restarts its processing plant.

A. Operation & Maintenance

13. Commencing no later than 90 Days after the Effective Date of this Consent Decree, Defendant shall submit for EPA review and approval an Operations & Maintenance Plan for ESPs on its indurating furnaces ("O&M Plan").

14. At least once per calendar year, but as frequently as necessary, Defendant shall review its O&M Plan to determine if any updates are necessary to maintain the effectiveness of all key and auxiliary equipment associated with the ESPs and wet scrubbers. Defendant shall submit any updates to its O&M Plan to EPA. If EPA disagrees with any such updates, then EPA will send Defendant a written notification describing the disagreement within 60 Days of receipt of Defendant's updates. Defendant may implement any O&M Plan updates, but shall discontinue any such updates in the event of EPA disagreement, unless the issue is submitted to dispute resolution.

15. Once per calendar year, Defendant shall provide refresher training on the requirements of the O&M Plan to relevant personnel.

B. Continuous Opacity Monitoring

16. Defendant's Review of Continuous Opacity Monitoring (COM) data. Every six months after the Effective Date (to be submitted on September 15 and March 15) Defendant shall submit a report that includes each instance, or related group of instances, except for an isolated instance that is the only 6-minute block average exceeding 20% but not exceeding 27% occurring within an hour, in which the 6-minute block average reading of the COM data for each ESP exceeds 20% opacity. For each instance or related group of instances, Defendant shall:

a. Identify the root cause of each instance in which the 6-minute block average reading exceeds 20% opacity;

b. When the root cause is unknown, provide a description of efforts taken by Defendant to investigate the root cause of each 6-minute block average reading that exceeds 20% opacity, including a copy of any related ESP operating records;

c. Describe corrective actions taken in response to the root cause of each instance in which the 6-minute block average reading exceeds 20% opacity, and attach relevant documents produced to address the cause of the high reading(s), if any; and

d. Describe preventative actions taken, if any, and actions to be taken, if any, by Defendant to eliminate such instances of 6-minute block average readings that exceed 20% opacity in the future, along with a proposed schedule for taking such corrective action, or, alternatively, a justification for taking no additional action to address such instances.

17. EPA's Review of Defendant's Future Corrective Action. If EPA disagrees with any portion of Defendant's conclusions concerning the recommendations for actions planned or not planned to address exceedances reported in Paragraph 16.d, then EPA will send Defendant a written notification describing the disagreement within 60 Days of receipt of the Defendant's conclusions. If the Defendant objects to any modified or additional corrective action required by EPA, it may dispute EPA's determination pursuant to Section XI (Dispute Resolution). If no dispute is initiated, Defendant shall carry out the corrective action sought by EPA.

C. Wet Scrubbers

18. Master List of Wet Scrubbers. Within 30 Days of the Effective Date, Defendant shall submit to EPA a list of all wet scrubbers at the Empire Mine subject to the operating limits for pressure drop and scrubber water flow rate in 40 C.F.R. § 63.9590(b)(1). For each such wet scrubber, Defendant shall list the make and model number, the year of installation at the Empire Mine, and the emission source it is designed to control.

19. Response to Pressure Drop and Water Flow Rate Deviations.

a. On a semi-annual basis, Defendant shall report to EPA (on the dates specified in Paragraph 16) each uncorrected pressure drop and scrubber water flow rate that remained below the established operating limits for that wet scrubber and was not corrected within three consecutive 10-Day periods as described in 40 C.F.R. § 63.9634(j). The report shall detail and document compliance with the corrective action procedures required by 40 C.F.R. § 63.9634(j).

b. On a semi-annual basis, Defendant shall submit a report (on the dates specified in Paragraph 16) to EPA that lists all daily average pressure drop and scrubber water flow rate that remained below the established operating limits for that wet scrubber after three attempts at corrective action pursuant to 40 C.F.R. § 63.9634(j) and the corrective action taken. For each instance in which three attempts at corrective action are unsuccessful, Defendant shall submit the results of the performance test conducted to establish new operating limits and:

(1) the root cause of nonconformance with the established operating limits; and

(2) if the root cause is unknown, a description of efforts taken by Defendant to investigate the root cause of the nonconformance.

VII. PERMITS

20. Where any compliance obligation under Section VI (Compliance Requirements) requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section X (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

21. Permits to Ensure Survival of Certain Consent Decree Terms. Prior to termination of this Consent Decree, Defendant shall submit a complete application to MDEQ to incorporate its O&M Plan into a non-Title V, federally enforceable permit to install that will survive termination of this Consent Decree. All permits shall authorize Defendant to make updates and revisions to the O&M Plan and shall not require that permit amendments be obtained to authorize such updates and revisions. The Parties agree that the incorporation of these provisions into the Title V Permit shall be done in accordance with the State's Title V rules.

22. Requirements incorporated into operating permits pursuant to this Section shall survive termination of this Consent Decree. For any application for permit amendment required by this Section, Defendant shall submit to EPA in the manner set forth in Section XV (Notices), a copy of each application, as well as a copy of any permit proposed as a result of such application, to allow for timely participation in any public comment opportunity.

VIII. REPORTING REQUIREMENTS

23. Whenever (1) any violation of this Consent Decree, or (2) any violation of any applicable permits required by this Consent Decree, or (3) any event affecting Defendant's performance under this Consent Decree, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after Defendant first knew of the violation or event. This procedure is in addition to the requirements set forth elsewhere in this Consent Decree.

24. Each report submitted by Defendant under this Decree shall be signed by an official of the submitting party and include the following certification:

> *I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

25. If no reportable event occurs during a reporting period, Defendant is not obligated to submit an empty report but may comply with its reporting obligation by submitting a cover letter stating that no reportable event occurred, together with the certification contained in Paragraph 24. Defendant is not obligated to submit any report or cover letter of no reportable event for information set forth in Section VI unless and until Empire restarts operations at its processing plant in Palmer, Michigan.

26. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

27. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

IX. STIPULATED PENALTIES

28. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section X (Force Majeure). A "violation" includes failing to perform any obligation required by the terms of this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree, except that an isolated differential pressure deviation or scrubber water flow rate deviation, by itself, shall not be considered a violation of this Decree unless and until the deviation is not corrected within three consecutive 10-Day periods pursuant to 40 C.F.R. § 63.9634(j) and the reports required by this Decree are not submitted timely to EPA.

29. Late Payment of Civil Penalty. If Defendant fails to pay its civil penalty required to be paid under Section V (Civil Penalty) when due, Defendant shall pay a stipulated penalty of $1,000 per Day for each Day that the payment is late.

30. Compliance Milestones.

a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements set forth in Section VI:

Penalty Per Violation Per Day	Period of Noncompliance
$175	1st through 14th Day
$375	15th through 30th Day
$625	31st Day and beyond

31. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VIII.

Penalty Per Violation Per Day	Period of Noncompliance
$100	1st through 14th Day
$150	15th through 30th Day
$375	31st Day and beyond

32. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

33. The United States may seek stipulated penalties under this Section by sending a written demand to Defendant. The United States may waive stipulated penalties or reduce the amount of stipulated penalties it seeks, in the unreviewable exercise of its discretion and in accordance with this Paragraph.

34. Stipulated penalties shall continue to accrue as provided in Paragraphs 29 through 33, during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of receiving the final appellate court decision.

35. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 10, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

36. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

37. Subject to the provisions of Section XIII (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any

other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law.

X. FORCE MAJEURE

38. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by the Defendant, or Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

39. If any event occurs or has occurred that may delay or prevent the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide written notice to EPA within 7 Days of when Defendant first knew that the event might cause a delay or interruption. The notice shall include an explanation and description of the reasons for the delay or interruption; the anticipated duration of the delay or interruption; all actions taken or to be taken to prevent or minimize the delay or interruption; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or interruption or the effect of the delay or interruption; Defendant's rationale for attributing such delay or interruption to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay or interruption was attributable to a force majeure event. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

40. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify the Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

41. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Defendant in writing of its decision.

42. If Defendant elects to invoke the dispute resolution procedures set forth in Section XI (Dispute Resolution), it shall do so no later than 15 Days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 38 and 39. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XI. DISPUTE RESOLUTION

43. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Decree.

44. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 20 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

45. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

46. The United States shall serve its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by Plaintiff. The Plaintiff's Statement of Position shall be binding on the Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

47. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten Days of receipt of the Plaintiff's Statement of Position pursuant to the preceding Paragraph. The motion shall contain a

written statement of the Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

48. The United States shall respond to the Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

49. Standard of Review. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 45, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and that it is entitled to relief under applicable principles of law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law, and Defendant reserve the right to oppose this position.

50. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 34. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section IX (Stipulated Penalties).

XII. INFORMATION COLLECTION AND RETENTION

51. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

a. monitor the progress of activities required under this Consent Decree;

b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

c. obtain samples and, upon request, splits of any samples taken by Defendant or its representatives, contractors, or consultants;

d. obtain documentary evidence, including photographs and similar data; and

e. assess Defendant's compliance with this Consent Decree.

52. Upon request, Defendant shall provide EPA or its authorized representative splits of any samples taken by Defendant to the extent technically feasible. Upon request, EPA shall provide Defendant splits of any samples taken by EPA to the extent technically feasible.

53. Defendant may also assert that information required to be provided under this Section, including documentary evidence obtained pursuant to Paragraph 51.d., is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

54. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

55. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

56. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 55. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 55. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Defendant's mine, whether related to the violations addressed in this Consent Decree or otherwise.

57. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Empire Mine, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 55.

58. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with any provisions of the Act, 42 U.S.C. § 7401 *et seq*., or with any other provisions of federal, state, or local laws, regulations, or permits.

59. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

60. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XIV. COSTS

61. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XV. NOTICES

62. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing, sent by U.S. Mail (and also by electronic mail where provided), and addressed as follows:

As to the United States (by email):
eescasemanagement.enrd@usdoj.gov
Re: DJ # 90-5-2-1-11180

As to the United States (by mail):
EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-2-1-11180

As to EPA (by mail and email):
James Morris
Associate Regional Counsel
Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, IL 60604-3590
(312) 886-6632
morris.james@epa.gov

and

Patrick Miller
Environmental Scientist
Environmental Protection Agency, Region 5
77 West Jackson Blvd. (AE-17J)
Chicago, IL 60604-3590
(312) 886-4044
miller.patrick@epa.gov

As to Defendant (by mail and email): Terry Fedor
Empire Iron Mining Partnership
101 Empire Mine Road
Palmer, Michigan 49871
Terry.Fedor@clevelandcliffs.com

and

Douglas A. McWilliams
Squire Patton Boggs (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114
douglas.mcwilliams@squirepb.com

63. Any Party may, by written notice to the other Party, change its designated notice recipient or notice address provided above.

64. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XVI. EFFECTIVE DATE

65. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

XVII. RETENTION OF JURISDICTION

66. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XI (Dispute Resolution) and XVIII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVIII. MODIFICATION

67. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

68. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XI (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 49, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XIX. TERMINATION

69. After Defendant has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, and has either: (a) certified that the Empire Mine is permanently closed and will not restart operations, or (b) implemented the O&M Plan and training required by Paragraphs 13 & 15, submitted at least two reports required by Paragraph 16, submitted the master list of wet scrubbers required by Paragraph 18, has submitted a complete permit application if required by Paragraph 20, and has maintained satisfactory compliance with this Consent Decree for a period of one year from the Effective Date after the Empire Mine has restarted, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

70. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

71. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section XI. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 60 Days after service of its Request for Termination.

XX. PUBLIC PARTICIPATION

72. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

XXI. SIGNATORIES/SERVICE

73. Each undersigned representative of Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

74. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXII. INTEGRATION

75. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXIII. FINAL JUDGMENT

76. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant.

