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

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

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO EXCLUDE TESTIMONY OR, ALTERNATIVELY, TO ISSUE A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE

NAR avoids the United States' argument under Rule 37 and responds instead to a straw argument that was not made. The focus of the United States' motion was NAR's untimely disclosure of a Point2 representative as a trial witness. Motion at 6-11. NAR's obligation to disclose trial witnesses arises from four sources: (i) Rule 26(a)(3)(A); (ii) Magistrate Judge Denlow's October 24, 2006 Order (D.E. 79), which modified the default timing under the Rule by requiring that NAR disclose witnesses on the subject of procompetitive justifications by March 15, 2007; (iii) the parties' stipulation that updated witness lists be exchanged by September 7, 2007; and (iv) NAR's duty under Rule 26(e)(1)(A) to supplement its March 15 witness list in a timely manner. Remarkably, NAR's opposition ignores its Rule 26 obligation to disclose witnesses and instead diverts the focus to whether NAR complied with its separate duty under Rule 26(a)(1)(A) to disclose persons with discoverable information. NAR Br. 1, 6-8.

By focusing on a disclosure obligation not in issue, then claiming that the United States was "aware of" Point2 and had previously scheduled the deposition of its employee, NAR misses the

point. The United States had no way of knowing that NAR might call a Point2 witness at trial until NAR belatedly disclosed that fact on November 19, 2007. Rather, the United States had every reason to rely on NAR's March and September 2007 witness lists, which did not include a witness from Point2.

Responding to the relief requested under Rule 611, NAR does not argue seriously that it should be allowed to present trial testimony from a volunteer witness who refuses to produce documents that bear on the truth of his testimony. Instead, NAR argues that the United States has failed to show that the withheld documents are relevant. But NAR's own opposition argues that Mr. Tufts' testimony is "critical"[1] because technology has "made threats of broker withdrawal from MLSs even more credible and serious than ever." NAR Br. 2-3. Any proper evaluation of whether Point2 could become a "credible and serious" alternative to MLSs would necessarily include an analysis of the company's business plans and strategies.

Accordingly, for the reasons set forth in Plaintiff's motion and this reply, the Court should exclude Mr. Tufts' testimony or, at a minimum, preclude NAR from calling him unless Point2 promptly produces the documents at issue.

I. NAR'S OPPOSITION CONFIRMS THAT THE KEY FACTS ARE UNDISPUTED

The chronology of events set forth in the United States' motion is largely uncontested by NAR.[2] Specifically, NAR does not dispute that:

- **NAR did not disclose any Point2 witness in its March 15, 2007 or September 7,**

[1] As set forth below, NAR's characterizations regarding the importance of Mr. Tufts are overstated. *Infra* 7-8.

[2] NAR's opposition does allege (mistakenly) that "DOJ's chronology omits significant facts that make clear that DOJ was well aware of Mr. King" since September 2007. NAR Br. 4. In fact, each of the "significant facts" that NAR mentions was included in Plaintiff's chronology. Motion 6-7.

2007 witness lists.[3] Although Plaintiff's motion highlights this fact repeatedly (2, 6, 10), NAR's opposition omits any discussion of these non-disclosures.

- **After the United States noticed Mr. King's deposition on October 1, 2007, NAR did not cross-notice.** NAR's opposition does not attempt to explain this decision.

- **NAR waited until the day before discovery closed, November 19, to disclose that it "might" call a Point2 witness at trial.** NAR's opposition suggests a possible explanation for the tardy disclosure: "In the course of preparing for Mr. King's deposition, counsel for NAR concluded that Mr. King did, in fact, have relevant knowledge." NAR Br. 4. But NAR was aware of Point2 since before May 1, 2007, when NAR's industry expert mentioned the company in his report.[4]

- **Point2 has declined to produce its business plans and strategies and a list of its U.S. broker members.** NAR does not dispute this fact, but instead criticizes the requests, as discussed in Section III below.

- **NAR has refused to ask Point2 to produce the documents voluntarily.** Motion at Ex. 1 (D.E. 195-2, p. 9). NAR's opposition offers no explanation for its failure even to ask Point2 to produce the subject documents.

- **NAR has declined to stipulate that it will not elicit testimony on the same topics that are the subject of Plaintiff's document requests.** NAR's opposition does not explain its refusal to accept such a stipulation.

II. MR. TUFTS' TESTIMONY SHOULD BE EXCLUDED UNDER RULE 37

A. NAR's Late Witness Disclosure Was Without Substantial Justification

NAR's opposition ignores the substance of the United States' argument under Rule 37 and focuses exclusively on minimizing the least important of its lapses – the absence of Point2 in

[3] Magistrate Judge Denlow's October 24, 2006 Order mandated that NAR "identify fact witnesses on pro-competitive justification on or by 3/15/07." D.E. 79. NAR's brief confirms its view that testimony from Point2 is relevant to its alleged procompetitive justification. NAR Br. 2-3. By agreement, the parties updated their initial witness lists on September 7, 2007.

[4] Point2 is also mentioned in the August 1 report of NAR's economic expert Dr. Flyer. Before then, Point2 was interviewed by an assistant to Dr. Flyer, and NAR's counsel began communicating with Point2 personnel at least as early as October 1, 2007. Motion at Ex. 4.

NAR's initial disclosures under Rule 26(a)(1)(A). NAR Br. 1, 6-8. NAR argues that Point2's omission from its early disclosures, and its failure to identify Point2 in any supplement to these disclosures, can be excused because the United States became "aware of" Point2 beginning in May 2007 and later scheduled the deposition of a Point2 witness. *Id.* at 7. This argument sidesteps the issue presented by the United States' motion.

But for NAR's failure to join the issue, it should go without saying that the factual predicate for this motion is NAR's late disclosure of a Point2 witness. Motion 1, 6, 10-11. Plaintiff's motion listed the omission of Point2 from NAR's initial disclosures as only the first of many facts establishing that the United States had no reason to believe that NAR might call a Point2 witness at trial – until November 19. *Id.* at 10-11. Accordingly, NAR failed to comply with its obligation to disclose a Point2 witness under Rules 26(a)(3)(A) and 26(e)(1)(A). Because there are at least hundreds of persons having discoverable information in this case, Magistrate Judge Denlow's October 24, 2006 Order modified the default timing under Rule 26(a)(3)(A) and required earlier disclosure of witnesses. D.E. 79. The parties necessarily structured their discovery efforts around the March 2007 Court-ordered lists, as well as the updated lists that the parties agreed to exchange in September 2007. The United States relied on these witness lists (and lack of any timely supplementation) in concluding that NAR did not intend to call a Point2 witness at trial.

By focusing on only one of its disclosure obligations, NAR fails to supply any justification for its failure to comply with Rule 26(a)(3)(A) by disclosing a Point2 witness on its March 15, 2007 witness list. Nor does NAR offer a justification for not supplementing this list to add such a disclosure "in a timely manner" – as required by Rule 26(e)(1)(A) – either on the agreed upon date of September 7 or well before the end of the discovery period. Indeed, NAR's argument

suggests it had no witness disclosure obligation, which would render its November 19 disclosure of a Point2 witness gratuitous.

B. NAR's Late Witness Disclosure Was Not Harmless

NAR argues that any late disclosure on its part was harmless because the United States somehow knew or should have assumed that NAR would call a Point2 witness. NAR Br. 7-8. But NAR's repeated failure to disclose a Point2 witness compels the opposite conclusion. Indeed, purporting to explain its belated disclosure, NAR claims that "[i]n the course of preparing for Mr. King's [November 19] deposition, counsel for NAR concluded that Mr. King did, in fact, have relevant knowledge." NAR Br. 4. This statement, which implies that NAR first learned that it should list a Point2 witness just before the discovery cutoff, contradicts NAR's argument that the United States somehow knew of Point2's "significance" six months earlier. *Id.* at 3. If, as NAR argues, the United States should have known this – based on information provided by NAR – then NAR also must have known of Point2's significance six months earlier.