XXIV. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

77. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section III (Applicability), Paragraph 6; Section VI (Compliance Requirements), Paragraphs 13, 14 (except with respect to dispute resolution), 15-16, 17 (except with respect to dispute resolution), 18-19; Section VII (Permits), Paragraphs 20-22; Section VIII (Reporting Requirements), Paragraphs 24-25; and Section XII (Information Collection and Retention) Paragraphs 51-52, is restitution or required to come into compliance with the law.

Dated and entered this 4th day of September, 2019

/s/ Gordon J. Quist
UNITED STATES DISTRICT JUDGE

Signature Page for Consent Decree resolving:
United States v. Empire Iron Mining Partnership

FOR THE UNITED STATES OF AMERICA:

May 9, 2019
Date

KAREN S. DWORKIN
Deputy Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

MICHAEL J. ZOELLER
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20044-7611
Tel: (202) 305-1478
Fax: (202) 616-6584
Email: michael.zoeller@usdoj.gov

ANDREW BYERLY BIRGE
United States Attorney
Western District of Michigan

ADAM TOWNSHEND
Assistant United States Attorney
Western District of Michigan
330 Ionia Avenue, NW, Suite 501
Grand Rapids, MI 49503
Tel: (616) 808-2130
Fax: (616) 456-2408
Email: adam.townshend@usdoj.gov

Signature Page for Consent Decree resolving:
United States v. Empire Iron Mining Partnership

FOR THE UNITED STATES OF AMERICA:

Date

KAREN S. DWORKIN
Deputy Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

MICHAEL J. ZOELLER
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20044-7611
Tel: (202) 305-1478
Fax: (202) 616-6584
Email: michael.zoeller@usdoj.gov

ANDREW BYERLY BIRGE
United States Attorney
Western District of Michigan

ADAM TOWNSHEND
Assistant United States Attorney
Western District of Michigan
330 Ionia Avenue, NW, Suite 501
Grand Rapids, MI 49503
Tel: (616) 808-2130
Fax: (616) 456-2408
Email: adam.townshend@usdoj.gov

Signature Page for Consent Decree resolving:
United States v. Empire Iron Mining Partnership

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

T. LEVERETT NELSON
Regional Counsel
U.S. Environmental Protection Agency, Region 5

JAMES MORRIS
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
Office of Regional Counsel
77 West Jackson Blvd.
Chicago, IL 60604-3507
(312) 886-6632

Signature Page for Consent Decree resolving:
United States v. Empire Iron Mining Partnership

FOR EMPIRE IRON MINING PARTNERSHIP:

3/9/2019
Date

TERRY FEDOR
Empire Iron Mining Partnership
101 Empire Mine Road
Palmer, Michigan 49871
Terry.Fedor@clevelandcliffs.com

3/8/19
Date

DOUGLAS A. McWILLIAMS
Squire Patton Boggs (US) LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
Tel: (216) 479-8332

EXHIBIT 26

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DYNO NOBEL, INC., Defendant.	)	Civil No. 3:19-cv-00984

CONSENT DECREE

TABLE OF CONTENTS

Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint in this action concurrently with this Consent Decree, alleging that Defendant, Dyno Nobel, Inc. ("Dyno Nobel" or "Defendant") violated Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603; Sections 304 and 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11004 and 11023; Section 112(r) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(r); and the respective implementing regulations for such requirements.

The Complaint against Defendant alleges that, at its facility near St. Helens, Oregon, Defendant violated the above statutes by: 1) failing to timely report releases above the applicable reporting threshold of the hazardous substance ammonia (anhydrous); 2) failing to accurately report annual stack or point source releases of ammonia (anhydrous) in its annual Toxics Release Inventory filing; and 3) failing to comply with all requirements to reduce the risk of a chemical accident at its facility.

Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint.

The Parties (as defined below) recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or

admission of any issue of fact or law except as provided in Section I, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the Defendant pursuant to 28 U.S.C. §§ 1331, 1345, 1355; CERCLA Section 109(c)(1), 42 U.S.C. § 9609(c)(1); EPCRA Section 325(b)(3) and (c)(4), 42 U.S.C. §§ 11045(b)(3) and (c)(4); and CAA Section 113(b), 42 U.S.C. § 7413(b). Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1395; CERCLA Section 109(c)(1), 42 U.S.C. § 9609(c)(1); EPCRA Section 325(b)(3) and (c)(4), 42 U.S.C. §§ 11045(b)(3) and (c)(4); and CAA Section 113(b), 42 U.S.C. § 7413(b), because events giving rise to this action occurred within this judicial district, and because Defendant owns and operates a facility within this district.

2. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction and agrees that the Complaint states claims upon which relief may be granted.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendant and any successors, assigns, or other entities or persons otherwise bound by law.

4. No transfer of ownership or operation of the Facility (as defined below), whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to such

transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed transfer agreement, to EPA Region 10 and the United States Department of Justice, in accordance with Section XIV (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.

5. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor, Auditor, individual, or entity retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, contractors, or Auditors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in EPCRA, CERCLA, the CAA, or regulations promulgated pursuant to EPCRA, CERCLA, or the CAA shall have the meanings assigned to them under such statute or regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Audit" shall mean a third-party audit required by Section V (Compliance Requirements) of this Consent Decree and Appendix A.

b. "Audit Finding" shall mean each way in which an Auditor conducting an Audit pursuant to Section V of this Consent Decree determines that any document, record, report, diagram, test, system, review, evaluation, policy, practice, plan, training, procedure, personnel, equipment, or other item, action or omission at the Facility deviates from, or does not comply or conform with an applicable requirement or standard set forth in Appendix A, Paragraphs 15 or 17.

c. "Audit Participant" shall mean any participant to an audit that is not an employee or subcontractor of the Auditor.

d. "Audit Report" shall mean the report of each Audit submitted by the Auditor pursuant to Paragraph 20 of Appendix A to the Consent Decree.

e. Auditor" shall mean the independent third-party approved by EPA to conduct the Audits pursuant to Paragraph 12 of this Consent Decree and Appendix A.

f. "Complaint" shall mean the complaint filed by the United States initiating this action.

g. "Consent Decree" or "Decree" shall mean this Decree and all appendices attached hereto listed in Paragraph 94 (Appendices).

h. "Date of Lodging" shall mean the date that this Consent Decree is lodged with the Court for public comment.

i. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day

would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.

j. "Defendant" shall mean Dyno Nobel, Inc.

k. "Dyno Nobel Covered Process" shall mean, solely for purposes of determining the scope of the Audit required under Paragraph 12 and Appendix A, any activity at the facility, including any use, storage, manufacturing, handling, or on-site movement, involving a regulated substance present in more than a threshold quantity as determined under § 68.115, as depicted in the diagram attached hereto as Appendix B.

l. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

m. "Effective Date" shall have the definition provided in Section XV (Effective Date).

n. "Facility" shall mean Defendant's ammonia and chemical manufacturing facility located at 63149 Columbia River Highway, Deer Island, Oregon, also known as the "St. Helens Plant".

o. "Paragraph" shall mean a portion of this Decree identified by an Arabic numeral.

p. "Parties" shall mean the United States and Defendant.

q. "Responsible official" shall mean a corporate officer of the Defendant or any other person who performs similar policy or decision-making functions for the corporation or a duly authorized representative of such person, including but not limited

to the Plant Manager, if the representative is responsible for the overall operation of the Facility.

r. "Section" shall mean a portion of this Decree identified by a roman numeral.

s. "Supplemental Environmental Project" or" SEP" shall mean the activities described and set forth in Paragraph 21 and Appendix C.

t. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

8. Within 30 Days after the Effective Date, Defendant shall pay the sum of $492,000 as a civil penalty, together with interest accruing from the date of lodging, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging.

9. Defendant shall pay the civil penalty due by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account, in accordance with instructions provided to Defendant by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the District of Oregon after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Jeff Droubay
Senior Vice President
Legal and Business Affairs
Dyno Nobel Americas
2795 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XIV (Notices).

At the time of payment, Defendant shall send notice that payment has been made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; (ii) to the United States via email or regular mail in accordance with Section XIV; and (iii) to EPA in accordance with Section XIV. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in United States v. Dyno Nobel, Inc. and shall reference the civil action number xx: 19-cv-xxxx, and DOJ case number 90-5-2-1-09238/4.

10. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) in calculating its federal income tax.

V. COMPLIANCE REQUIREMENTS

11. At the Facility, Defendant shall comply with the requirements of:

a. The emergency notification requirements of Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of EPCRA, 42 U.S.C. § 11004, and their implementing regulations at 40 C.F.R. Parts 302 and 355, respectively;

b. The Toxic Release Inventory Reporting requirements of Section 313 of

EPCRA, 42 U.S.C. § 11023, and its implementing regulations at 40 C.F.R. Part 372; and

c. The Risk Management Program requirements of Section 112(r)(7) of the Clean Air Act ("CAA"), 42 U.S.C. § 7412(r)(7), and its implementing regulations at 40 C.F.R. Part 68.

12. Compliance Audits. Defendant shall retain an independent third-party Auditor who shall conduct compliance audits at the Facility in accordance with the requirements set forth in Appendix A of this Consent Decree. The Audits shall take place during typical operating conditions for the Facility and shall evaluate the Facility's compliance or conformance with the Audit standards set forth in Paragraphs 15 and 17 of Appendix A and with the compliance requirements set forth in Paragraph 11 of this Consent Decree. Defendant shall comply with and implement all provisions of the Independent Third-Party Audit Protocol embodied in Appendix A attached hereto. Defendant shall ensure that the audits are completed in accordance with the deadlines set forth at Paragraph 27 of Appendix A.

13. Revised Filings.

a. No later than August 15, 2019, Defendant shall complete the stack testing of the Urea Surge Tank Vent (also referred to as the "Vent Scrubber C-654"), as provided in the Superseding Plea Letter dated February 14, 2018, signed by Defendant on February 16, 2018, and attached hereto as Appendix D.

b. No later than November 15, 2019, the Defendant shall submit to EPA and the United States Department of Justice, in accordance with Section XIV (Notices):

(1) A copy of the report from the stack test, which report shall include all items monitored and recorded during the test;

(2) Revised Form Rs for reporting years 2013 through 2018 that reflect the results of such stack testing as a basis for emissions calculations for the Vent Scrubber C-654, and that otherwise meet the requirements of EPCRA 313, 42 U.S.C. 11023, and 40 C.F.R. Part 372. Such revised reports shall also be submitted in the manner specified in 40 C.F.R. Part 372; and

(3) A revised continuous release report that reflects the results of such stack testing as a basis for emissions calculations for the Vent Scrubber C-654, and that otherwise meets the requirements of 40 C.F.R. §§ 302.8 and 355.32. Such revised report shall also be submitted in the manner specified in 40 C.F.R. Parts 302 and 355.

c. No later than 180 days after the Effective Date, Defendant shall submit a revised Risk Management Plan in the method and format to the central point specified by EPA as of the date of submission that includes the gas preparation area as part of the Covered Process and shall ensure that the requirements of 40 C.F.R. Part 68 are met with respect to the gas preparation area.

14. Notwithstanding the review or approval by any agency of the United States of any plans, reports, policies or procedures formulated pursuant to the Consent Decree, Defendant will remain solely responsible for compliance with the terms of the Consent Decree, all applicable permits, and all applicable federal, state, regional, and local laws and regulations.

15. Approval of Deliverables. After review of the Auditor's Audit Protocols and Checklists referred to in Appendix A and the Defendant's response to the Audit Reports referred to in Appendix A ("Deliverables"), EPA shall in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission. EPA's decision to disapprove any portion of the submission or to impose any specified conditions on approval shall be subject to the Dispute Resolution provisions set forth in Section X below. Defendant may seek relief under the provisions of Section IX (Force Majeure) based on a contention that its failure to meet requirements of the Consent Decree resulted from EPA's failure to timely approve or disapprove a submission that was timely and complete.

16. If the submission is approved pursuant to Paragraph 15, Defendant shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 15(b) or (c), Defendant shall, upon written direction from EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions.