NAR also does not explain its refusal to remedy its late disclosure. During the February 14th conference call setting a briefing schedule for the present motion, the Court asked counsel for NAR to explain what steps NAR had taken to obtain a voluntary production of documents by Point2. Despite the Court's inquiry, NAR's opposition is silent on this point.[5] NAR also does not address its refusal to stipulate that it would not make any arguments relating to Point2's future or

[5]Instead, NAR criticizes the United States for "refus[ing] even to disclose to NAR what document discovery it would be seeking." NAR Br. 5 n.3. But the criticism has no significance. In fact, as the email cited by NAR makes plain, the United States assured NAR that "[w]e will disclose to you exactly what documents we are seeking as soon as we prepare our requests, which will be shortly." Motion at Ex. 1 (D.E. 195-2, p. 4). The United States did so days later, forwarding to NAR a copy of Plaintiff's document requests to Point2 (the same day they were served on Point2), more than one month before it requested NAR's assistance in obtaining the documents from Point2. Ex. 1.

potential plans for its NLS technology. NAR's refusals, and its failure to explain them, further make a finding of harmlessness here inappropriate.

Under Rule 37(c), NAR's unjustified failure to disclose information required by Rule 26(a) or 26(e) results in the "automatic and mandatory" exclusion of such information, unless such failure is harmless. *Musser v. Gentiva Health Services*, 356 F.3d 751, 755 & 758 (7th Cir. 2004). Although NAR's brief embraces this standard (NAR Br. 7), it asserts without elaboration that exclusion of Mr. Tufts' testimony would lead to reversal. NAR cites three cases in support of this argument, but provides no description or discussion of these cases. *Id.* at 8. None of these cases bears any factual resemblance to these cases, and only one involved a reversal. *See Sherrod v. Lingle*, 223 F.3d 605, 612-13 (7th Cir. 2000) (reversing exclusion where trial court failed to consider the issue of harmlessness, noting that "in most cases, a district court would be fully within its discretion in strictly applying the rules and excluding reports that were incomplete or submitted a day late").

In fact, Seventh Circuit precedent contradicts NAR's "reversible error" argument. In *Musser v. Gentiva Health Servcs.*, 356 F.3d 751, 755 & 758-59 (7th Cir. 2004), the Court affirmed, under an abuse of discretion standard, the trial court's exclusion of experts disclosed only after their depositions as fact witnesses. The Court upheld the trial court's finding that defendant suffered harm because there were only three months remaining before trial. *Id.* The facts here present a stronger case for exclusion. Not only is this case similarly (four months) close to trial; in addition, the untimely disclosed witness's Canadian employer has refused to produce relevant documents, NAR seeks to obtain an advantage from Point2's refusal (*i.e.* friendly testimony that cannot be fully challenged), and the only means of compelling Point2's document production from Canada is a time-consuming, lengthy and uncertain process that presents

substantial risk that the United States will not obtain the documents in time for a deposition of Mr. Tufts on the eve of trial, if at all.

C. NAR's Claims of Prejudice Are Unsupported

Attempting to avoid the consequences of its untimely disclosure, NAR's opposition asserts that Mr. Tufts is a "critical" witness whose exclusion would "seriously prejudice" NAR's defense. NAR Br. 1, 3. As a preliminary matter, this claim is irrelevant under Rule 37(c), which provides that the failure "without substantial justification" to make a required disclosure results in exclusion "unless such failure is harmless." As NAR's own opposition makes clear, prejudice to NAR is not a relevant factor in the Rule 37 analysis. *See* NAR Br. 7 (quoting list of relevant factors under Rule 37 as set forth in *David v. Caterpillar*, 324 F.3d 851, 857 (7th Cir. 2003)).[6]

Moreover, NAR's claim that a Point2 witness is "critical" to its case is contrary to its own actions. NAR does not explain why it did not disclose such a "critical" witness on its earlier witness lists or why it did not seek any discovery from Point2. Even on its most recent witness list, served this month, NAR identified Point2's representative as a "may call" rather than a "will call." Ex. 2 (NAR's February 14, 2008 witness list). NAR's claim also cannot be reconciled with the testimony of NAR's own economic expert, Dr. Flyer, who was unable to conclude that Point2 had any relevance to his opinions. Motion Ex. 4 (D.E. 195-2, p. 25) ("I don't know that it's

[6]These factors are intended to guide the Court's "broad discretion" and, as applied here, include (1) prejudice to the United States, (2) the United States' ability to cure the prejudice, (3) likelihood of disruption to the trial and (4) bad faith or willfulness on NAR's part. *Id.* For the reasons set forth here and in Plaintiff's motion, the first three factors support exclusion under Rule 37. As to the fourth factor, the United States does not rely on any claim of bad faith, and NAR has not stated whether its late disclosure was willful or inadvertent. NAR's refusals to assist the United States in curing the prejudice resulting from the late disclosure, however, could only have been willful. As set forth in Plaintiff's motion, a showing of bad faith or willfulness is not required under Rule 37. Motion 11 n.5.

pertinent to any of the opinions drawn in the report or any of the analysis I undertake.").

If a Point2 witness is indeed "critical," there are only two explanations for the preceding facts. Either NAR deliberately chose not to disclose a Point2 witness in order to retain the element of surprise in the deposition the United States had scheduled but subsequently cancelled, or NAR erred by failing to disclose a "critical" witness. In either case, the consequences of NAR's omission should be borne by NAR, not the United States.

NAR also fails to provide any specifics to support its bare conclusions regarding Point2's "importance." NAR Br. 2-3. Instead, NAR repeats its "procompetitive justification" that an association of competitors may restrict new forms of competition solely because some of its members threaten to withdraw from MLSs in the absence of such restrictions. *Id.* NAR provides no legal support for this novel proposition, which would immunize from antitrust liability any joint venture whose members coupled their anticompetitive conduct with implausible threats of withdrawal. Further, NAR does not dispute that no broker has ever withdrawn from an MLS because it could not opt out of VOWs.[7] In fact, there is no evidence that any broker has withdrawn from an MLS except to join another MLS (or to leave the business). Ex. 3 (Murray Dep. 224). For a broker to withdraw from an MLS without joining another would be "economic suicide," according to NAR's industry expert, Mr. Murray. *Id.* at 142-143, 190-191.

NAR also does not explain how Point2's testimony would not be cumulative. Contrary to NAR's first claim regarding the relevance of the testimony, it cannot plausibly need a Canadian witness from Saskatoon to testify about the "information that is readily available to [U.S.]

[7] Contrary to the claim attributed to the United States in NAR's opposition, the United States has not argued that "brokers could not and would never withdraw from an MLS." NAR Br. 2.

consumers on the internet" (NAR Br. 2), a major subject in the reports of both of NAR's experts. As to NAR's second claim of relevance (*id.* at 2-3), Mr. Murray claimed in his report and deposition that there are many companies that possess the technology to enable brokers to share listings data with one another.[8] Excluding Point2 will not impair NAR from presenting testimony on these issues and, therefore, it will not be prejudiced.

III. THIS COURT SHOULD BAR NAR FROM OFFERING MR. TUFTS' TESTIMONY IF POINT2 REFUSES TO PRODUCE DOCUMENTS BEARING ON THE TRUTH OF THAT TESTIMONY

The fundamental question presented by the United States' motion under Fed. R. Evid. 611 is whether the documents that Point2 is withholding are relevant to its employee's expected testimony. If they are, there can be no appropriate basis for allowing Mr. Tufts to provide voluntary testimony while allowing Point2 to withhold evidence needed to test his testimony. This would effectively permit Mr. Tufts to volunteer testimony for NAR while avoiding hard questions on cross examination. Such a result is not "effective for the ascertainment of the truth." Fed. R. Evid. 611(a)(1); *see also United States v. Toner*, 173 F.2d 140, 144 (3d Cir. 1949) ("Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination . . . his direct testimony should be struck out.") (quotation omitted).[9]

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[8] Indeed, one of these companies, Terabitz in California, was deposed in discovery.

[9] Contrary to NAR's argument (NAR Br. 8), the absence of a Rule 611 opinion involving the same factual situation does not mean that the Rule does not apply. It is not surprising that no opinion involves the unique circumstances presented here, where a foreign non-party beyond the Court's subpoena power volunteers to provide a witness at trial for one party, but refuses to produce relevant documents to the other party. NAR points out that the two cases cited in Plaintiff's motion dealt with the exclusion of party witnesses and not a non-party like Mr. Tufts. But in granting control to the Court over the presentation of witnesses and evidence, Rule 611 makes no distinction between party and non-party witnesses. Rule 611, by its terms, applies to Mr. Tufts.

Rather than seriously arguing that Mr. Tufts should be permitted to avoid effective cross examination by Point2's withholding of documents, NAR asserts instead that the United States "does not make any serious effort" to establish "how the documents it seeks are relevant." NAR Br. 11. In fact, the United States explained the relevance of the documents at length in its motion.[10] Indeed, NAR confirms in its opposition that Mr. Tufts will present "critical" testimony on the allegedly "reasonable likelihood that some brokers might withdraw" from MLSs, because Point2's technology has "made threats of broker withdrawal from MLSs even more credible and serious than ever." NAR Br. 2-3. Evaluating whether Point2 has or could become a "credible and serious" alternative to MLSs requires review of the company's business plans and strategies. Likewise, a list of the American brokers who currently subscribe to Point2 is another measure of whether NAR's claims regarding Point2's potential role are realistic. In addition, NAR cannot now claim that these documents are irrelevant after refusing to stipulate that it would not make any arguments relating to Point2's future or potential plans for its NLS technology.

NAR charges the United States with adopting conflicting positions for arguing first that Point2's testimony is irrelevant, then claiming that it needs documents to test that testimony. NAR Br. 10. But there is no tension between the positions. The United States sought the deposition of Mr. King initially to test an assertion in the report of NAR's industry expert, but ultimately decided

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[10] Motion 5-6 ("documents from Point2 relating to its business plans and strategies and the members of its national listing service" are relevant because they "relate directly to the subjects of Mr. Tufts' expected voluntary testimony about whether Point2 currently functions, could function, or plans to function as an MLS alternative for brokers"); 13 ("The evidence sought will bear directly on the validity of NAR's anticipated claim that Point2's alleged 'MLS-like systems' could be a timely, likely, and sufficient alternative to MLSs for American real estate brokers. For example, Mr. King reportedly left Point2 based on his 'fundamental disagreement with the company's future plans,' which highlights the importance of obtaining Point2's strategic and business plans (request no. 1) to gain perspective on and test Mr. Tufts' testimony.").

that the issue was irrelevant. For this reason, and because Mr. King was *not* then on NAR's witness list, the United States decided that there was no need to take any discovery from Point2 and cancelled Mr. King's deposition on November 15. NAR's subsequent decision to name Mr. King as a trial witness on November 19 fundamentally changed Point2's and Mr. King's significance: The United States' view of Point2's irrelevance no longer determined the scope of discovery. As stated in its motion, the United States needs the documents it requested to test the expected Point2 testimony that NAR may offer because "the parties' disagreement over Point2's relevance cannot be resolved until later." Motion 5.

The remainder of NAR's response to Plaintiff's motion under Rule 611 raises several inaccurate and immaterial charges. First, NAR's portrayal of Point2 as a neutral third party (NAR Br. 9) is contrary to that company's "White Paper" regarding this litigation.[11] That document publicly sides with NAR in the lawsuit and markets Point2's services as a "solution" to the lawsuit, particularly to those brokers who would be disappointed by a NAR loss. NAR Br. at Ex. 2. In fact, in an email produced by NAR, its top legal officer characterized Point2's arguments in a similar document as an "advertorial" that was "attempting to get readers [NAR members] to sign up for Point2." Ex. 4, p. ENAR-124944.

Second, NAR speculates that the government's document requests are too broad and burdensome, but Point2 has objected only on the basis of confidentiality. There are also no facts to suggest that any of these requests would impose an undue burden on Point2. Indeed, NAR has served similar requests for business plans and strategies (a common document request in antitrust

[11] Contrary to NAR's suggestion that the United States knew about the White Paper since June 2007, the United States was unaware of the paper until it began preparing for Mr. King's deposition in October 2007.

cases) upon employers of the United States' witnesses, and it has received such documents from these witnesses in response to its subpoenas.[12] NAR cannot claim that the United States is not entitled to the same discovery NAR has demanded and received from third parties.

NAR argues that the United States should have narrowed its request for business plans and strategies to documents "relevant to the narrow issue of 'whether Point2 currently functions, could function, or plans to function as an MLS alternative for brokers.'" NAR Br. 11. Such language is unworkable as a document request because it enables evasion by requiring subjective judgments about relevance rather than providing objective criteria for determining responsiveness. Further, the United States explained to Point2's general counsel that it had already made its request as narrow as possible, but nevertheless would consider any limitation the company might suggest. Motion at Ex. 8 (D.E. 195-2, p. 50). Point2 did not respond with any. *Id.* at 49. Moreover, in addition to its blanket refusal to produce documents relating to its business plans and strategies or membership,[13] Point2 has produced a total of eight documents, none containing non-public information.

Third, NAR asserts conclusorily that Point2 produced "all documents" responsive to 11 of the 13 requests. NAR Br. 5. The claim is not only irrelevant, but untrue. Point2 produced eight documents and one database in response to the eleven requests, with four of the documents related

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[12] Ex. 5, NAR Subpoenas to: Prudential Real Estate, at ¶ 32 ("All strategic plans, business plans, and forecasts prepared by, reviewed by, or disseminated to, eRealty or Prudential's Senior Management."); HBM II, at ¶ 35 (same); ZipRealty, Inc., at ¶ 17 (same).

[13] The United States requested a list of U.S. *brokers* who are members of Point2's listing service. Point2 responded that the identities of *agents* using its service was publicly available. The United States informed Point2 that it had tried to derive the information it needed from the publicly available information, but was unable to do so reliably. Motion at Ex. 8 (D.E. 195-2, p. 50). Point2 did not respond to the United States' request to produce the information in a readily accessible form. *Id.* at 49.

to one request (#5).[14] Point2 has not searched for responsive documents from the files of even the proposed witness, Mr. Tufts. Motion at Ex. 8 (D.E. 195-2, p. 49).

By using its power under Rule 611 to condition NAR's calling Point2 as a voluntary trial witness on Point2's production of responsive documents in time for a meaningful deposition well before trial, the Court would ensure both parties' ability to elicit truthful and complete testimony from Point2 at trial, an outcome that is by no means assured by issuing a letter seeking international assistance.

IV. NAR'S ARGUMENTS REGARDING THE REQUEST FOR INTERNATIONAL ASSISTANCE ARE MISCONCEIVED

While confirming that it does not object to the issuance of a letter of request, NAR raises two issues about which it claims to be "unclear." NAR Br. 12. First, NAR suggests that the United States has unnecessarily sought the Court's assistance because Canada is "obligated" to assist the United States in obtaining documents from Point2.

NAR is mistaken. The Agreement[15] on which NAR relies does not obligate the Canadian Competition Bureau to secure documents on behalf of the United States. A full reading of Article

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[14] For all but two of the thirteen requests Point2 either refused to produce documents (Nos. 1 & 2), produced electronic documents created by counsel the day before production (Nos. 4 & 5), produced documents unrelated to the request (Nos. 6 & 7), produced an inadequate array of documents when evidence on Point2's website implies that additional items are available (No. 4), produced documents that are missing portions containing the responsive information (No. 5), claimed not to possess documents when the United States has information to the contrary (Nos. 8 & 13), claimed not to possess a different type of document without addressing the request made (No. 11), or claimed not to possess documents that Point2 likely would have because of the nature of its business (Nos. 10 & 13).

[15] Agreement Regarding the Application of Their Competition and Deceptive Marketing Practices Laws, U.S.-Can. Aug. 1995 [hereinafter "The Agreement"] (*available at* http://www.usdoj.gov/atr/public/international/docs/uscan721.htm).

III, Section 3(a), quoted only partially by NAR, shows the non-compulsory nature of the Agreement (prefatory language omitted by NAR is italicized):

> 3. *Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,*
>
> a. assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested Party's territory;

Agreement, Art. III, § 3(a). The omitted language reveals, contrary to NAR's selective reading, that the agreement does not obligate Canada to take any action.[14] Moreover, the quoted section involves seeking "*voluntary* compliance with requests for information" and simply does not address the compulsory process that Point2's refusal has put at issue here.