17. If the submission is disapproved in whole or in part pursuant to Paragraph 15(c) or (d), Defendant shall, within 45 days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is

approved in whole or in part, Defendant shall proceed in accordance with the preceding Paragraph.

18. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require Defendant to correct any deficiencies, in accordance with the preceding Paragraphs, or may itself correct any deficiencies subject to the right of EPA to seek stipulated penalties as provided in the Section VIII (Stipulated Penalties).

19. Any stipulated penalties applicable to the original submission, as provided in Section VIII (Stipulated Penalties), shall accrue during the 45 day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of Defendant's obligations under this Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission,.

20. Permits. Where any compliance obligation under this Section requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section IX (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT

21. Defendant shall implement a Supplemental Environmental Project ("SEP"), the Purchase of Emergency Response Equipment, in accordance with all provisions of Paragraphs 21 through 30 and Appendix C. The SEP will provide the emergency response equipment specified in Appendix C to the identified emergency response organizations to assist them in responding to emergencies near the Facility. Defendant will spend no less than $939,852, which amount excludes Defendant's costs administering the SEP.

22. Defendant is responsible for the satisfactory completion of the SEP in accordance with the requirements of this Decree. "Satisfactory completion" means completing the SEP in accordance with the requirements and schedule set forth in this Consent Decree and Appendix C. Defendant may use contractors or consultants in planning and implementing the SEP.

23. With regard to the SEP, Defendant certifies the truth and accuracy of each of the following:

a. that all cost information provided to EPA in connection with EPA's approval of the SEP is complete and accurate and that Defendant in good faith estimates that the cost to implement the SEP, exclusive of Defendant's overhead and administrative costs, is $939,852;

b. that, as of the date of executing this Decree, Defendant is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

c. that the SEP is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Decree;

d. that Defendant has not received and will not receive credit for the SEP in any other enforcement action;

e. that Defendant will not receive any reimbursement for any portion of the SEP from any other person; and

f. that (i) Defendant is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in Paragraph 21; and (ii) Defendant has inquired of the SEP recipient(s) and/or SEP implementer(s) whether any are a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the recipient(s) and/or the implementer(s) that none are a party to such a transaction. For purposes of these certifications, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan, or other mechanism for providing federal financial assistance whose performance period has not yet expired

24. SEP Completion Report. Within 30 days after the date set for completion of the SEP, Defendant shall submit a SEP Completion Report to the United States, in accordance with Section XIV (Notices). The SEP Completion Report shall contain the following information:

a. a detailed description of the SEP as implemented;

b. a description of any problems encountered in completing the SEP and the solutions thereto;

c. an itemized list of all eligible SEP costs expended;

d. certification that the SEP has been fully implemented in accordance with all provisions of Paragraphs 21 through 30 and Appendix C and documentation providing evidence of the project's completion (including but not limited to photos, vendor invoices or receipts, correspondence) and documentation of all SEP expenditures; and

e. a description of the environmental and public health benefits resulting from implementation of the SEP.

25. EPA may require information in addition to that described in the preceding Paragraph in order to evaluate Defendant's Completion Report.

26. After receiving the SEP Completion Report, the United States shall notify Defendant whether or not Defendant has satisfactorily completed the SEP. If Defendant has not completed the SEP in accordance with this Consent Decree, the United States shall include in the written notice the reasons for its determination that the Defendant has not satisfactorily completed the SEP and stipulated penalties may be assessed under Section VIII (Stipulated Penalties).

27. Disputes concerning the satisfactory performance of the SEP and the amount of eligible SEP costs may be resolved under Section X (Dispute Resolution).

28. Each submission required under this Section shall be signed by an official with knowledge of the SEP and shall bear the certification language set forth in Paragraph 34.

29. Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the SEP under this Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action, United States v. Dyno Nobel, Inc., taken on behalf of the U.S. Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act, the Emergency Planning and Community Right-to-Know Act, and the Clean Air Act."

30. For federal income tax purposes, Defendant agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

VII. REPORTING REQUIREMENTS

31. Semi-Annual Reporting. By July 31st and January 31st of each year after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII, Defendant shall submit electronically a semi-annual report for the preceding six months that shall include:

a. a description of progress on all activities undertaken under Paragraphs 11 through 13 and Appendix A of this Consent Decree; and

b. a discussion of Defendant's progress in satisfying its obligations in connection with the Emergency Response Equipment SEP under Section VI including, at a minimum, a narrative description of activities undertaken; status of any construction or compliance measures, including the completion of any milestones set forth in Appendix C, and a summary of costs incurred since the previous report.

32. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States of such violation or potential violation and its likely duration, in writing, within ten working Days of the Day Defendant first becomes aware of the violation or potential violation, with an explanation of the violation or potential violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation or potential violation. If the cause of a violation or potential violation cannot be fully explained at the time the report is due, Defendant shall so state in the report. Defendant shall investigate the cause of the violation or potential violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation or potential violation, within 30 Days of the Day Defendant becomes aware of the cause of the violation or violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section IX (Force Majeure).

33. Whenever any violation or potential violation of this Consent Decree or of any applicable permits or any other event affecting Defendant's performance under this Consent Decree, or the performance of its Facility, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after Defendant first knew of the violation or potential violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

34. Certification of Reports and Other Submissions.

a. Each report submitted by Defendant under this Section and Appendix A or

C shall be signed by a Responsible Official of the submitting party and include the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

b. This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

35. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by CERCLA, EPCRA, the CAA, or regulations promulgated thereunder, or by any other federal, state, or local law, regulation, permit, or other requirement.

36. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law, subject to the provisions of Paragraph 69, below.

VIII. STIPULATED PENALTIES

37. Upon the Effective Date of the Consent Decree, Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified in this Section, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule

approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

38. Late Payment of Civil Penalty. If Defendant fails to pay the civil penalty required to be paid under Section IV (Civil Penalty) when due, Defendant shall pay a stipulated penalty of $3,000 per Day for each Day that the payment is late.

39. Stipulated Penalties for Violations of Compliance Requirements.

a. Except as provided for in Paragraph 39.b., no stipulated penalties under this Consent Decree shall accrue for violations of the compliance requirements set forth in Paragraph 11 or Audit Findings listed in an Auditor's Report submitted to EPA pursuant to Appendix A, provided that any such noncompliance is corrected as required by Paragraphs 23 and 27 of Appendix A. Except as set forth in Paragraph 71, the United States hereby explicitly reserves its right to bring a civil action based on any violation of a compliance requirement in Paragraph 11, violations of other provisions of this Consent Decree, Audit Findings, or applicable law (including but not limited to, actions for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt).

b. The following stipulated penalties shall accrue per violation per Day for violations of compliance requirements set forth in: (1) Paragraph 11,where such violation commenced after the date of completion of the Audit as set forth in Paragraph 27 of Appendix A or where such violation is not contained in an Audit Finding listed in the Auditor's Report; or (2) Paragraphs 12 and 13.

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$1,000
16-30	$2,250
31 and Over	$4,500

40. Stipulated Penalties for Failure to Perform Audits in Accordance with Appendix A of this Consent Decree. Defendant shall be liable for the following stipulated penalties that shall accrue per violation per Day for the following violations of the requirements pertaining to the compliance audits as set forth in Appendix A: Failure to complete an Audit in accordance with the Audit methodology set forth in Paragraphs 14 through 20 of Appendix A; failure to complete the Audit by the applicable deadline set forth in Paragraph 27 of Appendix A ; failure of the Auditor to submit the Auditor's Report to EPA and/or of Defendant to submit Defendant's Audit Statement as required by Paragraphs 20 and 22 of Appendix A; and failure of Defendant to correct an Audit Finding by the applicable deadline as set forth in Paragraphs 23 and 27 of Appendix A.

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$1,800
16-30	$3,000
31 and Over	$7,500

41. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VII (Reporting Requirements) and Section XI (Information Collection and Retention) of this Consent Decree.

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$750
16-30	$1,500
31 and Over	$3,000

42. Stipulated Penalties for Failure to Satisfactorily Complete the SEP.

a. If Defendant fails to satisfactorily complete the SEP in accordance with the provisions of this Consent Decree by the deadline set in Section VI (Supplemental Environmental Project) and Appendix C, Defendant shall pay stipulated penalties for each day for which it fails to satisfactorily complete the SEP, as follows:

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$1,500
16-30	$3,000
31 and Over	$6,000

b. If Defendant fails to implement the SEP, or halts or abandons work on the SEP, Defendant shall pay a stipulated penalty of $1,004,300 less (i) the amount spent by Defendant to purchase any "turnout gear" delivered to the Recipients pursuant to Appendix C; (ii) the amount spent by Defendant to purchase any "SCBAs" delivered to the Recipients pursuant to Appendix C; and (iii) the amount of any stipulated penalties paid pursuant to Paragraph 42(a). The penalty under this subparagraph shall accrue as of the date specified for completing the SEP or the date performance ceases, whichever is earlier.

c. If Defendant fails to comply with Paragraph 24 , Defendant shall pay stipulated penalties for each failure to meet an applicable deadline, as follows:

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$750
16-30	$1,500
31 and Over	$3,000

43. The following stipulated penalties shall accrue per violation per Day for all other violations of this Consent Decree not set forth in Paragraphs 38 through 42 above.

Period of Non-Compliance or Days Late	Penalty Per Violation Per Day Late or Deficient
1-15	$750
16-30	$1,500
31 and Over	$3,000

44. Except as provided in subparagraph 42.b, stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

45. Defendant shall pay any stipulated penalty within 30 Days of receiving the United States' written demand for payment.

46. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

47. Stipulated penalties shall continue to accrue as provided in Paragraph 44, during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined

to be owing, together with interest at the rate specified in 28 U.S.C. § 1961, to the United States within 30 Days of the effective date of the agreement or the receipt of EPA's decision or order.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest at the rate specified in 28 U.S.C. § 1961, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest at the rate specified in 28 U.S.C. § 1961, within 15 Days of receiving the final appellate court decision.

48. Obligations Prior to the Effective Date. Upon the Effective Date, the stipulated penalty provisions of this Decree shall be retroactively enforceable only with regard to the requirements of Paragraph 13 that have occurred prior to the Effective Date, provided that such stipulated penalties that may have accrued prior to the Effective Date may not be collected unless and until this Consent Decree is entered by the Court.

49. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 9, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

50. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in

28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

51. The payment of penalties and interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

52. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XII (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendant's violation of this Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

IX. FORCE MAJEURE

53. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the

delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

54. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice orally or by electronic or facsimile transmission to EPA, within 72 hours of when Defendant first knew or should have known that the event might cause a delay. Within seven days thereafter, Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

55. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by

the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

56. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant in writing of its decision.

57. If Defendant elects to invoke the Dispute Resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraph 54. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA.

X. DISPUTE RESOLUTION

58. Unless otherwise expressly provided for in this Consent Decree, the Dispute Resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a

dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Decree.

59. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when the United States receives a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, Defendant invokes formal Dispute Resolution procedures as set forth below.

60. Formal Dispute Resolution. Defendant shall invoke formal Dispute Resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

61. The United States shall serve its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of

Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

62. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

63. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

64. Standard of Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 60, Defendant shall have the burden of demonstrating, based on the administrative record, which shall include the Statement of Position of the United States and Defendant, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

65. The invocation of Dispute Resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with

respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 47. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

66. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

a. monitor the progress of activities required under this Consent Decree;

b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

c. obtain documentary evidence, including photographs and similar data; and

d. assess Defendant's compliance with this Consent Decree.

67. Until three years after the termination of this Consent Decree, Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United

States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

68. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to EPA. Defendant may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

69. Defendant may also assert that information required to be provided under this Consent Decree is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

70. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws,

regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

71. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the Date of Lodging.

72. Except as otherwise expressly provided in Paragraph 71, the United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Defendant's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

73. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Facility, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 71.

74. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of CERCLA. EPCRA, the CAA, or regulations promulgated thereunder, or with any other provisions of federal, state, or local laws, regulations, or permits.

75. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

76. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XIII. COSTS

77. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XIV. NOTICES

78. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and sent by first class or overnight mail to the addressees specified below. Simultaneously, such notices shall be emailed to the relevant recipients, except that any notice attachments that are too voluminous to email need only be provided by mail. Where this Consent Decree requires that notices and submissions are to be made to the United States, they shall be made to the United States Department of Justice and EPA. Where the Consent Decree requires that Notices and Submissions shall be made to EPA, they need only be sent to EPA. Except as otherwise provided herein, all reports, notifications, certifications, or other communications required under this Consent Decree to be submitted or sent to the United States, EPA, and/or Defendant shall be addressed as follows:

As to the United States by email:

eescdcopy.enrd@usdoj.gov
Re: DJ # 90-5-2-1-09238/1

As to the United States by mail:

EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-2-1-09238/4

As to EPA:

Director, Enforcement and Compliance Assurance Division
EPA Region 10 (OCE-201)
U.S.EPA Region 10
1200 Sixth Avenue Ste. 155
Seattle, WA 98101

As to Defendant:

Jeff Droubay
Senior Vice President
Legal and Business Affairs
Dyno Nobel Americas
2795 East Cottonwood Parkway, Suite 500
Salt Lake City, UT 84121

with a copy to:

David Rabbino, Esq.
Jordan Ramis PC
2 Centerpointe Drive, 6th Fl.
Lake Oswego, OR 97035
david.rabbino@jordanramis.com

Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

79. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

80. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted,

whichever occurs first, as recorded on the Court's docket; provided, however, that Defendant hereby agrees that it shall be bound to perform duties under Paragraph 13 that may be scheduled to occur prior to the Effective Date. In the event the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XVI. RETENTION OF JURISDICTION

81. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X (Dispute Resolution) and XVII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

82. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

83. Any disputes concerning modification of this Decree shall be resolved pursuant to Section X (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 64, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XVIII. TERMINATION

84. This Consent Decree may be terminated upon satisfaction of all of the following conditions:

a. Defendant has completed the Audits and corrected all Audit Findings in accordance with Paragraph 12 and the requirements set forth in Appendix A of this Consent Decree;

b. Defendant has submitted and filed the revised notices and reports in accordance with Paragraph 13;

c. Defendant has completed the SEP in accordance with Section VI (Supplemental Environmental Project) of this Consent Decree and the requirements set forth in Appendix C of this Consent Decree;

d. Defendant has complied with all other requirements of this Consent Decree for a period of at least three years after entry; and

e. Defendant has paid the civil penalty, has resolved any outstanding disputes, and has paid any accrued stipulated penalties as required by this Consent Decree.

85. If Defendant believes it has satisfied the requirements for termination set forth in Paragraph 84, Defendant shall serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting completion documentation required by Appendices A, B, and C (to the extent not already submitted).

86. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If, the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

87. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section X. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 30 Days after service of its Request for Termination.

XIX. PUBLIC PARTICIPATION

88. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

XX. SIGNATORIES/SERVICE

89. Each undersigned representative of Defendant and the Deputy Section Chief of the Environmental Enforcement Section of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

90. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail or email with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXI. INTEGRATION

91. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than Deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XXII. FINAL JUDGMENT

92. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant.

XXIII. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

93. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section II (Applicability), Paragraph 5; Section V (Compliance Requirements), Paragraphs 11, 12, 13, and 20; Section VII (Reporting Requirements), Paragraphs 31 (except with respect to the SEP); and Section XI (Information Collection and Retention), Paragraphs 67 through 69; and related Appendix A is restitution or required to come into compliance with law.

XXIV. APPENDICES

94. The following Appendices are attached to and hereby incorporated into this Consent Decree:

a. "Appendix A" sets for the requirements for the Compliance Audits required by Paragraph 12 of this Consent Decree.

b. "Appendix B" is a diagram of the "Dyno Nobel Covered Process."

c. "Appendix C" sets the requirements for completing the Supplemental Environmental Project required by Section VI of this Consent Decree.

d. "Appendix D" is the Superseding Plea Letter dated February 14, 2018, signed by Defendant on February 16, 2018.

Dated and entered this 20 day of September, 2019.

Marco Hernández
UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

Date

NATHANIEL DOUGLAS
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

6-24-19
Date

FREDERICK S. PHILLIPS
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
(202) 305-0439
Frederick.phillips@usdoj.gov

BILLY J. WILLIAMS
United States Attorney
District of Oregon

6-24-19
Date

FOR ALEXIS LIEN
Assistant United States Attorney
District of Oregon
1000 SW Third Ave Suite 600
Portland, Oregon 97204
(503) 727-1098

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Allyn Stern
Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 10

Julie Vergeront
Assistant Regional Counsel
Office of Regional Counsel, ORC-113
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101
(206) 553-1497

FOR DYNO NOBEL, INC.

_____ _____

Date _____

_____

FOR DYNO NOBEL, INC.

28 May 2019
Date

Jeffrey Dronbay
SVP Legal and Business Affairs

APPENDIX A

Appendix A: Independent Third-Party Audit Protocol

1. Pursuant to Paragraph 12 of the Consent Decree, Defendant shall retain an Auditor who shall conduct a Compliance Audit at the Facility in accordance with the requirements set forth in this Appendix A for:

a. The release notification requirements of Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of EPCRA, 42 U.S.C. § 11004, and their implementing regulations at 40 C.F.R. §§ 302.8 and 355.32 for releases that are continuous and stable in quantity and rate ("Continuous Release Notification" provisions);

b. The annual Toxics Release Inventory ("TRI") reporting requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, and its implementing regulations at 40 C.F.R. Part 372; and

c. The Risk Management Program requirements of CAA Section 112(r)(7), 42 U.S.C. § 7412(r)(7), and the implementing regulations at 40 C.F.R. Part 68, Subparts D and E.

2. Defendant shall give the Auditor a copy of the Consent Decree and all appendices, as well as all other information and access necessary to complete the Audit set forth herein. The Audit must evaluate the Facility's compliance or conformance with the Audit standards set forth in Paragraphs 15 and 17 below. Defendant shall ensure that the Auditor conducts the Audit in accordance with the requirements set forth in Paragraphs 14 to 20 below and according to the deadlines set forth in Paragraph 27

below.

3. The definitions set forth in Section III of the Consent Decree shall apply to the Audit conducted in accordance with this Appendix.

4. United States Approval of Auditors. Within 30 days of the Effective Date of the Consent Decree, Defendant shall submit to the United States the names and qualifications of three proposed independent third-party Auditors meeting the requirements of Paragraph 5 below.

5. Before the United States can approve any independent third-party Auditor to conduct the Audit required by Paragraph 12 of the Consent Decree and as set forth in Paragraphs 14 to 20 below, Defendant and each Auditor candidate must certify the following conditions have been met:

a. The Auditor is a professional engineer with expertise in the fields of: 1) the Continuous Release Notification provisions of CERCLA and EPCRA at 40 C.F.R. §§ 302.8 and 355.32, respectively; 2) the annual TRI reporting requirements of 40 C.F.R. Part 372; 3) the development and implementation of Risk Management Plans and the Risk Management Program regulations at 40 C.F.R. Part 68, Subparts D and E relating to chemical manufacturing and chemical plant operations and maintenance;

b. The Auditor must have at least five years' experience in evaluating the compliance of facility plans, policies, practices and procedures with applicable Risk Management Program regulations, plans, and requirements;

c. The Auditor has been trained and/or certified in proper auditing techniques;

d. Neither the Auditor nor the Auditor's employer has been employed by Defendant or any corporate affiliates of Defendant, nor conducted research, development, design, construction, financial, engineering, legal, consulting nor any other advisory services for Defendant within the last two years; and

e. Neither the Auditor nor the Auditor's employer was involved in the development or construction of any process at the Facility or any operating, maintenance, or other risk management procedures for the Facility.

6. The Defendant understands and agrees that:

a. The Auditor shall not be permitted to provide any other commercial, business, or voluntary services to Defendant or its corporate affiliates for a period of at least two years following the Auditor's submittal of its final Audit Report;

b. Defendant shall not provide future employment to any of the Auditors or persons who managed, conducted, or otherwise participated in the Audit for a period of at least two years following the Auditor's submittal of its final Audit Report; and

c. Subject to Paragraph 20, the Auditor and EPA may communicate independently with each other without notice to, or including, Defendant.

d. Once Defendant signs a contract with the Auditor, no communication shall occur between Defendant and the Auditor without EPA simultaneously being copied on the communication (except such communications that occur on-site while the audit is being conducted). Accordingly, all such communications must be by

electronic mail or letter so that EPA may be copied. Before Defendant signs any contract with the Auditor, Defendant may communicate with the Auditor without copying EPA and provide a preliminary site tour and documentation relating to the Facility if desired, to help the Auditor anticipate safety needs and price services.

7. Notwithstanding Paragraphs 1 through 6 above, the Auditor may assemble an auditing team, to be led by the Auditor. The auditing team may include other employees of the third-party auditor firm or subcontractors meeting the criteria of Paragraphs 5 and 6. The Auditor may obtain participation in any audit by Audit Participants, including Defendant or Facility personnel; however, Audit Participants shall not contribute to any Auditor's Report under Paragraph 20.

8. The United States shall review the proposed Auditors and either approve them in accordance with Paragraph 9 or disapprove them in accordance with Paragraph 10.

9. The United States shall notify Defendant in writing whether it approves the proposed Auditor(s). Within 30 days after United States' approval, Defendant shall retain an approved Auditor to perform the activities set forth in Paragraphs 14 through 20 of this Appendix. The contract for the auditing services shall prohibit the Auditor from providing any other commercial, business, or voluntary services to Defendant and its corporate affiliates for a period of at least two years following the Auditor's submittal of its final Audit Report; and shall prohibit the Defendant from employing the Auditor or any persons who managed, conducted, or otherwise participated in the Audit for a period of at least two years following the Auditor's submittal of its final Audit Report. Defendant shall ensure that all Audit personnel who conduct or otherwise participate in Audit activities have certified that they satisfy the conditions set forth

in Paragraphs 5 and 6 above before receiving any payment from Defendant.

10. If the United States disapproves all the proposed Auditors, the United States will provide notice to Defendant stating the good-faith reasons for such disapprovals. Within 60 days of receipt of the United States' notification, Defendant shall submit for approval another proposed Auditor that meets the qualifications set forth in Paragraphs 5 and 6. The United States shall review the proposed Auditor in accordance with Paragraph 8. Disapprovals of the proposed Auditors shall be subject to Section X (Dispute Resolution) of the Decree.

11. If the Auditor selected pursuant to Paragraph 9 cannot satisfactorily perform the Audit, within 60 Days of learning that the Auditor cannot satisfactorily perform the Audit, Defendant shall submit for approval two or more proposed replacement Auditors that meet the qualifications set forth in Paragraphs 5 and 6. In the event that it becomes necessary to select a replacement Auditor as provided in this Paragraph, the United States shall review the proposed replacement Auditors and either approve them in accordance with Paragraph 9 or disapprove them in accordance with Paragraph 10.

12. Nothing in Paragraphs 4 through 11 precludes the United States from assessing stipulated penalties for missed Audit deadlines associated with the need to replace an Auditor unless Defendant successfully asserts that the inability of the Auditor to perform the Audit as required was a Force Majeure event in accordance with Section XI of the Consent Decree; however, any pending Audit deadline set out in Paragraph 27 may be extended up to 120 days by mutual, written agreement between the parties should an Audit deadline be affected while the United States is evaluating a replacement Auditor following Defendant's timely submission under Paragraph 11.