A letter rogatory is necessary whenever a party—including the United States—needs to compel production of documents in Canada, as the Department of State's Guidance on Judicial Assistance in Canada (attached by NAR to its response) makes clear:

> C. Compulsion of Testimony/Production of Documents
>
> When a witness is unwilling to testify or when production of documents is required, litigants and tribunals must obtain the required evidence by a letter rogatory/letter of request to the appropriate Canadian court.

NAR Br. Ex. 3, at 4. Thus, contrary to the conjecture in NAR's response, the United States cannot seek compulsory process without this Court's assistance.

Finally, NAR claims it is "unclear" on why the United States did not submit a proposed letter rogatory with its motion. NAR Br. 12. The United States has not yet done so because the Court's Civil Case Management Procedures instruct parties not to email proposed orders until

[14] *See also* Article XI ("Nothing in this Agreement shall require a Party to take any action, or to refrain from acting, in a manner that is inconsistent with its existing laws, or require any change in the laws of the Parties or of their respective provinces or states.").

after the underlying motion or request has been heard. Plaintiff remains ready to email the proposed letter if directed to do so. Plaintiff's compliance with the Court's Procedures has not prejudiced NAR.

CONCLUSION

For the foregoing reasons, the Court should exclude Mr. Tufts from testifying. Alternatively, the Court should (i) order that Mr. Tufts' testimony will be barred unless Point2 promptly and substantially complies with Plaintiff's document requests; or (ii) issue a Request for International Judicial Assistance to Saskatchewan, Canada.

Respectfully submitted,

s/Timothy Finley

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Dated: February 28, 2008

CERTIFICATE OF SERVICE

I, Timothy Finley, hereby certify that on this 28th day of February, 2008, I caused a copy of the foregoing to be served on the person listed below by ECF.

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Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com

s/ Timothy Finley

Timothy Finley

INDEX OF EXHIBITS

Exhibit 1: Email forwarding United States' voluntary document request to Point2 and NAR on December 12, 2007.

Exhibit 2: NAR's February 14, 2008 witness list.

Exhibit 3: Selections from the 9/20/07 deposition of Steve Murray

Exhibit 4: Email from Laurie Janik, counsel for NAR, discussing Point2's "advertorial".

Exhibit 5: Excerpts from NAR's subpoenas to Prudential Real Estate, HBM II, and ZipRealty, Inc.

EXHIBIT 1

Kendler, Owen

From: Kendler, Owen
Sent: Wednesday, December 12, 2007 1:51 PM
To: 'Charles Biro'; 'Jack Bierig'; 'Scott Stein'
Subject: FW: U.S. v. National Association of Realtors

-----Original Message-----
From: Kendler, Owen
Sent: Wednesday, December 12, 2007 1:51 PM
To: 'jgolding@point2.com'
Subject: U.S. v. National Association of Realtors

Mr. Golding,

Thank you for talking with us about Point2's willingness to voluntary produce documents to the Division and the status of Mr. King with the company. As we discussed, I have attached for your review a schedule of the documents to be voluntarily submitted. Let me know if you have any difficulty opening the pdf. We look forward to discussing our requests with you once you have had the opportunity to look them over.

Please let us know at your earliest convenience if Mr. King or an another Point2 representative will be appearing as a trial witness for the NAR and whether Point2 will agree to voluntarily comply with our requests.

Thank you,
Owen

54704_1.pdf

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EXHIBIT 2

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

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

NAR'S PRELIMINARY LIVE TRIAL WITNESS LIST

WITNESS	WILL CALL	MAY CALL
Gar Anderson		X
Ann Bailey	X	
Patricia Bybee	X	
Stephen Byrd		X
Carl DeMusz	X	
Chris Eigel		X
Frederick Flyer (expert)	X	
Harold Fogel		X
Robert Hale	X	
Ralph Holmen		X
Laurie Janik	X	
Mark Lesswing	X	

David Liniger		X
Robert Most	X	
Stephen Murray (expert)		X
Clifford Niersbach		X
Alex Perriello		X
Ron Phipps	X	
Richard Smith		X
Brad Tertell		X
Carey Tufts		X
John Veneris		X
comScore 30(b)(6) designee to authenticate data provided on 1/18/07		X

NAR also reserves the right to call any witness listed on DOJ's witness list.

National Association of Realtors®

By: /s/ Scott D. Stein

Jack R. Bierig
John W. Treece
Scott D. Stein
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

Dated: February 14, 2008

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action
vs.	)	No. 05 C 5140
NATIONAL ASSOCIATION OF REALTORS,	)	
Defendant.	)	

The videotaped deposition of STEPHEN H. MURRAY, called as a witness for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before PAULINE M. VARGO, a Notary Public within and for the County of DuPage, State of Illinois, and a Certified Shorthand Reporter of said state, C.S.R. No. 84-1573, at Suite 3700, One South Dearborn Street, Chicago, Illinois, on the 20th day of September, A.D. 2007, at 9:06 a.m.

Page 142

13:09:39 THE VIDEOGRAPHER: We are going back on the
13:09:41 video record at the start of Tape 4 at 1:09 p.m.
13:09:46 MR. KRAMER: Thank you.
STEPHEN H. MURRAY,
called as a witness herein, having been previously
duly sworn and having testified, was examined and
testified further as follows:
EXAMINATION (Resumed)
BY MR. KRAMER:
13:09:47 Q. Mr. Murray, before we broke for lunch,
13:09:51 you were referring to ZipRealty in connection with
13:09:54 opt-outs. Do you recall that?
13:09:55 A. Yes.
13:09:57 Q. Were you suggesting that ZipRealty
13:10:01 supported NAR's opt-out provisions?
13:10:03 A. No, I don't -- I don't recall their
13:10:07 exact position on it at this moment, but no, I
13:10:10 don't think -- to the best of my knowledge, they
13:10:12 are not in support of it back in 2002 and '3.
13:10:16 Q. Do you know if they are any different in
13:10:20 their views today on the 2005 policy?
13:10:22 A. I don't know. I don't know what their
13:10:24 position is at this time.
13:10:26 Q. Before the break also, did I understand

Page 143

13:10:29 you to say that it would be suicide for a broker to
13:10:33 take their listings off a broker's VOW?
13:10:38 A. It could be, yes.
13:10:39 Q. And would that generally be your view?
13:10:42 A. Yes.
13:10:43 Q. If that is your general view, would it
13:10:46 also be a general view that it would be suicide
13:10:49 even more so for brokers to withdraw from an MLS
13:10:54 over their listings appearing on a VOW?
13:10:56 A. It would be very difficult, yes. It
13:11:02 could be, again, very harmful to their business.
13:11:06 Q. And as a general proposition would you
13:11:08 expect that it would be very harmful to their
13:11:10 business?
13:11:11 A. Yes, I do.
13:11:22 Q. Would you agree that allowing brokers to
13:11:24 make individual decisions about their listings --
13:11:30 excuse me. Strike that, please.
13:11:33 Would you agree that allowing brokers to
13:11:35 make individual decisions about how their listings
13:11:37 may be used is procompetitive in its own right?
13:11:42 A. Yes.
13:11:45 Q. What do you mean when you use the word
13:11:48 "procompetitive" in that context?