13. Defendant shall be solely responsible for paying for each Auditor's fees and expenses.

14. Notice of Audit Commencement. At least 30 Days prior to the commencement of the Audit, Defendant shall provide notice to EPA pursuant to Section XIV (Notices) of the Consent Decree of the Day that the Audit will commence along with:

a. The protocol the Auditor proposes to use for the Continuous Release Notification and the TRI reporting portions of the Audit; and

b. The checklist that the Auditor proposes to use for the Risk Management Program portion of the Audit.

15. Paper Audit of Defendant's Policies and Engineering Specifications. The Auditor shall review the Facility's documents related to implementation of the Risk Management Program at the Facility, including but not limited to: the Defendant's policies applicable to the Facility for risk management; the Facility's Hazard Analysis, Management of Change, Standard Operating Procedures, and Process Safety Management documents for the Dyno Nobel Covered Process; and the engineering and design specifications for the Dyno Nobel Covered Process at the Facility. The Auditor shall evaluate the above documents for compliance with 40 C.F.R. Part 68, Subparts D and E, and for consistency with the most current applicable design codes and standards, including, but not limited to, any relevant portions of the following standards:

a. ASME Boiler and Pressure Vessel Code Section 8;

b. National Board Inspection Code;

c. API 510 Pressure Vessel Code;

d. API 570 Piping Inspection Code;

e. API 580 Risk-Based Inspection and API RP 581 Risk-Based Inspection Technology; and

f. ASME B31.3 Process Piping.

The Auditor shall evaluate conformance with all of the above-listed codes, standards and practices, as in effect at the time of the audit. Defendant may use alternative methods for achieving compliance with the requirements of the applicable industry practices and/or standards as long as the selected alternatives are documented by the Facility to be equivalent to or better than the applicable industry standards in reducing the hazards. The paper audit referred to in this Paragraph shall be completed at the same time as the on-site Audit according to the schedule set forth in the Table in Paragraph 27 of this Appendix.

16. Defendant shall submit to the Auditor policies and engineering specifications referred to in Paragraph 15 within 120 days after EPA approval of the proposed Auditor(s) pursuant to Paragraph 9 above.

17. On-Site Facility Audit. Defendant shall ensure that the Auditor conducts an Audit at the Facility as required by Paragraph 12 of the Consent Decree according to the schedule set forth in the Table in Paragraph 27 of this Appendix.

a. The Continuous Release Notification portion of the Audit shall include:

i. A review of the currently applicable Continuous Release Notification(s) that have been filed for the Facility with the National Response Center, EPA Region 10, the State Emergency Response Commissions for Oregon and Washington, or the Local Emergency Planning

Commissions for Columbia County in Oregon, and Clark and Cowlitz Counties in Washington (collectively, the "Reporting Agencies"), along with:

(A) All Continuous Release Notifications that have been filed for the Facility with any of the Reporting Agencies after the earlier of May 1, 2019 or the date of the first submission to EPA pursuant to Paragraph 13(b) of the Consent Decree;

(B) All other notifications required by 40 C.F.R. §§ 302.8 or 355.32 that have been filed by Defendant for the Facility on or after the date in Paragraph 17(a)(i)(A) above; and

(C) All supporting documentation required by 40 C.F.R. § 302.8.

ii. An on-site evaluation of the emission sources covered in the currently applicable Continuous Release Notifications for the Facility, and the emissions from such sources, to determine whether the requirements of 40 C.F.R. §§302.8 and 355.32 are met.

b. The TRI reporting portion of the Audit shall include:

i. A review of all potential TRI reporting statutory and regulatory obligations of the Facility for the most recent completed calendar reporting year and the four previous reporting years for ammonia, nitric acid, nitrate compounds, formaldehyde, copper compounds, and any other toxic chemical manufactured, processed, or otherwise used by the Facility.

ii. A review of the Facility's records maintained pursuant to 40 C.F.R. § 372.10 for the subject reporting years;

iii. A review of information available to the Facility relevant to quantifying releases of the toxic chemicals reported to the TRI for the subject reporting years; and

iv. An on-site evaluation of the sources potentially subject to TRI reporting, including (A) an analysis of emissions to air, releases to water on-site, releases to land on-site, transfers to publicly owned treatment works, and off-site transfers of toxic chemicals reported to TRI for the subject reporting years; and (B) an evaluation of the Facility's on-site waste treatment methods, on-site energy recovery processes, and on-site recycling processes of the toxic chemicals reported to TRI for the subject reporting years.

c. The Risk Management Program portion of the Audit shall include:

i. A review of all on-site documents relevant to Defendant's Risk Management Program; and

ii. An evaluation of the Dyno Nobel Covered Process for compliance with the applicable requirements of Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7); 40 C.F.R. Part 68, Subpart D and E; all applicable federal, state and local codes and regulations and current accepted industry practices, standards, and guidelines, including the industry

standards and codes in Paragraph 15; and other requirements contained in the Facility's Risk Management Plan and Risk Management Program.

18. Audit Completion. Defendant shall ensure that the Auditor completes the paper and on-site Audits no later than the applicable deadlines for the Facility set forth in the Table in Paragraph 27 below.

19. Audit Out-briefing.

a. Within 20 Days of the completion of the on-site Audit, the Auditor shall conduct an out-briefing with Defendant in which the Auditor shall orally convey the major Audit Findings.

b. Defendant shall notify EPA of the scheduled date of the out-briefing for the Audit at least five Days prior to the out-briefing. EPA shall have the right to have its representatives (including contractors) attend the out-briefing either in person or telephonically. If the out-briefing date changes, Defendant shall notify EPA at least 48 hours prior to the out-briefing date.

c. Defendant shall correct Audit Findings disclosed at the out-briefing in accordance with Paragraphs 23 through 27 below. Regardless of whether Defendant corrects such Audit Findings, the Auditor shall include such Audit Findings in the Auditor's Report submitted to EPA pursuant to Paragraph 20 below, but may also include a description of the correction(s) that occurred prior to submission of the Auditor's Report.

20. Auditor's Report. No later than the applicable deadline set forth in the Table in Paragraph 27, Defendant shall ensure that the Auditor submits a report of the paper and on-site

Audit results ("Auditor's Report") directly to EPA pursuant to Section XIV (Notices) of the Consent Decree, with a copy sent concurrently to Defendant. The Auditor shall not share any written draft reports with Defendant prior to the submission of the Auditor's Report directly to both EPA and Defendant. EPA shall give notice to Defendant as soon as possible before it has any material communications directly with an Auditor about an Audit and give Defendant the opportunity to participate in such conversations. The Auditor's Report shall:

a. Describe when and how the Audit was conducted, as well as the names of all Defendant's personnel involved with the Audit;

b. Describe all the types of information and records reviewed in the paper Audit phase and the equipment, processes, practices, structures and other items reviewed, tested, observed or evaluated during the on-site Audit phase;

c. Describe each situation for which a notification under 40 C.F.R. § 302.8(g), (h), or (i) is required based on the results of the Audit of the Continuous Release Notifications in effect at the time of the Audit, and include a draft of each such notification;

d. Describe the list of TRI chemicals evaluated as part of the TRI portion of the Audit and the reporting threshold determinations made for each such chemical, and include a table listing each such chemical for which any release estimate calculated through the Audit differs from the estimate reported on the TRI Report ("Form R") originally submitted or is for a chemical not previously reported. The Table shall include (i) the release estimate calculated on the Form R originally submitted, if applicable; (ii) the release estimate calculated through the Audit; (iii) the treatment or disposal method; and (iv) the

chemicals for which a new or corrected Form R will be submitted;

e. Include drafts of the new or corrected Form Rs that will be submitted as a result of the Audit for each chemical for which the Audit shows: (i) one or more reporting threshold has been exceeded for a chemical for which no Form R was originally submitted; (ii) one or more release estimate calculated through the Audit, or the treatment or disposal data, is a significant data quality error as specified in EPA's *Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to- Know Act* (including the *Interim Data Quality Amendment to the EPCRA Section 313 Enforcement Response Policy*); or (iii) for PBT chemicals (chemicals with lower reporting thresholds specified in 40 C.F.R. § 372.28), the release estimated calculated through the Audit is equal to or greater than a 25% increase over the reported amount.

f. To the extent not addressed in subparagraphs (a) through (e) above, identify and list separately each Audit Finding of non-compliance and non-conformance with the Audit standards set forth in Paragraphs 15 and 17 and discovered in the Audit; and

g. Provide a detailed recommendation as to how each discovered Audit Finding should be corrected.

21. At Defendant's election, any on-site Audit may serve as the official Risk Management Program audit required by 40 C.F.R. § 68.79 provided that all requirements of that section are met. The use of an on-site Audit as the official Risk Management Program audit for the Facility will reset the Facility's three-year rolling clock for the performance of a compliance audit.

22. Defendant's Statement for the Audit.

a. No later than the applicable deadline set forth in the Table in Paragraph 27, Defendant shall submit to EPA, pursuant to Section XIV (Notices) of the Consent Decree, a written statement ("Defendant's Audit Statement") in which Defendant:

i. Responds to or comments on each of the Audit Findings;

ii. Describes each completed or proposed action to correct each undisputed Audit Finding, including the date(s) that such corrections occurred or are scheduled to occur; and

iii. Identifies any Audit Findings contained in the Audit Report that Defendant believes are inaccurate or incorrect and the factual or technical basis as to why Defendant believes such Audit Findings are inaccurate or incorrect.

b. If EPA agrees with Defendant that an Audit Finding is inaccurate or incorrect, EPA shall so advise Defendant and Defendant may request that the Auditor revise or remove that Audit Finding from the Audit Report. If the Auditor does not so revise the Audit Report, EPA may waive or revise the corrective actions consistent with its decision that the Audit Finding was incorrect or inaccurate.

23. Correction of Audit Findings.

a. Except as provided in Paragraph 23(b) below, Defendant shall implement all steps necessary to correct each Audit Finding identified in the Auditor's Report as soon as practicable but no later than the applicable date set forth in the Table in Paragraph 27 for correction under this Paragraph 23(a)

b. Extensions of Correction Deadlines in Limited Circumstances.

i. Defendant may seek more time to implement correction of an Audit Finding if in Defendant's Audit Statement, submitted to EPA pursuant to Paragraph 22 above, Defendant explains and documents:

(A) that the correction is likely to cost Defendant more than $25,000;

(B) that it is not reasonable under the circumstances to correct the Audit Finding by the applicable deadline set forth in the Table in Paragraph 27 for corrections under Paragraph 23(a); and

(C) the date by which Defendant believes correction is reasonable under the circumstances.

ii. Where Defendant seeks additional time to correct an Audit Finding, Defendant shall correct such Audit Finding no later than the earlier of:

(A) the correction date proposed in Defendant's Audit Statement;

(B) the date indicated by EPA in an objection submitted under Paragraph 24 (provided that such date is not less than 90 Days after Defendant's receipt of EPA's objection), unless a different date for correction is agreed to by the parties or ordered by the Court in Dispute Resolution under Section X of the Consent Decree; or

(C) the latest possible date for correction under this Paragraph 23.b as set forth in the in the Table in Paragraph 27.

24. EPA Objections to Proposed Timing or Method of Correction of Audit Findings.

a. At any time after receiving Defendant's Audit Statement pursuant to Paragraph 22, EPA may object to (1) the method by which Defendant has corrected or intends to correct an Audit Finding; and/or (2) the proposed timing of correction where Defendant's Audit Statement proposes a later date for correction than the applicable deadline set forth in Column 4 of the Table in Paragraph 27 for correction. If EPA objects, it shall notify the Defendant in writing pursuant to Section XIV of the Consent Decree (Notices) as to the bases of its objection(s), and indicate what method or methods to correct the Audit Finding are required, and/or provide the date(s) by which it believes it is reasonable under the circumstances for Defendant to correct the Audit Finding.

b. If Defendant disagrees with EPA's proposed method or timing of correction, it may invoke dispute resolution in accordance with Section X (Dispute Resolution) of the Consent Decree by submitting a Notice of Dispute to EPA within 15 Days of receiving EPA's objection. If the method of correction is in dispute, it shall be Defendant's burden to establish that the method by which it proposes to correct the Audit Finding will result in compliance with the applicable Audit standards set forth in Paragraphs 15 and 17. If the timing of correction is in dispute, it shall be Defendant's burden to establish (1) that it will cost more than $25,000 to correct the Audit Finding; and (2) that it is not reasonable under the circumstances to correct the Audit Finding any earlier than the date proposed in Defendant's Audit Statement submitted pursuant to Paragraph 22.

c. If Defendant does not invoke dispute resolution pursuant to Paragraph

24.b within 15 Days of receiving EPA's objection, Defendant shall correct the Audit Finding by the method indicated in EPA's objection by the date set forth in the Table in Column 4 of Paragraph 27.

25. Public Access to Audit Reports. Defendant agrees to make the Audit Report Findings, and Defendant's responses to those Findings, including Defendant's plans to correct violations, available to the public upon request.

26. Notification of Correction of Audit Findings of Non-Compliance and Non-Conformance.

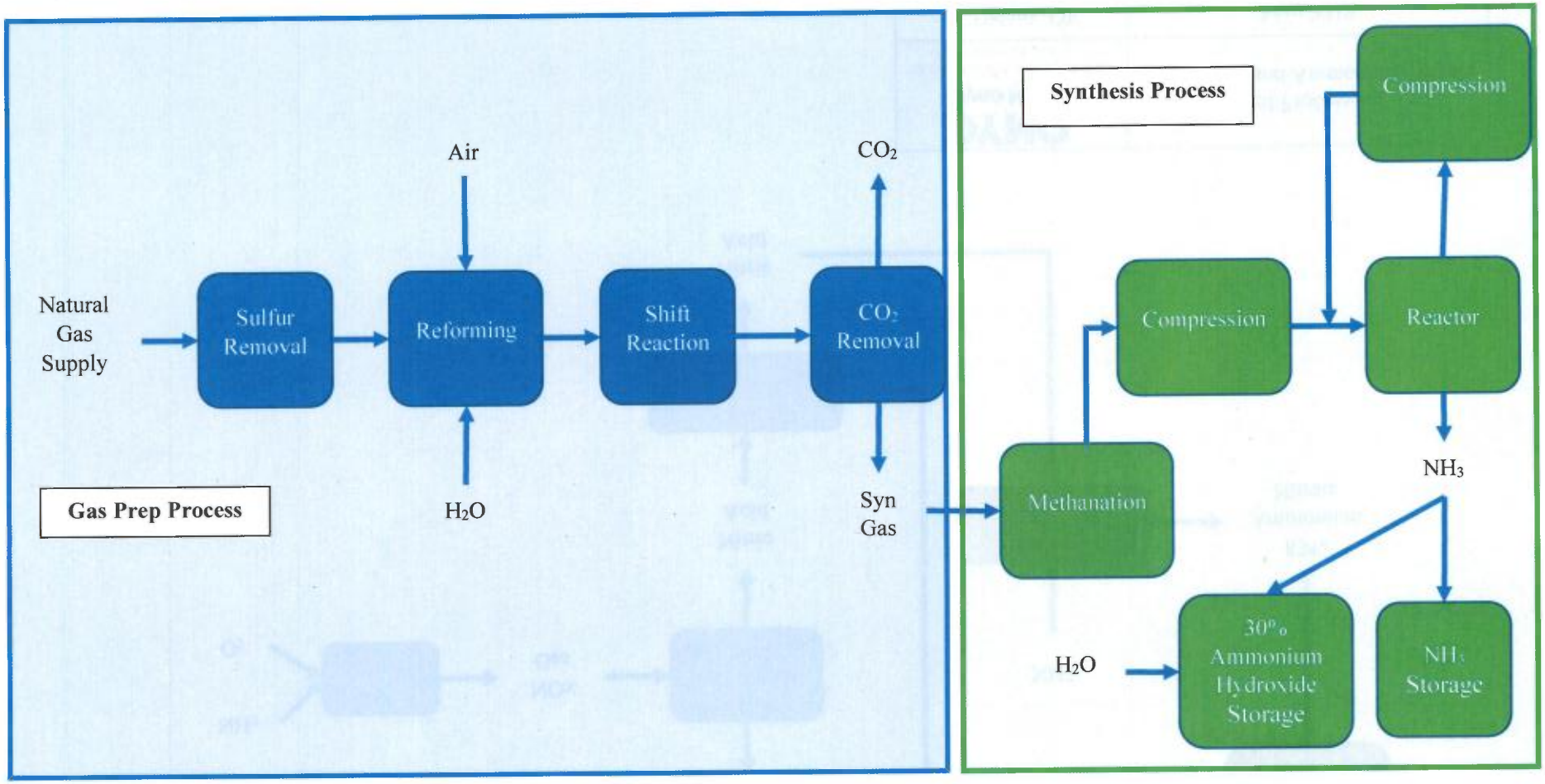
For each Audit Finding in the Auditor's Report, Defendant shall notify EPA of the method and date of correction of the Audit Finding of non-compliance and non-conformance in the quarterly report submitted pursuant to Section VII (Reporting) of the Consent Decree for the quarter in which the correction was completed.

27. Audit Milestone Deadlines. Defendant shall ensure that the Auditor completes the following Audit milestones no later than the applicable deadlines set forth in the table below for: (1) Completion of the Audit as required by Paragraph 18; (2) Submission of the Audit Report as required by Paragraph 20; (3) Submission of Defendant's Statement in response to the Audit as required by Paragraph 22; and (4) Correction of all Audit Findings as required by Paragraph 23, unless EPA has agreed to an alternative date for correction.

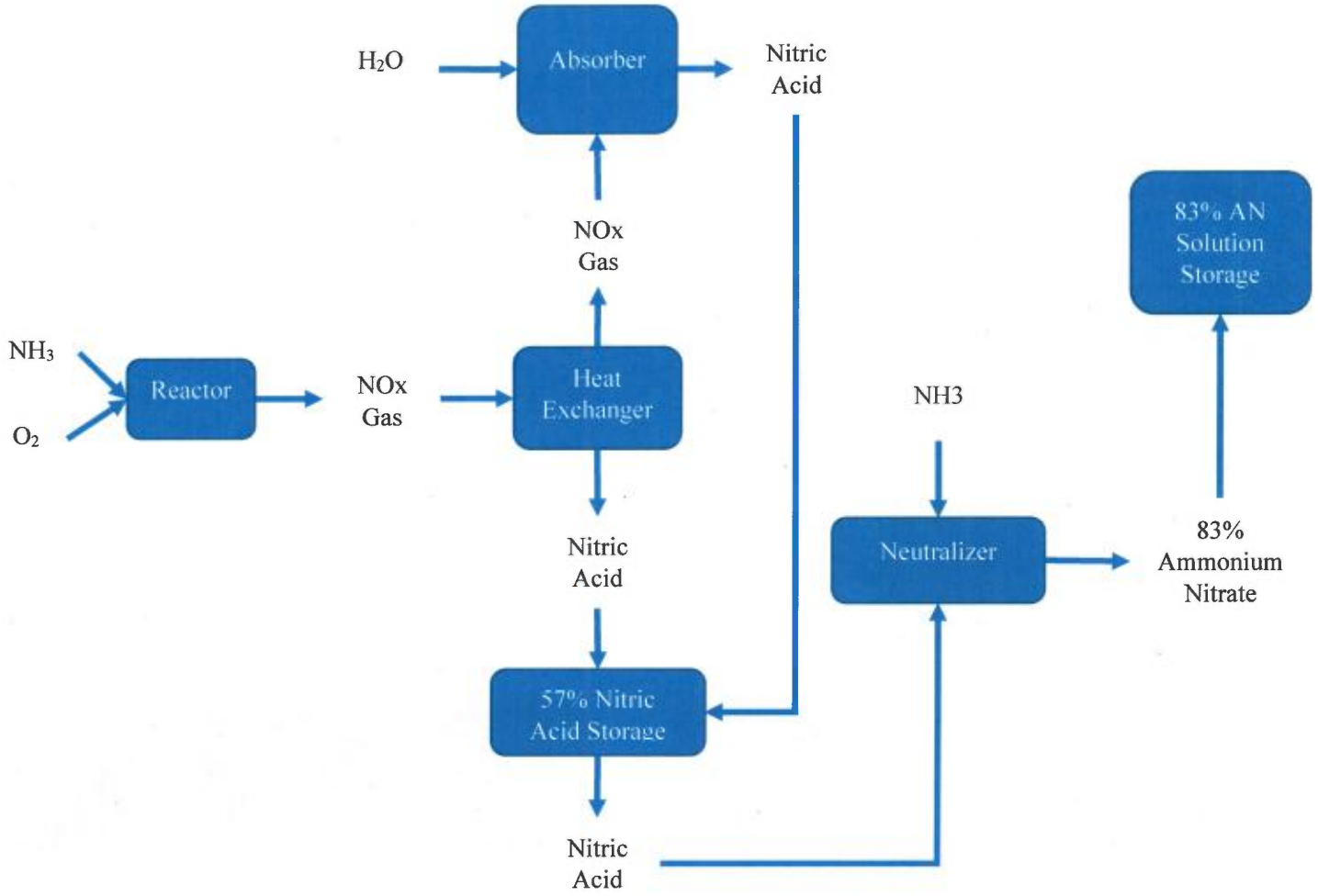
Type of Audit	1	2	3	4	5
	Deadline for Completing Audit	**Deadline for Auditor Report for Audit**	**Deadline for Defendant's Audit Statement for Audit**	**Deadline for Correction of all Audit Findings Unless Delayed Per Paragraph 23.b.**	**Deadline for Corrections of Audit Findings subject to Paragraph 23.b.**
Paper Audit	App. Date + 8M	App. Date + 10M	App. Date + 11M	App. Date + 17M	App. Date + 23M
On-Site Audit	App. Date + 8M	App. Date + 10M	App. Date +11M	App. Date + 17M	App. Date + 23M

For purposes of this table, "App. Date" refers to the date on which the United States approves the Defendant's proposed Auditor(s) pursuant to Paragraph 9 above.