Page 144

13:11:50 A. It's -- I mean by that it's beneficial
13:11:55 to housing consumers and is beneficial to
13:11:58 competition within the industry for those
13:12:03 consumers; that is, brokers competing to get
13:12:06 consumers to use them for their services.
13:12:09 Q. Would you explain how it's beneficial to
13:12:14 consumers?
13:12:15 A. Brokers employ an ever-changing mix of
13:12:21 strategies to market properties. If essentially
13:12:26 they all have exactly the same means of marketing
13:12:30 properties at all times, then their need to compete
13:12:36 with each other to the extent they have already may
13:12:40 well be inhibited.
13:12:44 Example. MLS, it is a significant and
13:12:48 superior marketing system, but in addition to that,
13:12:52 brokers use Homes Book, TV, billboards, direct
13:12:55 mail, e-mail, fax, all kinds of things.
13:13:00 If you take and they are required to be
13:13:04 an MLS and now they are required to be on every MLS
13:13:07 site that anybody wants to put them on, then their
13:13:11 need to compete in their mix of websites or
13:13:13 features of those websites might necessarily be
13:13:16 reduced. So their need to compete for those
13:13:19 listings and offer special services to sellers

Page 145

13:13:22 could be inhibited. That's what I mean.
13:13:26 Q. How would their need to compete for
13:13:29 listings could be inhibited?
13:13:32 A. Well, as an example, a broker right now
13:13:36 can choose in addition to various broker websites
13:13:42 today, they can choose multiples -- there may be --
13:13:48 I don't know exactly how many. There may be 50
13:13:50 other websites of some nature that are out there
13:13:53 right now. If any operator could grab those
13:13:56 listings, then at any time my guess would be most
14:00 of them would -- pardon me -- most of them would,
14:03 and at that point the broker says, well, they are
14:06 already on all 50 leading real estate sites, so,
14:09 you know, that's it. I don't really need to do
14:11 anything more.
14:13 I mean, right now there is an infinite
14:16 variety of brokers choosing whether to be, for
14:18 instance, on Point 2 or Trulia or Google or Yahoo
14:23 or Propsmart, and I could go down this huge list,
14:26 but that's an individual broker decision.
14:28 If it is required that they must make
14:30 all their listings available to anybody with a
14:32 broker's license who wants them, then I could
14:36 almost assure you every one of those sites will go

Page 190

14:21:09 1 Q. And is it also your view that threats
14:21:12 2 of withdrawal from the MLS as a result of the VOW
14:21:16 3 policy were reasonable, as you also stated, in
14:21:20 4 connection with the concern that withdrawal would
14:21:22 5 have been harmful to competition?
14:21:24 6 A. Yes. I mean, based also on the --
14:21:32 7 particularly the now-rapid expansion of
14:21:34 8 alternatives to MLS, on which I have commented
14:21:36 9 earlier today.
14:21:38 10 I do want to correct one impression I
14:21:40 11 think earlier, and I hope I didn't misstate this
14:21:44 12 too badly. I think you asked me about the
14:21:46 13 withdrawal. We talked about the definition of
14:21:48 14 what you and I meant to be absolute withdrawal.
14:21:51 15 Q. Yes, sir.
14:21:51 16 A. When I talk about the threat of
14:21:53 17 withdrawal, I am really talking about a group, and
14:21:58 18 I meant that in that context all along. I really
14:22:03 19 truthfully don't see any one individual broker
14:22:07 20 withdrawing from the MLS entirely as a reasonable
14:22:14 21 expectation.
14:22:15 22 Q. Why would you not expect to see that,
14:22:17 23 sir?
14:22:19 24 A. Regardless of their market share, one

Page 191

14:22:24 1 broker withdrawing from the MLS, and, if you will,
14:22:28 2 we used the term "going naked," the damage done to
14:22:34 3 their ranks of real estate agents who are wedded,
14:22:38 4 you know, who are fairly embedded with the MLS or
14:22:41 5 an MLS-type program, that the damage to any one
14:22:46 6 firm trying to do that by itself would be very,
14:22:48 7 very harmful to that brokerage company.
14:22:50 8 Q. You used the term earlier "economic
14:22:54 9 suicide." Would you view it as that?
14:22:55 10 A. I do. And so when I referred to in
14:22:58 11 these statements that NAR was right to perceive the
14:23:03 12 threat, I wanted to clarify. In that context I am
14:23:06 13 always talking about a group of "X" number or more
14:23:12 14 that develop -- and I think I said earlier today,
14:23:14 15 develop an alternative to MLS, and I meant a group.
14:23:22 16 I didn't mean one. I just wanted to be sure I
14:23:24 17 communicated that clearly with you.
14:23:26 18 Q. And when you say a group, what would you
14:23:28 19 view it, a critical mass to be to make that type of
14:23:34 20 withdrawal viable, please, in your view?
14:23:36 21 A. In my work in the past where we would
14:23:40 22 gather brokers to try to compel change in an MLS,
14:23:44 23 we always felt like we had to have at least 60
14:23:47 24 percent of the listings in a given marketplace to

Page 192

14:23:50 1 make our threat credible.
14:23:52 2 Q. And why was that?
14:23:54 3 A. It was a number that seemed to get MLS's
14:23:58 4 attention or Board of Realtors' attention when we
14:24:01 5 had that kind of market share sitting on one side
14:24:03 6 of the table saying, "If you don't lower your
14:24:06 7 charges to our agents, we are going to form our own
14:24:09 8 MLS and reduce costs."
14:24:11 9 Q. And why would the figure of 60 percent
14:24:14 10 or so get the attention of an MLS, is what I am
14:24:17 11 trying to get at?
14:24:19 12 A. Sir, it just seemed to be the around
14:24:22 13 that number. It could be 55, it could be 70, but
14:24:25 14 in or around that number seemed -- I mean, if it
14:24:28 15 was 45, it didn't seem to get the same attention.
14:24:31 16 I guess that is the contrast I want to make.
14:24:34 17 Q. So what I am saying, what I am trying to
14:24:36 18 get at, sir, is, given a number that would get the
14:24:38 19 attention, what I am trying to understand is why
14:24:41 20 would that number get the attention?
14:24:42 21 A. I can't answer it from their side of the
14:24:43 22 table. I don't know why it took that number to
14:24:45 23 seem to get their attention, but that's roughly
14:24:47 24 what it took.

Page 193

14:24:49 1 Q. You can't answer with your experience of
14:24:51 2 working with MLSs?
14:24:53 3 A. Well, obviously it's more than half,
14:24:56 4 but, I mean, whether it was 60 or 80 didn't seem to
14:24:59 5 make much difference.
14:25:01 6 Q. When you use the term "withdrawing" or
14:25:04 7 "going naked," is that the equivalent of the phrase
14:25:09 8 "absolute withdrawal" that you used earlier?
14:25:11 9 A. I believe you and I would agree --
14:25:13 10 that's what I wanted to make sure we knew.
14:25:15 11 Absolute -- I used the term "naked," which is what
14:25:17 12 we talk about in the industry, but the absolute
14:25:19 13 withdrawal is one firm leaving MLS and not joining
14:25:22 14 another one.
14:25:25 15 Q. If a group of --
14:25:27 16 A. Go ahead.
14:25:28 17 Q. If a group of brokers that represented
14:25:31 18 60 to 70 percent of the brokers in an MLS
14:25:34 19 threatened to withdraw from the MLS if the MLS did
14:25:37 20 not adopt a VOW opt-out policy, would you view that
14:25:40 21 threat to be a procompetitive threat?
14:25:44 22 MR. BIERIG: Objection to the form of the
14:25:46 23 question in the absence of any statement as to the
14:25:51 24 reasons.

Page 222

14:59:55 alternatives would be to MLS.
15:00:00 Q. There is some talk about forming another
15:00:02 MLS?
15:00:03 A. Yeah. It's likely the answer is yes.
15:00:15 Q. As I understand it, none of the brokers
15:00:17 that communicated personally to you that they might
15:00:20 withdraw from their respective MLSs also told you
15:00:23 that they would try to continue in business without
15:00:25 being in an MLS?
15:00:27 A. I did not hear that from anybody, that
15:00:30 someone would leave the MLS and just do without any
15:00:34 MLS-type function. I have not heard that.
15:00:46 Q. Is it your opinion that brokers would
15:00:48 really leave an MLS without an opt-out provision
15:00:51 and stay out of the MLS without trying to set up a
15:00:55 new MLS?
15:00:59 MR. BIERIG: I object to the form of the
15:01:00 question. It also has been asked and answered.
15:01:01 BY THE WITNESS:
15:01:02 A. It's my position that no one single
15:01:04 broker would leave and try to go totally without
15:01:07 MLS. It's my position that a group of brokers
15:01:10 might leave and try to replace many of the MLS
15:01:13 functions on another platform.

Page 223

BY MR. KRAMER:
15:01:27 Q. Did you think that the brokers you
15:01:28 communicated with about the possibility of their
15:01:31 withdrawing from their respective MLSs if the VOW
15:01:34 policy did not include an opt-out provision would
15:01:41 actually withdraw from their respective MLSs?
15:01:42 A. Over time it was possible. I think what
15:01:44 I really thought would happen initially was they
15:01:47 would first develop alternatives and they would
15:01:51 make sure those were working and functioning before
15:01:53 they contemplated leaving an MLS.
15:01:55 Q. So they would continue to stay in the
15:01:58 MLS they were in?
15:01:59 A. While they built an alternative. Pardon
15:02:01 me.
15:02:02 Q. Which brokerages in particular do you
15:02:05 have in mind that were of that viewpoint?
15:02:11 A. I have had conversations with dozens of
15:02:13 brokers around that topic. In some cases it's not
15:02:18 even the discussion of opt-out or leaving MLS.
15:02:21 It's is there a possibility to use one of these
15:02:24 companies as the future MLS platform and that in
15:02:30 some cases their frustration with their MLSs has
15:02:33 nothing to do with opt-out.

Page 224

15:02:36 There are a wide number of discussions I
15:02:38 have had with brokerages all over the country with
15:02:41 frustration with MLS that has nothing to do with
15:02:45 opt-out. At this time they are looking for also
15:02:47 alternatives because of that frustration.
15:02:49 Q. Are you aware of any brokerage in the
15:02:51 country that has withdrawn from an MLS over
15:02:56 frustration with any policy and not gone into
15:03:01 another MLS?
15:03:02 A. No, not at this time.
15:03:06 Q. Did you think that the brokers you
15:03:08 communicated with about the possibility of their
15:03:10 withdrawing from their respective MLSs if the VOW
15:03:14 policy were not adopted with an opt-out would
15:03:19 likely withdraw from their respective MLSs?
15:03:22 A. As I have said, I think the first thing
15:03:24 they would do is develop alternatives and then
15:03:28 determine if in fact not having an opt -- if there
15:03:31 was no opt-out, the first thing they would do would
15:03:34 be probably develop alternatives, and then they
15:03:36 would look to see if in fact not having an opt-out
15:03:39 harmed their business.
15:03:42 I think that if there is -- if there is
15:03:46 no opt-out and absolutely nothing happens, it's

Page 225

15:03:52 detrimental to business. They don't end up with,
15:03:55 by my prior example, Citigroup taking every listing
15:04:00 in the country and plopping it on their site
15:04:01 without a broker's permission and getting the
15:04:02 advertising value of that listing content. I mean,
15:04:05 if nothing along those lines happened, they may not
15:04:09 leave MLS at all.
15:04:14 Q. Is it your understanding that there
15:04:16 have been problems with VOWs' operations and in
15:04:20 conjunction with the MLS that would cause brokers
15:04:22 to want to leave the MLS or opt-out if they could?
15:04:27 MR. BIERIG: I object to the form of the
15:04:28 question.
BY MR. KRAMER:
15:04:30 Q. Is it your understanding that VOWs have
15:04:33 created problems with the use of listing brokers'
15:04:37 listings that have -- I lost my train of thought.
15:04:45 MR. KRAMER: Let's take a break at this point.
15:04:47 THE VIDEOGRAPHER: We are going off the video
15:04:48 record at the end of Tape 5 at 3:04 p.m.
15:22:07 (WHEREUPON, a recess was had.)
15:22:21 THE VIDEOGRAPHER: We are going back on the
15:22:25 video record at the start of Tape 6 at 3:22 p.m.
BY MR. KRAMER:

EXHIBIT 4

From: Laurie Janik
Sent: Sunday, July 8, 2007 5:00 PM
To: Nancy4RE@aol.com
Cc: charlesmcmillan@prodigy.net; dickgaylord@earthlink.net; DStinton@realtors.org; Pat@patsplace.com
Subject: Re: FYI from Nancy Riley

Nancy:
Thank for sharing this with me. I think this article is an "advertorial", attempting to get readers to sign up for Point2.
It mixes fact with hyperbole.
I found my self agreeing with certain statements (the government has unlimited resources to dedicate to litigation). Other statements are inaccurate (like the denial of NAR's motion to dismiss guarantees the Justice Department is going to win on at least some issue.
Responding to this type of story is very time consuming, because each sentence interlaces enough facts or partial truths with the writer's opinion.
Laurie

Nancy4RE@aol.com
07/08/2007 02:32 PM

To
DStinton@realtors.org, Pat@patsplace.com, dickgaylord@earthlink.net, charlesmcmillan@prodigy.net
cc
ljanik@realtors.org
Subject
FYI from Nancy Riley

Following is an article that I wonder if it captures and explains the essence of the ongoing legal battle between the U.S. Department of Justice and the National Association of Realtors®.
This is an extremely important and truly remarkable legal situation...

Online Ma rketing: DOJ vs NAR®
What it might mean to you and what you might want to start doing today.
by Michael Parker
With all the uncertainties facing the real estate industry today, none has more far-reaching possible implications than the ongoing legal battle between the Department of Justice and the National Association of Realtors®. Nothing less than the entire business model of NAR® is at issue, with the government challenging the commission structure, the MLS process, the ownership of your listings, even who may access your listings.
Anyone who thinks these issues will all somehow blow over and go away might be whistling past the graveyard. There is long and ample precedent for the wholesale restructuring of basic American institutions under pressure from the "trust-busters" all the way back to the Standard Oil Trust.
AT&T (formerly the ONLY American full-service phone company) was taken down. IBM fought off the DOJ for decades, spending hundreds of millions of dollars (if not billions) in the process and stalemated the DOJ. Microsoft has battled for years. When government gets the bit in its teeth, you can bet that things

will change. They are unstoppable by conventional means, have unlimited funds to spend litigating, have unlimited time to litigate, and can take the long view. Opponents of the government rarely can say the same. Accommodation is the government's preferred resolution technique and all-out litigation should be avoided at all costs. The institution under attack must always remember that politics is the only real defining obstacle: if the opposing side's lobbyists are as well-funded and as well-connected as yours, settlement is mandatory. For certain, management of any institution under attack cannot bankrupt the institution by fighting to protect a status quo that is inherently out of balance with full and fair competition, or that is perceived to be that way. (Perception bears equal gravity under law with fact. Look it up.) Rather, management should weigh its options, weigh what is in the best interests of their constituency, and weigh what is attainable in the face of attack, then try to fashion relief from same that restores peace, if not the status quo ante. Although it is still early in the game as far as these legal issues are concerned, maybe it is time to remember that the public, and the government, admire and embrace open and fair competition. There is something magnificently American about innovating and being better than the other guy. Maybe it is time to stop looking to Washington institutions for long term solutions and start innovating instead. Maybe an idea from "outside the box"—WAY outside the box—put forth by some very astute real estate people in Canada exemplifies the direction we should be taking. Before identifying the possible solution, however, let's look at the key issues and compare how the DOJ's aims line up with the proposed solution. [Note: The following is a very condensed version of the issues and the case; to obtain a free copy of the six-page Whitepaper authored by Jason Golding, CFO and General Counsel of Point2 Technologies that goes into more detail, write me and I will send it along to you via email.]

DOJ Objectives and concerns:

DOJ believes that innovation and technology in the real estate industry is suppressed;

That consumers cannot negotiate fair commissions for buying and selling a home;

That all Home Buyers need access to all listings on each and every website with listings to acquire a home for a competitive price;

Listings are not owned by the listing broker, but are effectively a public asset.

That last one is highlighted because that is the true issue, boiled down to its essence: DOJ believes listings posted to MLS are virtually (no pun intended) public property and that one should not need a membership card in order to view them. This, of course, is directly opposed to NAR'®s view.

Current status of case

NAR®'s Positions, as outlined in its Motion to Dismiss, were defeated. The court ruled that the case may proceed. While this is the lowest level of proof needed in a civil case to proceed, it is an early warning that to some extent, or to the full extent of what the DOJ wants implemented, some degree of success is in the offing for them.

Potentially, should full relief as sought by the government (not a sure thing) be granted, listings in the MLS would most likely become a "public asset" and access to them could not be restricted by NAR®, MLS® or anyone else. This would effectively take the agent and brokers hard won asset, the listing, and throw them out for third parties who would only collect commission as the sellers. Never having to endure the costs, hard work and effort needed to obtain those listings, and being furnished them for free, corporate Goliaths like Google, MSN, Yahoo and would-be corporate Goliaths like Zillow, Trulia. Redfin and others would be able to offer your listings without any involvement of the MLS® and without any oversight whatsoever of the NAR®. It is my personal opinion that this is going to happen: that is, that MLS listings will be ruled to be in the public domain. Then, to put it loosely into the words of Dave Liniger, founder of RE/MAX, "They'll be all these folks coming to the MLS table with only a fork—the only thing they'll be there for is to eat." Never mind who grew the crops, the food, the listings.

You can't out litigate DOJ, but you can out-innovate their concerns.

Barring a major change in objectives/management at DOJ, it is a certainty that

the DOJ will endure whatever length of time, whatever level of expense, and whatever opposition they may encounter to accomplish the reform they believe is needed. This column is not to debate the validity of either side's assertions or concerns, but to help focus thinking agents and brokers on better methodology and technology.

As such, what would be the probable results of such a ruling in this business and with regard to MLS in particular?

There would be a probable withdrawal of brokers from MLS;

There would be a potential situation put into play where people could use the public listings who are not required to provide value to the real estate transaction process;

There would be a substantially reduced incentive for brokers to produce and enter listing data into the MLS.

These and other changes would result from the government's intervention in this business. I think any Franchise, broker or agent would agree that such developments could effect the government's stated aims: a complete overhaul of the way homes are bought and sold. This wholesale change of method is not something that seems to have originated with the house buying public, but rather with the would-be competitors to MLS® and NAR®. The perceived monopoly of listing data by MLS® and the rules governing its utilization by NAR® have created abuses, restraint of competition, and to outsiders wanting a big piece of this very lucrative pie known as home sales, the target justifies vast expenditures of political and monetary capital to tear down the status quo in order to provide a profit opportunity for them and their ideas. This is the essence of capitalism. One could also call it a form of economic Darwinism, as well. The King is Dead! Long live the King!

Then, what?

As reformers unlimited have learned, overthrowing the status quo is one thing, supplanting it with a truly more efficient methodology that minimizes the number of oxen gored is quite another. To me, the question becomes: "What alternative system could I implement now that would run in harmony with MLS®, but as an adjunct to it, as well? What system could obviate DOJ's concerns, protect the ownership of your listings, provide free and open access to home buyers and sellers as you determine, that exists right now?"

The Saskatchewan Solution

Do you know that there is a system in place amongst over 140,000 agents and brokers right now where members can distribute their listings to 23 different (and counting) distribution points with the touch of a button (list follows article)? Or that they can also distribute their listings to as many or as few of those 140,000 members as they determine useful? And can accept other agents listings where they can be useful? Or that this system is for licensed agents and brokers, only, and anyone can participate for FREE? Or that over 1000 agents and brokers are joining this network EACH WEEK?

That system is called Point2 NLS® (Point2 National Listing Service) and you can join absolutely free by going to http://nls.point2.com/Content/Who.asp. That system wasn't designed by Washington lobbyists, trust-busting attorneys, would-be Goliaths, or people whose interests are contra those of agents and brokers. In fact, the purpose behind the design and implementation of Point2 NLS® was to broaden the availability and distribution of their client's listings, all in the name of selling homes faster, more efficiently, and without cumbersome rules and regulations (however well-intended) of any trade group or special interest. The only special interest Point2 NLS® works for is you, the agent or broker. In conjunction with Point2's Patent Pending "Agent Handshake" system, I believe this methodology of distributing listings, working cooperatively with other agents and brokers, automatically incubating leads and automatically passing out listings to inquiring consumers is in a class of its own.

It is important to note that, while Point2 is one of North America 's leading providers of websites to Realtors®, it is not necessary to have a Point2 website to join NLS. Anyone with any hosted website can join Point2 NLS, FREE, now and have all this tremendous distribution and interchange of listings with other members at their fingertips. There's no migration, no work to be done and

no cost. You don't need to utilize a Point2 platform to benefit from the Point2 NLS ® System. They welcome all other hosted solution sites; templated or custom, your host is totally irrelevant to participating in Point2 NLS®. Everyone is welcome.

Pont2's Technology is without equal in this area. In the making since 2003, this system is the product of thousands of man-hours of programming, careful thought, and intelligent design. It's not an idea, it is in place now. And it is brought to you from a seemingly unlikely place—Saskatoon , Saskatchewan, where Point2 Technologies is headquartered.

I recently was speaking with Brendan King, COO of Point2 Realty about the NLS system, and he reminded me of its origin and purpose. Here's what Brendan had to say:

"It is important to note that Point2 NLS is a marketing platform designed for licensed real estate professionals only, and works best in tandem with a regional or national MLS. The intent is to provide brokers and agents complete control and choice of how they utilize and whom they share their listing assets with. In essence, Point2 NLS allows the listing asset owner to display their listings everywhere the home buying consumer is looking, in effect, bypassing any would-be third parties looking to use the listing as a marketing asset of their own. Point2 NLS also allows real estate professionals to co-market their listings amongst each other via a broker exchange while giving the asset owner complete control and choice as to whom they choose as their marketing partners."

In my opinion, these straight-shooting folks from the prairie have this just right: They have produced an adjunct to MLS; a tool that both enhances the experience and stills many of the DOJ's concerns for the public fairness, interest and presence of free competition, while providing protection to the hardworking folks who produced the listing. Point2 NLS® gives us what DOJ wants the consumer to have: a full and free choice of where to research and purchase a home; a place not artificially controlled by special interest rules, as the MLS® is.

It may be that you have never thought of yourself as a "special interest," but that is exactly what the DOJ sees the NAR®, the MLS® and its members as: a powerful special interest monopolizing homes sales. By taking control of your listings with Point2 NLS® and making the choice where to offer them, an agent or broker is taking a step that very well may later be mandated, or made necessary through legislation or litigation. I see no downside, and I can't imagine why any thinking real estate agent or broker would not take advantage of this marketing platform that is called Point2 NLS.

Point2 already works with realtor.com and with many individual MLS® organizations. They have over 140,000 licensed professional real estate agents as members with over 1000 joining weekly. This solution is not a theory, it is a working and powerful solution available today. Free. Maybe it's time you looked into it, too.

Point2 NLS Listing partners: all available with one click! www.Backpage.com, www.CityCribs.com, www.craigslist.com, www.ebay.com, www.ebay.ca, www.edgeio.com, Google Base, www.hotpads.com, www.livedeal.com, www.livedeal.ca , New York Times, www.oodle.com, www.Point2homes.com, www.propbot.com, www.propsmart.com, www.realestateadvisor.com, www.trafficstrategies.com. www.trulia.com. www.UScondoexchange.com, www.vast.com, www.videohomes.com, www.wedgewoodproperties.com, Yahoo Classifieds, www.House.com, www.Homescape.com with more in the works.

Please note:

NYTimes.com takes only ad placement, directly from Point2 NLS, making the ad booking process seamless, quick and easy. No live feed to the site.

eBay, Craigslist and Backpage do not take live feeds. Point2 NLS facilitates quick and well presented ads on those sites through a quick cut and paste process for those sites.

Members can book pre-packaged Google Adword campaigns, making the process simple and quick, no worries with how much "I am going to end up paying after all the clicks are counted" type thing.

Members can book premium placement also on Point2 Homes, which is very popular amongst members.

nancyRiley.com
Nancy J. Riley CRS, PMN, CIPS
Coldwell Banker Residential
3401 Fourth Street North
St. Petersburg, FL 33704
(727) 822-9111 ext. 163
Cell:(727)560-2000
nancy4RE@aol.com

EXHIBIT 5

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

NORTHERN DISTRICT OF ILLINOIS

SUBPOENA IN A CIVIL CASE

UNITED STATES OF AMERICA

V. CASE NUMBER: 05 C 5140

NATIONAL ASSOCIATION OF REALTORS®

TO: Prudential Real Estate and Relocation Services, Inc.
c/o CT CORPORATION SYSTEM
208 South LaSalle Street
Suite 814
Chicago, IL 60604

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

X YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **SEE ATTACHED RIDER**

PLACE	DATE AND TIME
Sidley Austin LLP, One South Dearborn St., Chicago, IL, 60603, 37th Floor	January 8, 2007 5:00 p.m.

☐ YOU ARE COMMANDED to produce and permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if attorney for Plaintiff or Defendant)	Date
Attorneys for Defendant National Association of Realtors®.	December 7, 2006

Issuing Officers Name, Address, and Phone Number

Scott D. Stein and Joseph W. Yockey, Sidley Austin LLP, One South Dearborn Street, Chicago, Illinois, 60603, (312) 853-7520

26. All communications between eRealty or Prudential and any public officials (or their staffers or representatives) concerning the IDX, VOW, or ILD policies, or any other Rules relating to the display of residential listings data on or through the Internet.

27. All communications (regardless of date) with any real estate brokerage company, any competitor of eRealty or Prudential, or any company that operates or has operated a VOW or utilizes VOW technology concerning any of the following:

    a. The Capper Declaration;

    b. The lawsuit captioned *United States v. National Association of Realtors®*, Civil Action No. 05 C 5 140 (N.D. Ill.);

    c. The DOJ investigation that preceded the aforementioned lawsuit;

    d. Any allegedly discriminatory or anti-competitive practices directed at eRealty or Prudential (*e.g.*, discriminatory commission splits); or

    e. The IDX, VOW, or ILD policies, or any other Rules relating to the display of residential listings data on or through the Internet.

28. All notes, memoranda, or other documents reflecting or summarizing communications concerning any of the matters responsive to request 26.

29. Documents sufficient to show any financial, "in kind", or other benefit, contribution, or reimbursement to eRealty or Prudential by any entity in connection with any of the matters responsive to request 23 or request 26.

Business And Strategic Plans

30. One set of the materials provided to members of eRealty or Prudential's Board of Directors in connection with each meeting of the Board.

31. Audio recordings, video recordings, and transcripts of each presentation made by a member of eRealty or Prudential Senior Management in connection with any periodic investor conference calls or any real estate, investment, or technology conference.

32. All strategic plans, business plans, and forecasts prepared by, reviewed by, or disseminated to, eRealty or Prudential's Senior Management.

33. All communications between eRealty or Prudential and any investment bank or any actual or potential investor concerning eRealty or Prudential's financial stability or competitive prospects. This request includes all Quarterly Investor Reports and any initial public offering registration statements (whether or not they were filed or relate to an IPO that was not completed), and all "roadshow" presentations made by, to, or on behalf of eRealty or Prudential or any potential investors or investment banks.

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

NORTHERN DISTRICT OF ILLINOIS

SUBPOENA IN A CIVIL CASE

UNITED STATES OF AMERICA

V. CASE NUMBER: 05 C 5140

NATIONAL ASSOCIATION OF REALTORS®

TO: Home Buyers Marketing II, Inc.
c/o CT CORPORATION SYSTEM
208 South LaSalle Street, Suite 814
Chicago, IL 60604

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

X YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **SEE ATTACHED RIDER**

PLACE	DATE AND TIME
Sidley Austin LLP, One South Dearborn St., Chicago, IL, 60603, 37th Floor	December 4, 2006 5:00 p.m.

☐ YOU ARE COMMANDED to produce and permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if attorney for Plaintiff or Defendant)	Date
Julie K. Potter, Attorney for defendant NAR /s/ J K Potter	December 6, 2006

Issuing Officers Name, Address, and Phone Number

Julie K. Potter, Sidley Austin LLP, One South Dearborn Street, Chicago, Illinois, 60603 (312) 853-7221

30. All documents concerning any actual or contemplated work-around to accommodate the prospect that brokers may opt-out of permitting their listings to be displayed on HBM II's website under the IDX, VOW or ILD Policies.

31. All documents concerning the effect of the "No Advertising" provisions described in Paragraphs 44-49 of the Polston Declaration, including any complaints or dissatisfaction relating thereto.

32. All documents discussing the Membership Rule.

33. All documents concerning the relationship between a broker's interest in becoming an HBM II cooperating agent and the quantity or quality of listings on HBM II's website, as discussed in Paragraph 34 of the Polston Declaration.

Business And Strategic Plans

34. One set of the materials provided to members of HBM II's Board of Directors in connection with each meeting of the Board.

35. All strategic plans, business plans, and forecasts prepared by, reviewed by, or disseminated to, HBM II's Senior Management.

36. HBM II's monthly P&L and Operating Income Statements, by market, and all other routine reports distributed to HBM II's Senior Management or investors concerning HBM II's operational or financial performance.

37. All documents (regardless of timeframe) concerning HBM II's evaluation of whether to enter or withdraw from any geographic market. Examples of responsive documents include:

    a. Documents discussing the demographics or other characteristics of geographic markets that HBM II considers in evaluating whether to enter a geographic market;

    b. Documents discussing the requirements or costs of entry into a market, including the minimum viable scale, number of unique visitors, or page views;

    c. Documents discussing the anticipated costs of entry into a geographic market;

    d. Documents discussing reasons why HBM II did or did not enter a geographic market.

38. All documents discussing or reflecting HBM II's actual or estimated cost of entry into any geographic market.

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

United States District Court

NORTHERN DISTRICT OF ILLINOIS

SUBPOENA IN A CIVIL CASE

UNITED STATES OF AMERICA

V. CASE NUMBER: 05 C 5140

NATIONAL ASSOCIATION OF REALTORS®

TO: ZipRealty, Inc.
1300 Higgins Road
Suite 214
Park Ridge, IL 60068

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

X YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **SEE ATTACHED RIDER**

PLACE	DATE AND TIME
Sidley Austin LLP, One South Dearborn St., Chicago, IL, 60603, 37th Floor	October 12, 2006 5:00 p.m.

YOU ARE COMMANDED to produce and permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if attorney for Plaintiff or Defendant)	Date
Scott D. Stein, Attorney for defendant NAR.	September 7, 2006

Issuing Officers Name, Address, and Phone Number

Scott D. Stein, Sidley Austin LLP, One South Dearborn Street, Chicago, Illinois, 60603, (312) 853-7520

10. All communications with Internet service providers concerning the issue of Zip e-mails being flagged as spam. This request includes all documents and communications referenced in paragraph 17 of the Beasley Declaration.

Communications With DOJ And Other Government Representatives.

11. All drafts of the Beasley Declaration, and all communications relating to the Beasley Declaration.

12. All communications (regardless of date) with DOJ, the Federal Trade Commission, any state Attorney General, any legislator or legislative committee, or any state or local regulatory body, concerning any of the following:

    a. The Beasley Declaration;

    b. The lawsuit captioned *United States v. National Association of Realtors®*, Civil Action No. 05 C 5 140 (N.D. Ill.);

    c. The DOJ investigation that preceded the aforementioned lawsuit;

    d. Any allegedly discriminatory or anti-competitive practices directed at Zip (*e.g.*, discriminatory commission splits); or

    e. The IDX, VOW, or ILD policies, or any other Rules relating to the display of residential listings data on or through the Internet.

13. All notes, memoranda, or other documents reflecting or summarizing communications concerning any of the matters responsive to request 12.

14. All communications between Zip and any public officials (or their staffers or representatives) concerning the IDX, VOW, or ILD policies, or any other Rules relating to the display of residential listings data on or through the Internet.

Business And Strategic Plans

15. One set of the materials provided to members of Zip's Board of Directors in connection with each meeting of the Board.

16. Audio recordings, video recordings, and transcripts of each presentation made by a member of Zip Senior Management in connection with any periodic investor conference calls or any real estate, investment, or technology conference.

17. All strategic plans, business plans, and forecasts prepared by, reviewed by, or disseminated to, Zip's Senior Management.

18. All communications between Zip and any investment bank or any actual or potential investor concerning Zip's financial stability or competitive prospects. This request includes all Quarterly Investor Reports and any initial public offering registration