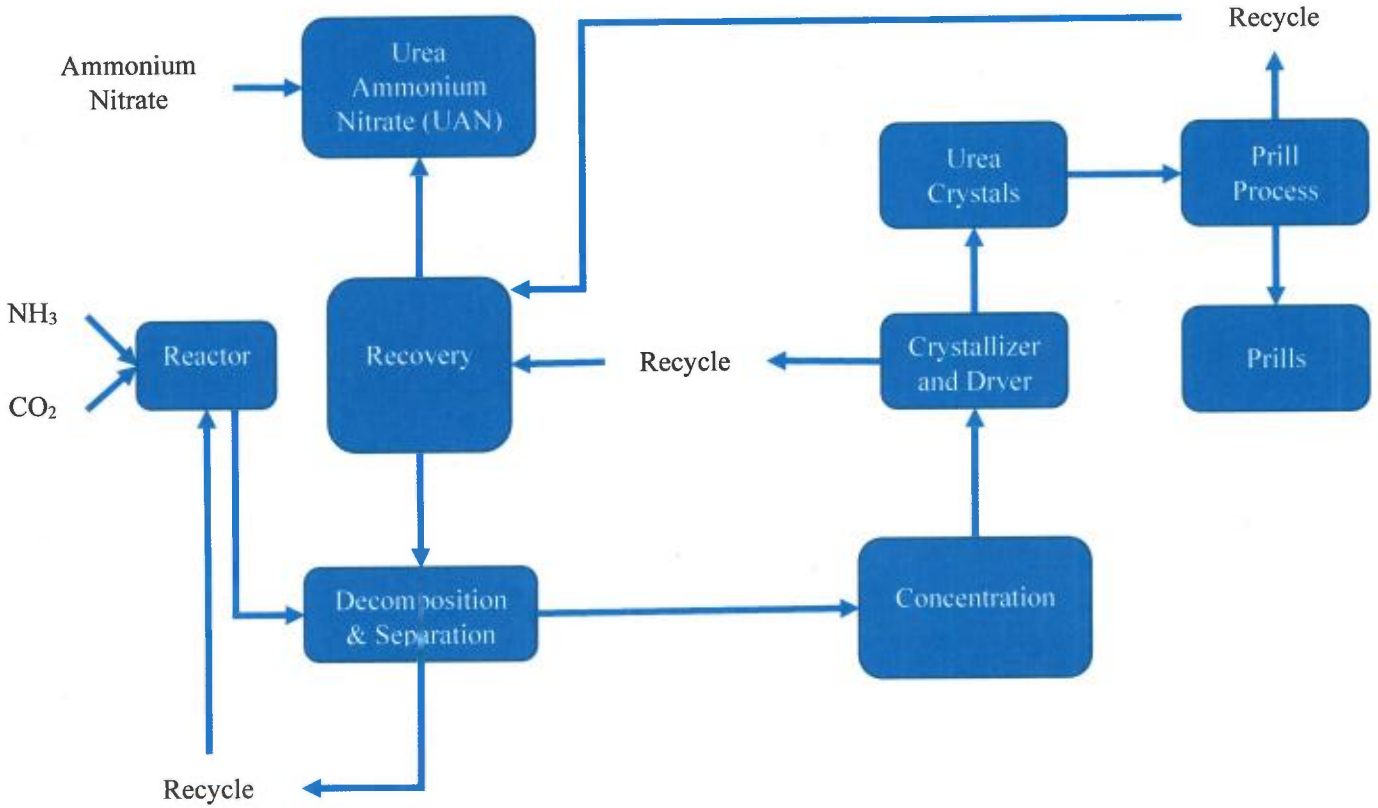
APPENDIX B



DYNO Dyno Nobel Groundbreaking Performance	RMP Covered Process Gas Prep and Ammonia Process
St. Helens, OR	May 2019



DYNO Dyno Nobel Groundbreaking Performance	RMP Covered Process Nitric Acid and Ammonium Nitrate
St. Helens, OR	May 2019



DYNO Dyno Nobel Groundbreaking Performance	RMP Covered Process Urea Production
St. Helens, OR	May 2019

APPENDIX C

APPENDIX C

Emergency Response Equipment
Supplemental Environmental Project

The Supplemental Environmental Project consists of donating emergency response equipment to the Columbia Fire & Rescue ("CF&R") and the Scappoose Rural Fire District ("SRFD"), as described below. CF&R and SRFD shall be collectively referred to as "the Recipients."

Scheduling:

Defendant shall order the equipment described below for the Recipients within 90 days of the Effective Date, which equipment must be delivered to the Recipients within 180 days of the Effective Date. The SEP shall be considered complete when each piece of equipment described below, or substantially similar equipment in the event the equipment listed below is not available, is delivered to the Recipients. If necessary, substantially similar equipment will be donated by Defendant after consultation with the Recipients.

1. Fifty sets of personal protective equipment commonly referred to as "turnout gear" for the CF&R, as shown on Attachment C-1. Each set of "turnout gear" consists of a coat and pants to protect a firefighter from flames as they enter a structure, chemicals used to fight fires, and chemicals generated during fires from materials located at the structure. The total expenditure for the "turnout gear" is $124,147.

2. Seventy-four sets of Self-Contained Breathing Apparatus ("SCBA") for the CF&R and 52 sets of SCBA for the SRFD, and spare parts, as shown on Attachment C-2. SCBA is the breathing system firefighters use during structure fires, hazardous material response, or any incident where the atmosphere is not safe to be in. The total expenditure for the equipment is $815,705.

APPENDIX C-1

SEAWESTERN
FIRE FIGHTING EQUIPMENT

P.O. Box 51, Kirkland, Washington 98083
Phone (425) 821-5858 / Fax (425) 823-0636 / Toll Free 1-800-327-5312
www.seawestern.com / E-mail: info@seawestern.com

QUOTATION

TO: Dyno Nobel – Columbia River Fire & Rescue
63149 Columbia River Highway
Deer Island, OR 97054
ATTN: Fire Chief Greisen

DATE: 2/26/19

Replying to your inquiry we are pleased to quote as follows:

ITEM #	QTY	DESCRIPTION	UNIT PRICE	EXTENSION
		JANESVILLE V-FORCE TURNOUTS		
1.	50	***Janesville V-Force Turnout Coat – 32"*** 7 oz PBI MAX Natural Outershell, with Glide Facecloth and ISODRI "C7" Thermal Liner System with W.L. Gore Crosstech Black Moisture Barrier. *Per Attached Line List* With 2" Lettering on Hanging Name Plate.	***$1,467.44***	***$73,372.00***
2.	10	***Janesville V-Force Turnout Option 35" Coat Length***	***$45.00***	***$450.00***
3.	50	***Janesville V-Force Turnout Pant*** 7 oz PBI MAX Natural Outershell, with Glide Facecloth and ISODRI "C7" Thermal Liner System, W.L. Gore Crosstech Black Moisture Barrier with V-Back Suspender System. *Per Attached Line List.*	***$1,006.50***	***$50,325.00***
		Total for Order of Fifty Sets of Turnouts Per Columbia River Fire & Rescue Department Specifications		***$124,147.00***

FOB: St. Helens, OR
DELIVERY: 75 to 90 Days after receipt of order

TERMS: Net on Receipt

Sea Western, Inc.

By: Steve Morris
Vice-President

APPENDIX C-2

SEAWESTERN
FIRE FIGHTING EQUIPMENT

P.O. Box 51, Kirkland, Washington 98083
Phone (425) 821-5858 / Fax (425) 823-0636 / Toll Free 1-800-327-5312
www.seawestern.com / E-mail: info@seawestern.com

QUOTATION

TO: Dyno Nobel – Columbia River Fire & Rescue
63149 Columbia River Highway
Deer Island, OR 97054
ATTN: Fire Chief Greisen

DATE: 2/26/19

Replying to your inquiry we are pleased to quote as follows:

ITEM #	QTY	DESCRIPTION	UNIT PRICE	EXTENSION
		MSA "G1" SCBA SYSTEM		
1.	126	***MSA "G1" Breathing Apparatus*** Includes: 4500 PSI Operating System with Remote Quick Connect Cylinder System, "G1" Carrier and Harness System with Chest Strap, Metal Cylinder Band and Adjustable Swiveling Lumbar Pad, "G1" Regulator with Solid Cover with Continuous Low Pressure Hose, Quick Connect Cylinder Connection, "G1" Amplifier System on Left Chest, "G1" PASS Device on Right Shoulder and Rechargeable Battery System. *NFPA 1981, 2013 Edition and NFPA 1982, 2013 Edition Compliant.*	***$3,980.00***	***$501,480.00***
2.	126	***MSA "G1" Breathing Apparatus Option "A"*** Telemetry System for G1 SCBA.	***$350.00***	***$44,100.00***
3.	126	***MSA "G1" Breathing Apparatus Option "B"*** Serviceable Shoulder Straps for Removal for Sanitization.	***$75.00***	***$9,450.00***
4.	126	***MSA "G1" Breathing Apparatus Facepiece*** Available in Small, Medium and Large.	***$285.00***	***$35,910.00***
5.	126	***MSA "G1" Breathing Apparatus 45 Minute Cylinder*** With Cylinder Valve and Quick Connect Fitting.	***$955.00***	***$120,330.00***

FOB: St Helens, OR
DELIVERY: 90 to 120 Days after receipt of order

Sea Western, Inc.

By: Steve Morris
Vice - President

SEAWESTERN
FIRE FIGHTING EQUIPMENT

P.O. Box 51, Kirkland, Washington 98083
Phone (425) 821-5858 / Fax (425) 823-0636 / Toll Free 1-800-327-5312
www.seawestern.com / E-mail: info@seawestern.com

QUOTATION

TO: Dyno Nobel – Columbia River Fire & Rescue
63149 Columbia River Highway
Deer Island, OR 97054
ATTN: Fire Chief Greisen

DATE: 2/26/19

Replying to your inquiry we are pleased to quote as follows:

ITEM #	QTY	DESCRIPTION	UNIT PRICE	EXTENSION
6.	10	***MSA "G1" Breathing Apparatus – Fill Station Adapter*** Quick Connect Adapter for Fill Station, Price Per Fill Position.	***$525.00***	***$5,250.00***
7.	4	MSA "G1" Breathing Apparatus – Fit Test Adapter For Quantitative Fit Test of Department Members.	***$315.00***	***$1,260.00***
8.	2	***MSA "G1" Tag Reader / Writer for Telemetry System*** Includes: Dongle and Software. One Reader for RFID Tags and One Reader/Writer for SCBA and Mask.	***$445.00***	***$890.00***
9.	126	***MSA ID Tags for Telemetry System***	***$35.00***	***$4,410.00***
10.	6	***MSA Base Station for Telemetry System*** For Command Apparatus to Monitor Firefighter Air Supply.	***$1,850.00***	***$11,100.00***
11.	52	***MSA Spare Rechargeable Battery Packs for "G1" SCBA.***	***$275.00***	***$14,300.00***

FOB: St Helens, OR
DELIVERY: 90 to 120 Days after receipt of order

Sea Western, Inc.

By: Steve Morris
Vice-President

SEAWESTERN
FIRE FIGHTING EQUIPMENT

P.O. Box 51, Kirkland, Washington 98083
Phone (425) 821-5858 / Fax (425) 823-0636 / Toll Free 1-800-327-5312
www.seawestern.com / E-mail: info@seawestern.com

QUOTATION

TO: Dyno Nobel – Columbia River Fire & Rescue
63149 Columbia River Highway
Deer Island, OR 97054
ATTN: Fire Chief Greisen

DATE: 2/26/19

Replying to your inquiry we are pleased to quote as follows:

ITEM #	QTY	DESCRIPTION	UNIT PRICE	EXTENSION
12.	11	***MSA "G1" Rechargeable Battery Charging Station*** For Fast Charging of Six "G1" Batteries.	***$575.00***	***$6,325.00***
13.	14	***MSA "G1" RIT System*** Includes: "G1" 2nd Stage Regulator, Low Air Alarm, 1ST Stage Regulator, "G1" Mask, Six Foot High Pressure Hose with Universal Rescue Air Connection, "G1" 60 Minute High Pressure Cylinder and New True North RIT Bag.	***$4,350.00***	***$60,900.00***
		Total for SCBA System Delivered to St Helens, OR		***$815,705.00***
		Above Pricing Includes Training of Department Members on the Use of the MSA G1 SCBA System *Above Pricing Includes Repair Instruction (CARE) Training for 4 Department Members*		

FOB: St Helens, OR
DELIVERY: 90 to 120 Days after receipt of order

Sea Western, Inc.

By: Steve Morris
Vice-President

APPENDIX D

Appendix D

PORTLAND MAIN OFFICE
1000 SW Third Avenue, Suite 600
Portland, Oregon 97204
(503) 727-1000
www.usdoj.gov/usao/or

Ryan W. Bounds
Assistant U.S. Attorney
Ryan.Bounds@usdoj.gov
(503) 727-1141
Reply to Portland Office

U.S. DEPARTMENT OF JUSTICE
United States Attorney's Office
District of Oregon
Billy J. Williams, United States Attorney

EUGENE BRANCH
405 E 8th Avenue, Suite 2400
Eugene, Oregon 97401
(541) 465-6771

MEDFORD BRANCH
310 West Sixth Street
Medford, Oregon 97501
(541) 776-3564

February 14, 2018

David A. Rabbino, Esq.
Two Centerpointe Drive, Sixth Floor
Lake Oswego OR 97035

Re: *United States v. Dyno-Nobel, Inc.*
Superseding Pre-Indictment Plea Offer

Dear Mr. Rabbino:

1. **Parties/Scope**: This plea agreement is between this United States Attorney's Office (USAO) and defendant Dyno-Nobel, Inc., and thus does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority. This agreement applies neither to any charges other than those specifically mentioned herein nor to any civil remedy that the Environmental Protection Agency or any other regulatory agency may seek.

2. **Charges**: Defendant agrees to waive indictment and to plead guilty to the Information to be filed in this case, which is transmitted herewith and charges defendant with failing to notify the National Response Center as soon as it had knowledge of an unpermitted release of a hazardous substance into the environment when the volume of such release was in excess of a reportable quantity, in violation of Title 42, United States Code, § 9603(a), (b)(3).

3. **Penalties**: The maximum sentence for an organization found guilty of this offense is a fine of $500,000 (or twice the gross pecuniary gains or losses resulting from the offense if such amount exceeds $500,000), a probationary term of five years, and a $400 fee assessment. Defendant agrees to pay the fee assessment by the time of entry of its guilty plea. *See* 18 U.S.C. § 3013(a)(2)(B).

4. **Dismissal/No Prosecution**: The USAO agrees not to bring additional charges against defendant in the District of Oregon arising out of this investigation, insofar as all the material facts underlying such charges are known to the USAO at the time this agreement is tendered to defendant.

5. **Sentencing Factors**: The parties agree that the Court must first determine the applicable advisory guideline range, then determine a reasonable sentence considering that range and the factors listed in 18 U.S.C. § 3553(a). Where the parties agree that sentencing factors apply, such agreement constitutes sufficient proof to satisfy the applicable evidentiary standard.

6. **Relevant Conduct**: The parties agree that defendant's relevant conduct includes its release of more than six tons of anhydrous ammonia vapor into the air over the course of three days from its facility located in St. Helens, Oregon, and its failure to notify the National Response Center until approximately seven days after defendant became aware of the first such discharge. Releases of anhydrous ammonia in excess of 100 pounds are required to be reported to the National Response Center pursuant to Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). This conduct yields an offense level of 12 pursuant to U.S.S.G. § 2Q1.2(a), (b)(1)(A), and (b)(6) before any adjustments.

7. **Acceptance of Responsibility**: Defendant must demonstrate to the Court that it fully admits and accepts responsibility under U.S.S.G. § 3E1.1 for its unlawful conduct in this case. If defendant does so, the USAO will recommend a two-level reduction in defendant's offense level. The USAO reserves the right to change this recommendation if defendant, between plea and sentencing, commits any criminal offense, obstructs or attempts to obstruct justice as explained in U.S.S.G. § 3C1.1, or acts inconsistently with acceptance of responsibility as explained in U.S.S.G. § 3E1.1.

8. **Stipulated $250,000 Fine and Two-Year Term of Probation**: So long as defendant continues to demonstrate its acceptance of responsibility as described in paragraph 7, *supra*, the USAO shall join defendant in stipulating to a sentence of a criminal fine in the amount of $250,000, due immediately and in full, and a two-year period of probation.

The parties stipulate that, as a special condition of probation, defendant shall implement a stack test of the C-654 scrubber—the source of the discharges recounted in paragraph 6, *supra*—following EPA's approval of the stack test protocol and/or methodology. Defendant shall promptly furnish the results of that test to EPA and agrees to operate the C-654 scrubber under the same or more efficient conditions during the period of probation and to use the results of the stack test as a basis for emissions calculations for the C-654 scrubber for future filings with the EPA.

Defendant shall also, as a special condition of probation, install and operate at the Saint Helens Plant a fenceline monitoring system that EPA agrees is reasonably capable of immediately detecting excessive ground-level concentrations of ammonia vapor at the perimeter of that facility.

9. **Court Bound To Impose Stipulated Sentence**: If the Court accepts this plea agreement, the Court agrees to be bound by the stipulated sentence of the parties. Because this agreement is

made under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the parties may rescind the agreement and defendant may withdraw its plea if the Court declines to follow the parties' agreement or recommendations.

10. **Waiver of Appeal/Post-Conviction Relief**: Defendant knowingly and voluntarily waives the right to appeal from any aspect of the conviction and sentence on any grounds, except for a claim that: (1) the sentence imposed exceeds the statutory maximum. Should defendant seek an appeal, despite this waiver, the USAO may take any position on any issue on appeal. Defendant also waives the right to file any collateral attack, including a motion under 28 U.S.C. § 2255, challenging any aspect of the conviction or sentence on any grounds, except on grounds of ineffective assistance of counsel, and except as provided in Fed. R. Crim. P. 33 and 18 U.S.C. § 3582(c)(2).

Defendant expressly agrees that this waiver shall remain effective in the event that the USAO alters its sentencing recommendation in conformity with paragraphs 7–8, *supra*, or if defendant breaches this agreement as described in paragraph 12, *infra*.

11. **Full Disclosure/Reservation of Rights**: The USAO will fully inform the PSR writer and the Court of the facts and law related to defendant's case. Except as set forth in this agreement, the parties reserve all other rights to make sentencing recommendations and to respond to motions and arguments by the opposition.

12. **Breach of Plea Agreement**: If defendant breaches the terms of this agreement, or commits any new criminal offenses between signing this agreement and sentencing, the USAO is relieved of its obligations under this agreement, but defendant may not withdraw any guilty plea or challenge or rescind the waiver of appeal or collateral attack as provided in paragraph 10, *supra*.

If defendant believes that the government has breached the plea agreement, it must raise any such claim before the district court, either prior to or at sentencing. If defendant fails to raise a breach claim in district court, it has waived any such claim and is precluded from raising a breach claim for the first time on appeal.

13. **Memorialization of Agreement**: No promises, agreements or conditions other than those set forth in this agreement will be effective unless memorialized in writing and signed by all parties listed below or confirmed on the record before the Court. If defendant accepts this offer, please sign and attach the original of this letter to the Petition to Enter Plea.

(Continued on next page.)

14. **Deadline**: This plea offer expires if not accepted by February 16, 2018, at 5:00 p.m.

Sincerely,

BILLY J. WILLIAMS
United States Attorney

RYAN W. BOUNDS
Assistant United States Attorney

Defendant Dyno Nobel, Inc., through its responsible agents and representatives, has carefully reviewed every part of this agreement with its attorney. Dyno Nobel understands and voluntarily agrees to the terms of this agreement. The corporation expressly waives its rights to appeal as outlined in this agreement. The corporation pleads guilty because, in fact, it is guilty.

2/16/2018
Date

For Dyno Nobel, Inc., Defendant

I represent the defendant as legal counsel. I have carefully reviewed every part of this agreement with defendant. To my knowledge, defendant's decisions to make this agreement and to plead guilty are informed and voluntary ones.

2/16/2018
Date

David A. Rabbino, Esq.
Attorney for Defendant

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS

NATIONAL ASSOCIATION OF REALTORS®

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 11001
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900, Washington, DC 20005-3314
Tel: (202) 538-8000

ATTORNEYS (IF KNOWN)

Owen M. Kendler, Chief, U.S. Department of Justice, Antitrust Division, Financial Services, Fintech & Banking Section
450 Fifth Street, N.W., Suite 4000, Washington DC 20530
Tel: (202) 305-8376

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ A. *Antitrust*

- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*

- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ C. *Administrative Agency Review*

- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR **○ F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☒ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ **G. *Habeas Corpus/ 2255***	○ **H. *Employment Discrimination***	○ **I. *FOIA/Privacy Act***	○ **J. *Student Loan***
☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ **K. *Labor/ERISA (non-employment)***	○ **L. *Other Civil Rights (non-employment)***	○ **M. *Contract***	○ **N. *Three-Judge Court***
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

● 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

15 U.S.C. § 1314(b), (e) - Petition to Set Aside Civil Investigative Demand

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint **YES** ☐ **NO** ☒

VIII. RELATED CASE(S) IF ANY (See instruction) **YES** ☒ **NO** ☐ If yes, please complete related case form

DATE: September 13, 2021 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Ethan C. Glass

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

CLERK=S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CO-932
Rev. 4/96

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 40.5(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk=s records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 40.5(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 40.5(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff , defendant or counsel must complete the following:

I. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(e=s) below.]

- ☐ (a) relates to common property
- ☒ (b) involves common issues of fact
- ☒ (c) grows out of the same event or transaction
- ☐ (d) involves the validity or infringement of the same patent
- ☐ (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: ☒

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

4. CAPTION AND CASE NUMBER OF RELATED CASE(E-S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

United States v. **National Association of REALTORS®** C.A. No. **20cv3356**

September 13, 2021
DATE

Ethan Glass
Signature of Plaintiff /Defendant (or counsel)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF REALTORS®,

Petitioner,

v.

UNITED STATES OF AMERICA,

U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION,

RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General, Antitrust Division,

Respondents.

Case No. 1:21-cv-2406

CERTIFICATE OF SERVICE

I hereby certify that, on September 13, 2021, copies of the National Association of REALTORS'® Petition to Set Aside, or in the Alternative Modify, Civil Investigative Demand No. 30729, Declaration of Ethan Glass in Support of the Petition, exhibits thereto, Civil Cover Sheet, and Notice of Related Case were served via email and U.S. mail on the antitrust investigators named in Civil Investigative Demand No. 30729 at the following addresses:

Owen M. Kendler, Chief
U.S. Department of Justice
Antitrust Division
Financial Services, Fintech & Banking Section
450 5th Street, NW
Washington, DC 20530
Email: owen.kendler@usdoj.gov

Miriam R. Vishio, Assistant Chief
U.S. Department of Justice
Antitrust Division
Civil Conduct Task Force

450 5th Street, NW
Washington, DC 20530
Email: miriam.vishio@usdoj.gov

Ethan D. Stevenson
U.S. Department of Justice
Antitrust Division
Financial Services, Fintech & Banking Section
450 5th Street, NW
Washington, DC 20530
Email: ethan.stevenson@usdoj.gov

Dated: September 13, 2021

Respectfully submitted,

/s/ Ethan C. Glass

Ethan C. Glass (D.D.C. Bar No. 1034207)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street NW, Suite 900
Washington, District of Columbia 20005-3314
ethanglass@quinnemanuel.com
Tel: (202) 538-8000
Fax: (202) 538-8100

Attorney for Petitioner National Association of REALTORS®

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NATIONAL ASSOCIATION OF REALTORS®

Plaintiff(s)

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

Defendant(s)

Civil Action No. 1:21-cv-2406

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Merrick B. Garland
Attorney General
United States Department of Justice
4950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005-3314
Tel: (202) 538 8000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-2406

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NATIONAL ASSOCIATION OF REALTORS®

Plaintiff(s)

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

Defendant(s)

Civil Action No. 1:21-cv-2406

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States of America
United States Department of Justice
4950 Pennsylvania Avenue, NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005-3314
Tel: (202) 538 8000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-2406

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NATIONAL ASSOCIATION OF REALTORS®

Plaintiff(s)

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

Defendant(s)

Civil Action No. 1:21-cv-2406

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. Department of Justice
Antitrust Division
450 Fifth Street NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005-3314
Tel: (202) 538 8000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-2406

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NATIONAL ASSOCIATION OF REALTORS®

Plaintiff(s)

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

Defendant(s)

Civil Action No. 1:21-cv-2406

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Richard A. Powers
Acting Assistant Attorney General, Antitrust Division
United States Department of Justice
450 Fifth Street NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005-3314
Tel: (202) 538 8000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-2406

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

NATIONAL ASSOCIATION OF REALTORS®

Plaintiff(s)

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION; RICHARD A. POWERS, in his official capacity as Acting Assistant Attorney General

Defendant(s)

Civil Action No. 1:21-cv-2406

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* The Honorable Channing D. Phillips
Acting United States Attorney for the District of Columbia
c/o Civil Process Clerk
United States Attorney's Office
555 4th St. NW
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Ethan C. Glass
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street NW, Suite 900
Washington, DC 20005-3314
Tel: (202) 538 8000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:21-cv-2406

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc: