UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF REALTORS,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil Action No. 21-cv-2406 (TJK)
	)	
UNITED STATES, et al.	)	
	)	
Respondents	)	

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

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PRELIMINARY STATEMENT

The Antitrust Division of the U.S. Department of Justice ("Antitrust Division" or "Division") properly issued Civil Investigative Demand 30729 ("the CID") in support of an investigation into potentially anticompetitive practices in the real estate industry. Petitioner National Association of Realtors (NAR) does not meet its heavy burden to demonstrate reason to set aside or modify the CID.

The CID is not barred by any prior agreement between the United States and NAR. In 2020, the United States and NAR discussed, and the United States eventually filed, a proposed settlement that would have culminated in entry of a consent judgment by the Court. But no consent judgment was ever entered. In the course of discussing settlement, the Division did agree to issue a closing letter confirming to NAR that it had closed an investigation of two NAR practices. But that closing letter did not preclude any future investigation by the United States, nor did the Division agree to any limitation on future investigations. Indeed, the Division made clear to NAR at the time that it was unable to agree to any such limitation.

The CID also complies with the standards of § 1312 of the Antitrust Civil Process Act (ACPA), 15 U.S.C. §§ 1311–1314, because it properly seeks information relevant to the Division's antitrust investigation into NAR's and other real estate associations' rules, policies, and practices and is reasonable in scope.[1]

The Court should deny NAR's petition.

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[1] As discussed in Background section I below, the ACPA prescribes a process for petitioning to set aside or modify CIDs. *See* 15 U.S.C. § 1314(b), (e); *infra* p. 2. An action of this kind typically takes the form of a summary proceeding and is docketed as a miscellaneous action. *Cf.* Loc. Civ. R. 40.3(a)(1) n.1; *SEC v. Lavin*, 111 F.3d 921, 926 (D.C. Cir. 1997) ("[S]ubpoena enforcement proceedings are generally summary in nature . . . ."); *Austl./E. U.S.A. Shipping Conf. v. United States*, Civil Action No. 80-1830, 1981 WL 2048, at *2 (D.D.C. Apr. 10, 1981) (holding that the ACPA calls for the kind of summary proceedings typical of administrative subpoena enforcement).

BACKGROUND

I. Statutory and regulatory background

The Antitrust Division promotes competition in the U.S. economy through enforcement of the Federal antitrust laws and other laws relating to the protection of competition, including by investigating possible violations of the Sherman Act, 15 U.S.C. §§ 1–7, issuing and enforcing civil investigative demands (CIDs), and prosecuting all litigation that arises out of such investigations. *See* ANTITRUST DIV., U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL I-2 (5th ed. 2012) [*hereinafter* ANTITRUST DIVISION MANUAL], https://www.justice.gov/atr/division-manual. A CID is a form of administrative subpoena used in civil antitrust investigations. The Antitrust Civil Process Act (ACPA), 15 U.S.C. §§ 1311–1314, governs CIDs.

Under the ACPA, the Division may serve a CID on any person if there is "reason to believe" that the person may have documentary material or information "relevant to a civil antitrust investigation." *Id.* § 1312(a). The ACPA also sets forth procedures for petitioning for enforcement of, or for an order modifying or setting aside, a CID and provides for federal district court jurisdiction over such petitions. *Id.* § 1314.

In the course of a civil investigation, the Division may decide that it should close an investigation. At the request of parties who are the subject of an investigation, the Division may issue a "closing letter" to confirm that the parties no longer have obligations to preserve documents or actively respond to currently pending CIDs. *See* ANTITRUST DIVISION MANUAL III-21 ("When the matter is closed, staff should notify the subjects of the investigation . . . ."). But closure of an investigation does not reflect any conclusion by the Division on the merits of the practices or conduct under investigation. *Cf. Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 713–14 (4th Cir. 2021) (holding that a decision by the Department of Justice not to bring enforcement action did not amount to a determination that the contested merger was

lawful); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002) (holding that lack of action by the Department of Justice against an alleged price-fixing conspiracy did not amount to a determination that the disputed conduct was lawful).

II. Factual background

A. The Antitrust Division's investigation of NAR

The CID requests documents and responses to interrogatories about NAR rules, policies, and practices that, among other things, restrict how real estate agents can market properties, dictate how real estate commissions are set, and impede commission negotiations. These rules may have anticompetitive effects such as raising the fees that homebuyers pay in commission to real estate agents and limiting consumer choice. This is important because every year, millions of Americans hire real estate agents to help them purchase homes. In 2021, real estate agents are expected to collect more than $100 billion in commissions. *See, e.g.*, Noah Buhayar, *Real Estate Agents Target Record $100 Billion as Home Sales Boom*, BLOOMBERG NEWS, July 9, 2021, https://www.bloomberg.com/news/articles/2021-07-09/real-estate-agents-eye-record-100-billion-as-home-sales-boom. Recent technological advances have spurred innovation and price competition across other sectors of the economy. Yet real estate commissions have barely budged as a percentage of home prices and have actually *increased* as home prices have outpaced inflation. *See* PANLE JIA BARWICK & MAISY WONG, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY: A CRITICAL REVIEW 6–7 (2019), https://www.brookings.edu/wp-content/uploads/2019/12/ES-12.12.19-Barwick-Wong.pdf. Even a modest injection of competition into real estate brokerage could save consumers billions of dollars per year.

In most U.S. real estate markets, nearly all homes sold are listed on a NAR-affiliated multiple listing service (MLS). *See, e.g.*, REAL ESTATE STANDARDS ORG., FREQUENTLY ASKED QUESTIONS ABOUT MLSS, https://www.reso.org/blog/mls-faq/ (stating that "[m]ore than 80

percent of homes sold in the U.S. are on the MLS," that there were 597 MLSs in the United States as of 2020, and that "[m]ost MLSs are owned by the REALTOR® [that is, NAR-affiliated] association that formed them"). NAR issues rules that affiliated MLSs and, in turn, member real estate agents follow. *See Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768, 773–74 (N.D. Ill. 2020).

Among those rules and policies are NAR's Participation Rule and its Clear Cooperation Policy. NAR's Participation Rule requires agents listing homes on an MLS to "make blanket unilateral offers of compensation to the other MLS participants." NAT'L ASS'N OF REALTORS, HANDBOOK ON MULTIPLE LISTING POLICY 115 (2021), https://cdn.nar.realtor/sites/default/files/documents/2021_NAR_HMLP_210112.pdf. An agent representing a buyer collects the offered compensation when the buyer purchases the home. This means that listing agents (that is, seller agents) and home sellers set the price of buyer-agent services. Because the price-setting is taken out of the buyer agent's hands and therefore the buyer agents do not compete on price, this rule raises antitrust concerns, including that buyer-agent fees may be higher than they would otherwise be in conditions of competition, and buyer agents may "steer" their clients away from properties with low buyer-agent commissions.

NAR's Clear Cooperation Policy requires members of an MLS to list a home on the MLS within "one . . . business day of marketing a property to the public." NAT'L ASS'N OF REALTORS, MLS CLEAR COOPERATION POLICY, https://www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy. NAR's Clear Cooperation Policy restricts the choices sellers have in marketing their properties. Sellers may have many reasons to list a home off the MLS, including that doing so may allow them to avoid paying higher commission rates or to protect their privacy. But under the Clear Cooperation Policy, real estate brokers often cannot market

properties outside the MLS unless they leave the MLS entirely, which agents are reluctant to do. *See, e.g.*, *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 317 (7th Cir. 2006) ("[I]t is impossible to perform the tasks of a real estate agent . . . in the relevant geographic area without using SCWMLS.").

The Antitrust Division began to investigate NAR in March 2019. In April 2019 and June 2020, the Division issued CIDs in connection with its investigation, numbered 29935 and 30360, respectively. The CIDs included inquiries concerning several NAR policies, including the Participation Rule and the Clear Cooperation Policy.

B. Settlement discussions between the Division and NAR

At various points during the Division's 2019–2020 investigation of NAR, the Division and NAR engaged in settlement talks. *See, e.g.*, NAR Pet. ¶ 25. Throughout these discussions, the Division repeatedly made clear that it could not agree to any settlement that purported to curtail its authority to investigate potentially anticompetitive NAR policies in the future.

The round of settlement talks that resulted in the now-withdrawn Proposed Final Judgment began on July 6, 2020, when NAR's counsel sent Assistant Attorney General for Antitrust Makan Delrahim a settlement proposal. *See* Ex. 1 (Letter from William Burck to Makan Delrahim (July 6, 2020)). Among NAR's requested terms were demands that the Division "stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years" and publicly state that it was closing its present investigations "because it has not concluded that the Participation Rule or the Clear Cooperation Policy causes harm to competition." Ex. 1 at 5.

Deputy Assistant Attorney General Michael Murray replied to NAR's counsel on July 13, 2020. DAAG Murray explained that "aspects of your offer, such as a commitment to not challenge NAR rules and policies in the future, are a nonstarter, especially in light of

longstanding Department policies concerning settlements that affect future potential investigations." Ex. 2 at 1 (Letter from Michael Murray to William Burck (July 13, 2020)).

On July 14, 2020, NAR modified its settlement proposal, demanding that the Division agree, among other things, that "any changes to the Participation Rule and/or the Clear Cooperation Policy, along with the other commitments by NAR discussed [previously in the letter], will completely address all of the Division's concerns and that the Division will close its investigation." Ex. 3 at 2 (Letter from William A. Burck to Michael Murray (July 14, 2020)). In the Division's July 29, 2020, response, DAAG Murray stated that the Division was willing to close its investigation into the Participation Rule but stressed that it was *not* willing to commit to refrain from further investigation or action against NAR:

> Should NAR be willing to accept these terms and the Court enters a resulting consent decree as a final judgment, the Division is willing to close its investigation into NAR's Participation Rule. Consistent with what we have previously noted, however, we cannot commit to never challenge NAR rules and policies in the future in light of longstanding Department policies on such commitments.

Ex. 4 at 1 (Letter from Michael Murray to William Burck (July 29, 2020)).

On August 6, 2020, NAR wrote with revised demands, including a request that the Division:

> issue a public closing statement indicating that (i) the Division investigated both the Participation Rule and the Clear Cooperation Policy; and (ii) the relief reflected in the consent decree addresses all of the concerns the Division identified with respect to those policies (emphasizing what would be reflected in the competitive impact statement submitted as a part of the Tunney Act proceedings).

Ex. 5 at 4 (Letter from William Burck to Michael Murray (Aug. 6, 2020)). The Division responded on August 12, 2020, rejecting this new proposal:

> We cannot, however, agree to the third (and new) term of a public closing statement. Doing so would imply that the Division has conducted a complete investigation into the competitive effects of the Participation Rule and that NAR

> has substantially complied with its CID obligations addressing this issue. Neither is correct and the Division cannot so publicly state. Moreover, as I have written previously, the Division cannot commit to never investigating or challenging NAR's rules and policies in the future.

Ex. 6 at 2 (Letter from Michael Murray to William Burck (Aug. 12, 2020)).

After further negotiations, NAR and the Division agreed to enter into a Stipulation and Proposed Final Judgment that would be filed with the Court. NAR informed the Division that it:

> 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.

NAR Pet. Ex. 6 at 1 (E-mail from Mike Bonanno to Samer Musallam (Oct. 26, 2020, 18:29 EDT)).

The Division responded, "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 [Policy] and that NAR will have no obligation to respond to CID Nos. 29935 and 30360." NAR Pet. Ex. 7 at 1 (E-mail from Samer Musallam to Mike Bonanno (Oct. 28, 2020, 16:12 EDT)). Notably, NAR did not request at this time, and the Division did not agree to, any limitation on future investigation of those policies or any other NAR policies.

On November 19, 2020, the Antitrust Division filed a Complaint, Stipulation and Order, and Proposed Final Judgment with the Court. *United States v. Nat'l Ass'n of Realtors*, No. 20-3356 (D.D.C.). The Complaint and Proposed Final Judgment addressed certain NAR practices, but not the Participation Rule or the Clear Cooperation Policy. *See, e.g.*, Complaint ¶ 1, *United States v. Nat'l Ass'n of Realtors*, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020), ECF No. 1; Proposed Final Judgment § IV, *Nat'l Ass'n of Realtors*, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020), ECF No. 4 (addressing NAR rules regarding (a) the display of buyer-agent compensation in the MLS database, (b) representations by buyer agents that their services are free, (c) filtering out lower-commission properties, and (d) access to lockboxes). The Stipulation provided that both parties consented to entry of the Proposed Final Judgment, but it expressly stated that "[t]he United States may withdraw its consent at any time before the entry of the proposed Final Judgment." Stipulation and Order ¶ 2, *Nat'l Ass'n of Realtors*, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020), ECF No. 5.

The Proposed Final Judgment contained a reservation of rights provision that made clear that the United States remained free to conduct future investigations into NAR:

> 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.

Proposed Final Judgment § XI, *Nat'l Ass'n of Realtors*, Case No. 1:20-cv-3356 (D.D.C. Nov. 19, 2020).

On the same day that the Division filed the Complaint and Proposed Final Judgment, the Antitrust Division sent a closing letter to NAR. That letter read as follows:

> 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.

NAR Pet. Ex. 12 at 1 (Letter from Makan Delrahim to William Burck (Nov. 19, 2020)).

C. The Division's withdrawal of the Proposed Final Judgment

The Antitrust Procedures and Penalties Act (Tunney Act), 15 U.S.C. § 16, required a public notice and comment period before any settlement with NAR could be concluded. During the Tunney Act process, the Antitrust Division concluded that the reservation of rights provision in the Proposed Final Judgment should be revised to avoid potential confusion about whether the judgment would foreclose further action by the Division on matters not covered by the judgment. NAR did not agree to the Division's requested modification. The Division consequently withdrew from the Proposed Final Judgment, as permitted under paragraph 2 of the Stipulation, and filed a notice of voluntary dismissal of the complaint. *See* Notice of Withdrawal of Consent to Entry of Proposed Final Judgment, *Nat'l Ass'n of Realtors*, Case No. 1:20-CV-03356-TJK (D.D.C. July 1, 2021), ECF No. 14; Notice of Voluntary Dismissal, *Nat'l Ass'n of Realtors*, Case No. 1:20-CV-03356-TJK (D.D.C. July 1, 2021), ECF No. 15; Press Release, Dep't of Just., Justice Department Withdraws from Settlement with the National Association of Realtors (July 1, 2021), https://www.justice.gov/opa/pr/justice-department-withdraws-settlement-national-association-realtors, *reproduced in* NAR Pet. Ex. 1. Thus, the case ended without entry of a consent judgment or any other judgment.

D. The Division's new investigation of NAR's practices

The Division resumed its investigative efforts and, in the course of investigation, issued the CID that is the subject of the present petition, CID 30729. The CID requests information

concerning the Participation Rule, the Clear Cooperation Policy, and other NAR rules, policies, and practices that raise antitrust concerns. The Division invited NAR—both within the text of the CID and in later communications—to discuss any questions or concerns about the scope or meaning of the CID. NAR never identified any request that it found to be unreasonable except for Request 10, which the Division offered to withdraw once NAR explained its concerns. *See* NAR Pet. ¶ 178 n.2.

On September 13, 2021, NAR filed the present petition to set aside or modify the CID. The petition asserts that the Division agreed to refrain from investigating NAR's Participation Rule or Clear Cooperation Policy in the future, and consequently the Division lacked the authority to issue the CID.

ARGUMENT

I. Legal standard applicable to a motion to quash an administrative subpoena

"The subpoenaed party bears the burden of showing that the administrative subpoena is unreasonable; a burden 'not easily met.'" *United States v. Hill*, 319 F. Supp. 3d 44, 47 (D.D.C. 2018) (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc)). The court's role "is a strictly limited one," *id.* (quoting *Texaco, Inc.*, 555 F.2d at 871–72), in light of the "important governmental interest in the expeditious investigation of possible unlawful activity," *Texaco, Inc.*, 555 F.2d at 872.

In evaluating whether to uphold a challenged CID, the court determines whether "'the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant'" to the agency's investigation. *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). If these three requirements are met, the CID remains in force unless it is unduly burdensome. *See, e.g.*, *Texaco, Inc.*, 555 F.2d at 882; *see also United States v. Inst. for Coll.*

Access & Success, 27 F. Supp. 3d 106, 111 (D.D.C. 2014) ("[A]n administrative agency's power to issue subpoenas as it performs its investigatory function is a broad-ranging one which courts are reluctant to trammel." (alteration in original) (quoting *Sandsend Fin. Consultants, Ltd. v. Fed. Home Loan Bank Bd.,* 878 F.2d 875, 878 (5th Cir. 1989))).

II. The Division had authority to issue the CID and never made any commitment that would preclude the present investigation.

The Antitrust Division had authority to issue the challenged CID under 15 U.S.C. § 1312. *See id.* § 1312(a) ("Whenever the Attorney General . . . has reason to believe that any person . . . may have any information, relevant to a civil antitrust investigation . . . , he may . . . cause to be served upon such person, a civil investigative demand . . . ."). The Division made no commitment, in the November 19, 2020, closing letter or otherwise, that would preclude the Division from investigating NAR's potentially anticompetitive practices or issuing new CIDs in connection with any such investigation. Throughout settlement negotiations for the now-withdrawn Proposed Final Judgment, the Division made clear to NAR that, in accordance with Division policy, it would not make such a commitment. In keeping with its mission to enforce federal antitrust laws, the Division has the statutory authority to investigate any of NAR's anticompetitive practices, for purposes of its investigation of NAR and its investigations of regional MLSs, and NAR has not met its high burden to show that the November 19, 2020, letter limits that authority or shields NAR from having to comply with a CID.

A. The Division made no commitment to refrain from opening a new investigation into NAR's practices.

Contrary to NAR's suggestions, the Division never committed to refrain from further investigation into NAR and its practices. The Antitrust Division committed only to issue NAR a letter stating that it had closed its investigation into two rules and that it would not require NAR to comply with the CIDs (29935 and 30360) that it had issued in connection with its

investigation. *See* NAR Pet. Ex. 7 at 1 (E-mail from Samer Musallam to Mike Bonanno (Oct. 28, 2020, 16:12 EDT)).

The three-sentence closing letter contained no commitment to refrain from future investigations of NAR or its practices or from issuing new CIDs in conjunction with such investigations. While the closing letter stated that "the Antitrust Division has closed its investigation" into NAR's Participation Rule and Clear Cooperation Policy, NAR Pet. Ex. 12 (Letter from Makan Delrahim to William Burck (Nov. 19, 2020)), it made no promise not to investigate in the future. On the contrary, the letter emphasized, "No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices [that are] not addressed by the consent decree." NAR Pet. Ex. 12 at 1.

B. The Division repeatedly informed NAR that it would not make any commitment to refrain from investigating NAR in the future in accordance with DOJ policy.

Indeed, in the discussions leading up to the closing letter, the Division repeatedly made clear to NAR that it would not commit to refrain from further investigation of NAR.

In his July 13, 2020, response to NAR's initial settlement proposal, DAAG Murray stressed that NAR's request for "a commitment to not challenge NAR rules and policies in the future" was "a nonstarter, especially in light of longstanding Department policies concerning settlements that affect future potential investigations." Ex. 2 at 1 (Letter from Michael Murray to William Burck (July 13, 2020)).

In the parties' later correspondence, the Division continued to refuse NAR's requests to agree to a prohibition on future investigation, repeating that its policies prohibit binding the United States from taking future action in closing letters or public closing statements. In his July 29, 2020, letter, DAAG Murray stated that the Division was potentially willing to close its

investigation into the Participation Rule but stressed that it could *not* commit to refrain from further investigation or action against NAR:

> Should NAR be willing to accept these terms and the Court enters a resulting consent decree as a final judgment, the Division is willing to close its investigation into NAR's Participation Rule. Consistent with what we have previously noted, however, we cannot commit to never challenge NAR rules and policies in the future in light of longstanding Department policies on such commitments.

Ex. 4 at 1 (Letter from Michael Murray to William Burck (July 29, 2020)). And in his August 12, 2020, letter, DAAG Murray repeated that "as I have written previously, the Division cannot commit to never investigating or challenging NAR's rules and policies in the future." Ex. 6 at 2 (Letter from Michael Murray to William Burck (Aug. 12, 2020)).

Thus, the Division never made any commitment to refrain from further investigation of NAR. On the contrary, the Division repeatedly stressed that it would not make such a commitment.

NAR's letters at the time further demonstrate that, throughout the parties' discussions, NAR understood that closure of the Division's investigations of the Participation Rule and Clear Cooperation Policy would not preclude future investigation, including future investigation of those same policies. In its July 6, 2020, letter communicating its initial settlement proposal, NAR set forth four discrete demands pertaining to the present investigation:

> 2. In return, the Department of Justice would:
>
> a. close its investigation regarding NAR's rules and policies;
>
> b. stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years;
>
> c. send a closing letter to NAR confirming that it has no obligation to provide additional information or documents in response to CID No. 29935 or CID No. 30360; and

> d. issue a public closing statement indicating that (i) the Division has investigated the Participation Rule and the Clear Cooperation Policy; and (ii) it has decided to close those investigations because it has not concluded that the Participation Rule or the Clear Cooperation Policy causes harm to competition.

Ex. 1 at 5 (Letter from William Burck to Makan Delrahim (July 6, 2020)). In items a and c, NAR requested closure of the investigation and withdrawal of the extant CIDs. In a separate item, item b, NAR requested a promise not to conduct further investigation of the Participation Rule.

Similarly, NAR's August 6, 2020, letter made three discrete demands:

> [T]o obtain complete closure regarding the Division's open investigations, NAR asks the Division to agree that it will:
>
> 1. close its investigations regarding NAR's rules and policies;
>
> 2. send a closing letter to NAR confirming that it has closed its investigations and that NAR has no obligation to provide additional information or documents in response to CID No. 29935 or CID No. 30360; and
>
> 3. issue a public closing statement indicating that (i) the Division investigated both the Participation Rule and the Clear Cooperation Policy; and (ii) the relief reflected in the consent decree addresses all of the concerns the Division identified with respect to those policies (emphasizing what would be reflected in the competitive impact statement submitted as a part of the Tunney Act proceedings).

Ex. 5 at 3–4 (Letter from William Burck to Michael Murray (Aug. 6, 2020)). Items 1 and 2 requested closure of the investigation, issuance of a closing letter, and withdrawal of the extant CIDs. A separate item, item 3, requested that the Division state that the consent decree "addresse[d] all the concerns the Division identified" with respect to the Participation Rule and Clear Cooperation Policy. This confirms that NAR clearly understood that what the Division ultimately agreed to provide—closure of the existing investigation of the two policies and issuance of a closing letter—did not include assurances against future investigation or action.

NAR also suggests that without a promise that the Division would refrain from future investigation, it would have had no incentive to agree to the Proposed Final Judgment. *See* NAR Pet. ¶ 126. But NAR clearly stood to gain from entry of the consent decree. Entering a consent decree would allow NAR to negotiate a remedy for the violations alleged in the Complaint and avoid the risk and expense of litigation regarding those violations. *See United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (noting that parties agreeing to be bound by a consent decree stand to benefit by "[s]aving themselves the time, expense and inevitable risk of litigation"). Moreover, while closure of the investigation did not have legal effect, the closure of the investigation and the withdrawal of the earlier CIDs did relieve NAR of its obligation to respond to those CIDs. And NAR appears to have believed the closure of the investigation had at least some import, because NAR immediately brought it to the attention of the court in an antitrust suit it was litigating against a private plaintiff. *See* NAR's Response to Plaintiff's Notice of Supplemental Authority at 1, Ex. B, *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 516 F. Supp. 3d 1047 (C.D. Cal. 2021) (Case No. 2:20-cv-04790-JWH-RAO), ECF No. 88.

III. The CID is sufficiently definite and seeks information relevant to the Division's investigation.

"A district court must enforce a federal agency's investigative subpoena if the information sought is reasonably relevant—or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the agency—and not unduly burdensome to produce." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (citations omitted). "The gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable." *Morton Salt Co.*, 338 U.S. at 652–53.

"[A]dministrative agencies must be given wide latitude in asserting their power to investigate by subpoena." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001); *see also*

Associated Container Transp. (Austl.) Ltd. v. United States, 705 F.2d 53, 58 (2d Cir. 1983) (recognizing the "broad investigatory powers granted to the Justice Department by the Antitrust Civil Process Act" and stating that "ACPA's legislative history indicates that the Justice Department is to be given wide latitude when issuing CID's"). "[A]n agency's investigatory authority is far-reaching, analogous to that of a grand jury, which 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Resol. Tr. Corp. v. Walde*, 18 F.3d 943, 947 (D.C. Cir. 1994) (quoting *Morton Salt Co.*, 338 U.S. at 642–43). A court assessing an administrative subpoena does not consider whether the agency will ultimately be able to prove a claim. *See Invention Submission Corp.*, 965 F.2d at 1090 ("At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint."); *Texaco, Inc.*, 555 F.2d at 874 ("[I]n the pre-compliant stage, an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case. . . . The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue."); *see also EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1427–28 (9th Cir. 1983) (en banc) (holding that an argument that claims were barred by res judicata based on an earlier consent decree was not properly addressed in the context of a request for enforcement of an administrative subpoena).

Just as a grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate," *United States v. R. Enters., Inc.*, 498 U.S. 292, 298 (1991), the Antitrust Division can compel the production of any potentially relevant information by issuing CIDs. Courts "defer to the agency's appraisal of relevancy, which must be accepted so

long as it is not obviously wrong." *Resol. Tr. Corp. v. Frates*, 61 F.3d 962, 964 (D.C. Cir. 1995) (quoting *Walde*, 18 F.3d at 946). Furthermore, a grand jury subpoena, and by extension an administrative subpoena, "is presumed to be reasonable and the burden is on the subpoena's opponent to disprove this presumption." *In re Sealed Case*, 121 F.3d 729, 755 (D.C. Cir. 1997); *see also Invention Submission Corp.*, 965 F.2d at 1090 ("[I]n light of the broad deference we afford the investigating agency, it is essentially the respondent's burden to show that the information is irrelevant.").

NAR argues that several requests are overbroad because they seek "all documents" relating to certain subjects. *See* NAR Pet. ¶¶ 179–181. These requests are appropriately tailored to obtain documents relating to specified subjects highly relevant to the Division's inquiry into NAR's potentially anticompetitive conduct. *U.S. EEOC v. George Washington University*, Case No. 17-cv-1978 (CKK/GMH), 2020 WL 3489478 (D.D.C. June 26, 2020), is not on point. That case dealt with a civil discovery request for the entire contents of three individuals' email boxes, regardless of subject matter. *See id.* at *7. NAR has not met its burden to show that the Division's requests are overbroad.

NAR also argues that the CID inappropriately seeks privileged information. It does not. The CID instructs NAR to "[p]roduce . . . non-privileged portions of any responsive document . . . for which a privilege claim is asserted," and to provide a privilege log for privileged material. *See* NAR Pet. Ex. 2 at 8.

NAR asserts that Request 4, which seeks documents related to a "business review" request that NAR made to the Antitrust Division—is intended to harass NAR. NAR Pet. ¶ 182. The request seeks information relevant to the Division's investigation and is entirely proper. Business review is a process in which private parties can explain proposed conduct, such as a

joint venture, to the Division and request that the Division "state its enforcement intentions" in a business review letter. 28 C.F.R. § 50.6. A business review letter communicates the Antitrust Division's current intentions concerning a practice but does not limit future action by the Division. *See id.* ("A business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest.").

In September 2018, NAR requested a business review letter from the Antitrust Division concerning a proposed practice in which NAR would have encouraged agents to list all their properties with a NAR-affiliated MLS. The considerations animating that proposed policy—such as NAR's reasons to limit off-MLS listings or potential effects of limiting off-MLS listings—are relevant to the Antitrust Division's investigation of the Clear Cooperation Policy, which similarly encourages agents to use NAR-affiliated multiple-listing services.

NAR also argues that Requests 14 and 15—requesting information regarding instances in which real estate agents withdraw from multiple listing services—are "unduly burdensome." NAR Pet. ¶ 185. These requests are important to the Division's investigation of the Participation Rule because NAR has previously asserted that such rules are necessary to maintain MLS membership and continues to argue that brokers may withdraw from MLSs if competitive developments, such as the authorized use of MLS data by nontraditional brokers who offer alternative pricing models that lower commissions, threaten their profits. *See* SWANEPOEL T3 GRP., D.A.N.G.E.R. REPORT 47, https://member.sabor.com/wp-content/uploads/2021/01/Danger-Report-small.pdf. The Division seeks this information to understand NAR's professed defenses and to determine whether NAR has accurately represented why real estate agents withdraw from membership in NAR-affiliated MLSs.

A further reason to reject NAR's petition to narrow the CID is that NAR has not met and conferred with the Division to attempt to narrow any claimed burden, even though the Antitrust Division has repeatedly indicated its willingness to negotiate with NAR to narrow the scope of the CID. *See supra* p. 10 (Background section II.D). Except with respect to Request 10, which the Division agreed to withdraw, NAR has not engaged in negotiations over these issues. Because it was unwilling to meet and confer with the Division to discuss any burden associated with complying with the CID, the Court should reject NAR's request to modify the CID based on vague and unsupported assertions. *See Phx. Bd. of Realtors, Inc. v. U.S. Dep't of Just.*, 521 F. Supp. 828, 832 (D. Ariz. 1981) (declining to set aside a CID because "[t]he Government ha[d] repeatedly indicated its willingness to negotiate with petitioner regarding the 'burden and scope' of the demands"); *FTC v. Boehringer Ingelheim Pharms., Inc.*, 898 F. Supp. 2d 171, 174–75 (D.D.C. 2012) (noting that the parties' dispute concerning an administrative subpoena had been significantly narrowed after discussions between the parties).

CONCLUSION

Because the CID is proper and reasonable in scope, and because the CID is not precluded by any Division commitment to NAR, the Court should deny the Petition.

Date: October 13, 2021

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

RICHARD A. POWERS
Acting Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

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EXHIBIT 1
Letter from William Burck to Makan Delrahim (July 6, 2020)

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July 6, 2020

VIA E-MAIL **SUBJECT TO FEDERAL RULE OF EVIDENCE 408**

The Honorable Makan Delrahim
Assistant Attorney General
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Assistant Attorney General Delrahim:

The National Association of REALTORS® (NAR) remains interested in having a constructive conversation with the Division, as NAR first proposed more than six months ago, rather than proceeding with an investigation that will unnecessarily burden NAR and the nation's real estate system in the midst of an unprecedented economic crisis. However, the two Civil Investigative Demands (CID's) the Division has issued to NAR within the past fourteen months regarding "competition in the provision of real-estate brokerages services" are vastly overbroad and unproductive in achieving a resolution. Indeed, the Division's approach poses a significant risk to the efficient functioning of the real estate industry, a cornerstone of the national economy, at a time when our nation can ill afford an "experiment" with scant precedent and even less benefit. NAR cannot acquiesce to that approach. In the first two sections of this letter, we explain the harm posed by the Division's current approach, and in the third we propose the outlines of a possible resolution in response to the letter from Division Staff dated June 8, 2020.

I. Upending the Real Estate System Would Have Catastrophic Consequences for the Nation's Economic Recovery

The MLS system is the linchpin of how residential real estate is bought and sold. Its efficiency-enhancing benefits are undisputed. As both the Antitrust Division and the FTC have publicly acknowledged, multiple listing services have pro-competitive benefits because they unquestionably reduce search and transaction costs for home buyers and home sellers. *See Competition in the Real Estate Brokerage Industry*, at 12-14.[1] Moreover, the MLS system provides a universal language for buyers, sellers, and brokers, which promotes efficiency and

[1] *Available at* https://www.justice.gov/sites/default/files/atr/legacy/2007/05/08/223094.pdf

expands output, and it has helped to standardize how residential real estate transactions are financed by the mortgage industry.

Despite the benefits of the MLS system and its importance to the residential real estate industry, NAR understands that the principal focus of the Division's ongoing investigation is NAR's "Participation Rule," which has been in place since the 1970s. The Participation Rule requires listing brokers to offer buyer brokers at least $1 of compensation for bringing a buyer to a transaction. We understand from our discussions with Division Staff that they want to eliminate the Participation Rule and prohibit listing brokers from making any offers of compensation to buyer brokers.

Staff have acknowledged that they want NAR to reverse the Participation Rule because they hope the MLS system will eventually be replaced with a different way of buying and selling residential real estate. They have conceded to us that their efforts to replace the MLS system will be "disruptive," at least in the near term, but they believe the costs of the widespread disruption caused by the Division's actions (which could suddenly and dramatically alter home values or make it more difficult for home buyers to finance home purchases) will be offset by the long-run benefits of the replacement for the MLS system that emerges in the wake of an enforcement action.

While the benefits of such a significant disruption in an industry that accounts for about 15% of the U.S. economy are dubious at best, this is a particularly bad time for the Division to try to fundamentally disrupt the way residential real estate is bought and sold in the United States. The devastating economic effects of the stay-at-home orders implemented by state and local governments in response to the COVID-19 pandemic have only recently started to recede. Efforts to disrupt the residential real estate industry by fundamentally changing the MLS system during this fragile time could cause a pillar of the economy to crumble just as the nation tries to make a recovery.

More fundamentally, there is no basis to replace the MLS system. Staff have yet to provide NAR with any reason to believe the Participation Rule—or, for that matter, any other NAR rule—has caused harm to competition. Multiple listing services are two-sided platforms, which means it would be the Division's burden to prove at trial that NAR's rules have anti-competitive effects, considering their impact on consumers on ***both*** sides of the platform (buyers and sellers of real estate). But instead of undertaking a two-sided analysis, Staff have focused on speculative harms to home buyers caused by the Participation Rule (allegedly inflated commissions), while ignoring the Participation Rule's benefits for home sellers and home buyers (*e.g.*, reduced transaction costs). This approach ignores the Supreme Court's teachings concerning antitrust analysis in two-sided markets. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) ("[C]ompetition cannot be accurately assessed by looking at only one side of the platform in isolation."); *see also United States v. Sabre Corp.*, No. 19-1548, 2020 WL 1855433, at *34 (D. Del. Apr. 7, 2020) ("[T]he government only attempted to demonstrate harm to the airlines side of the two-sided market. It has, thus, failed to meet its burden."). If necessary, NAR stands ready to defend its rules in litigation from such a misguided attack.

Finally, we question whether the Division has properly vetted its desire to fundamentally rewrite the rules of the residential real estate industry with other important stakeholders in the federal

government, including those responsible for fair housing and mortgage finance regulations. NAR has an obligation to ensure that these agencies are aware of the Division's activities as they will have a profound, and we believe profoundly negative, impact on the consumers these agencies are meant to protect.

II. The Constantly Expanding Scope of Staff's Investigation Is Unjustified and Imposes Undue Burdens on NAR

Given the fundamental flaws in Staff's theories, the fact that their views are inconsistent with real-world facts, and NAR's previous offer to cooperate with the Division, NAR has been disappointed by Staff's continued efforts to ***expand*** the scope of their investigation. Staff have sought virtually every document in NAR's possession concerning the Participation Rule, and within the past month, Staff have started seeking documents related to the Clear Cooperation Policy, which was adopted several months after CID No. 29935. Division Staff readily concede that the Clear Cooperation Policy is not covered by any aspect of CID No. 29935, but they nonetheless asked NAR to collect and produce documents concerning the Clear Cooperation Policy in response to that CID. This was the second time Staff have sought to rewrite the scope of the CID through after-the-fact correspondence. (Last year, Staff asked NAR to collect and produce documents concerning the Participation Rule that were created as early as 1985, even though CID No. 29935 only seeks documents that were created or received after January 1, 2017.) The Division has apparently since recognized Staff's request exceeded the scope of their authority, issuing a new Civil Investigative Demand on June 29, 2020 (CID No. 30360), to request documents concerning the Clear Cooperation Policy. But issuing seriatim CIDs does not change the overbroad nature of Staff's demands.

It is not appropriate to subject NAR to an open-ended fishing expedition, especially when targeted challenges to both the Participation Rule and the Clear Cooperation Policy are already pending in federal district courts. The Participation Rule is currently the subject of two separate class action lawsuits (*Moehrl v. The National Association of Realtors*, Case No. 1:19-cv-01610 (N.D. Ill.) and *Sitzer v. The National Association of Realtors*, Case No. 4:19-cv-00332 (W.D. Mo.)) and the Clear Cooperation Policy is similarly subject to ongoing litigation in two federal district courts in California (*Top Agent Network, Inc. v. National Association of Realtors*, Case No. 3:20-cv-03198 (N.D. Cal.) and *The PLS.com, LLC v. The National Association of Realtors*, Case No. 2:20-cv-04790 (C.D. Cal.)). The federal judges overseeing those cases will determine the appropriate scope of discovery for antitrust claims concerning the Participation Rule and the Clear Cooperation Policy. NAR will of course abide by their decisions and will produce to the Antitrust Division all materials that have been (or will be) produced in discovery in those civil actions. Those documents will be sufficient to satisfy NAR's obligations under CID No. 29935 and CID No. 30360, and absent a court order, NAR will not undertake a separate search for additional documents in response to Staff's shifting and overzealous demands.

On June 26, 2020, Division Staff sent NAR a letter claiming that NAR's document production from *Sitzer* and *Moehrl* will not satisfy the information requests in CID No. 29935 related to the Participation Rule because the CID seeks even "more information" relating to the Participation Rule than what will be produced in those cases. That claim underscores and confirms the overbreadth of CID No. 29935. The Antitrust Civil Process Act expressly incorporates "the

standards applicable to discovery requests under the Federal Rules of Civil Procedure," 15 U.S.C. § 1312(c)(1)(B), and the Federal Rules of Civil Procedure will establish the proper scope of discovery in *Sitzer* and *Moehrl*. Because Staff concede they are investigating the same conduct and same theories concerning the Participation Rule that are at issue in *Sitzer* and *Moehrl*, they are not entitled to discovery above and beyond what the district judges in those cases deem to be sufficient for the pursuit of those claims.

Staff's June 26 letter also conveyed their view that CID No. 29935 covers a number of other NAR policies and rules beyond the Participation Rule. But Staff have yet to even articulate a theory of competitive harm relating to any aspect of NAR's rules and policies other than the Participation Rule. The requirements of the Antitrust Civil Process Act and principles of due process protect NAR from being subjected to a roving inquisition that is propelled by little more than speculation.

III. NAR Is Open to a Reasonable Compromise Proposal

Notwithstanding NAR's concerns about the shifting scope of Staff's investigation, the overbreadth of the outstanding CIDs, and the lack of merit to Staff's theories of competitive harm, NAR remains willing to explore a compromise. To that end, NAR has authorized us to offer the following terms for the Division's consideration:

1. Subject to approval by the NAR Board of Directors, NAR would agree to:

    a. change its rules to allow MLSs to publish to consumers offers of compensation;

    b. educate and inform NAR members about the benefits of publishing offers of compensation to consumers (including the benefits to sellers and buyers);

    c. amend Article 12 of NAR's Code of Ethics to prohibit buyer brokers and buyer agents from representing that their services are free or available to buyers at no cost;

    d. change its rules to allow MLSs to prohibit participants from filtering listings displayed to customers based on the level of compensation offered;

    e. increase its efforts to educate and inform NAR members about their obligation to inform clients about all properties that match a client's interests;

    f. increase its efforts to educate and inform brokers, buyers, and sellers that they are able to negotiate offers of compensation at any time; and

    g. increase its efforts to educate and inform buyers that, subject to state and local laws, they can negotiate commission rebates with buyer brokers and buyer agents.

2. In return, the Department of Justice would:

   a. close its investigation regarding NAR's rules and policies;

   b. stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years;

   c. send a closing letter to NAR confirming that it has no obligation to provide additional information or documents in response to CID No. 29935 or CID No. 30360; and

   d. issue a public closing statement indicating that (i) the Division has investigated the Participation Rule and the Clear Cooperation Policy; and (ii) it has decided to close those investigations because it has not concluded that the Participation Rule or the Clear Cooperation Policy causes harm to competition.

To proceed with discussions concerning this proposal, we ask the Division to agree it will hold in abeyance NAR's obligations to respond to CID No. 29935 and CID No. 30360. Please let me know at your convenience whether the Division is interested in pursuing discussions concerning NAR's compromise proposal.

Respectfully submitted,

William Burck

cc: Owen Kendler (DOJ)
Lisa Scanlon (DOJ)
Steve Kramer (DOJ)
Ethan Glass (Quinn Emanuel)
Mike Bonanno (Quinn Emanuel)
Jack Bierig (Schiff Hardin)
Suzanne Wahl (Schiff Hardin)

EXHIBIT 2
Letter from Michael Murray to William Burck (July 13, 2020)

U.S. Department of Justice

Antitrust Division

July 13, 2020

SUBJECT TO FEDERAL RULE OF EVIDENCE 408

VIA E-MAIL
William Burck
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Re: NAR's July 6, 2020, Letter to Assistant Attorney General Makan Delrahim

Dear Mr. Burck:

This letter replies to the July 6, 2020, letter that you sent on behalf of NAR to Assistant Attorney General Delrahim regarding potential settlement. We first note that your letter contains a number of inaccuracies, including your statements regarding the focus and scope of the Division's investigation, staff's past statements on MLSs and CID No. 29935, and the language of CID No. 29935 itself. We will not catalogue nor respond to those inaccuracies here other than to say that the Division rejects your inaccurate assertions.

The Division has considered NAR's response to our June 8 offer of a partial resolution. Although we are pleased that you have agreed in term 1(c) of your letter to prohibit your members from representing their services as free, the balance of your counteroffer is not acceptable to us.

Your offer to educate your members as to various practices (terms 1(b), (e), (f), and (g)) alone does not resolve our concerns regarding the remainder of NAR's practices identified in our June 8 letter. In addition, we do not agree to the offered modest changes to MLS Policy Statement 7.58 (term 1(a) of your letter) and to rules that would give MLSs the option to prohibit filtering of listings displayed to customers based on the level of compensation offered (term 1(d) of your letter), which would not resolve our significant competitive concerns with those practices. We also do not agree to your position on NAR's Clear Cooperation Policy, and its absence in your proposal, both of which ignore our competitive concerns with this new NAR policy. We have discussed our competitive concerns about these and other NAR practices with you and will not repeat them here. Finally, we cannot agree to any of terms 2(a) through 2(d) of your letter, nor to anything other than the embodiment of a resolution we agree on in a consent decree. Indeed, aspects of your offer, such as a commitment to not challenge NAR rules and policies in the future, are a nonstarter, especially in light of longstanding Department policies concerning settlements that affect future potential investigations.

To recap, although we are amenable to a partial resolution including term 1(c) in your letter, we reject terms 1(a), (b), and (d) through (g) and terms 2(a) through (d) of your letter; and we insist on our proposed terms regarding MLS Policy Statement 7.58, the Clear Cooperation Policy, buyer-broker commission filtering, and embodiment of these terms in a consent decree, as outlined in our June 8 letter. Particularly because the final set of terms you offer on page 5 are a nonstarter, it is not clear to us whether further discussions would be fruitful. Please let us know by Wednesday July 15 at 5:00 pm whether you accept these terms that we have described above.

As we requested in our June 26 letter, which I have attached for your convenience, please also inform us via e-mail by tomorrow at 5:00 pm if NAR continues to take the position that the government is not entitled to any documents under CID No. 29935 beyond those produced in the private lawsuits in which NAR is currently involved. We understand that this is the position NAR is taking regarding CID No. 30360, as described in the letter we received on Friday from you, and our June 26 letter had sought to obtain an answer on the same question concerning CID No. 29935 by July 10. In addition, as we requested also in our June 26 letter, please identify by tomorrow at 5:00 pm the Bates numbers from the *Sitzer* document productions that satisfy the Document Demands identified on pages 2 to 4 of that letter. Finally, as we requested in the same letter, if you contend that NAR's responses to those discovery requests constitute compliance with CID No. 29935, please provide a certificate of compliance and privilege log for all documents or information withheld as privileged.

We look forward to your responses.

Sincerely,

/s/

Michael Murray

Enclosure

EXHIBIT 3
Letter from William A. Burck to Michael Murray (July 14, 2020)

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July 14, 2020

VIA E-MAIL **SUBJECT TO FEDERAL RULE OF EVIDENCE 408**

Michael Murray
Deputy Assistant Attorney General
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: *CID No. 29935 and CID No. 30360 to the National Association of REALTORS®*

Dear Michael,

We write in response to your July 13 letter concerning CID No. 29935, which you sent to us at 9:15 PM ET.

First, with respect to our discussions regarding a potential settlement, notwithstanding the concerns we have with the Division's investigation and the demands in your July 13 letter, NAR has authorized us to offer the following counterproposal for the Division's consideration.

Subject to approval by the NAR Board of Directors, NAR would:

1. change its rules to require MLSs to publish to consumers offers of compensation;
2. amend Article 12 of NAR's Code of Ethics to prohibit buyer brokers and buyer agents from representing that their services are free or available to buyers at no cost;
3. change its rules to require MLSs to prohibit participants from filtering listings displayed to customers based on the level of compensation offered; and
4. enter into a consent decree memorializing these commitments.

As you can see, NAR has made meaningful concessions compared to its last proposal, by (a) requiring MLSs to publish offers of compensation (instead of making the decision to publish offers of compensation optional); (b) requiring MLSs to prohibit filtering by level of compensation (instead of making the decision to prohibit filtering based on offers of compensation optional); and (c) agreeing to enter into a consent decree. While we recognize this proposal may not address all of the Division's concerns about the Participation Rule and the Clear Cooperation Policy, NAR

remains willing to discuss potential changes to those rules with the Division. That discussion will only be fruitful, however, if the Division agrees that (a) it will not insist on rescission of the Clear Cooperation Policy; (b) it will not insist on a blanket prohibition of offers of compensation; and (c) any changes to the Participation Rule and/or the Clear Cooperation Policy, along with the other commitments by NAR discussed above, will completely address all of the Division's concerns and that the Division will close its investigation.

Second, you have asked NAR to certify compliance with CID No. 29935, but it is not possible for NAR to provide a certificate of compliance for CID No. 29935 at this time. NAR has lodged objections to the Division's overly broad and unduly burdensome CID, and it will comply with the Antitrust Civil Process Act and the Federal Rules of Civil Procedure, not the Division's overbroad demands. Consistent with those obligations, NAR has agreed to produce the documents that are subject to discovery in the *Sitzer* and *Moehrl* actions. Document discovery in those cases is not yet complete, which means NAR's production of documents to the Division in response to the CID is not complete. And while you have asked NAR to identify by Bates number the documents in its production that are responsive to each request, NAR has no obligation to do so and the burdens of that exercise would far outstrip its potential benefit. NAR has produced its documents as they are maintained in the ordinary course of business, which is all that is required under the Federal Rules.

Third, we note the Division's demand for a response to its letter by 5 pm ET on July 14 is unreasonable, particularly in light of the Division's own delay in responding to NAR's initial proposal. As a reminder, NAR met with the Division on February 6 and outlined the terms of a potential compromise. The Division did not respond to NAR's proposal until June 8—four months later.

We look forward to your response.

Very truly yours,

William A. Burck

EXHIBIT 4
Letter from Michael Murray to William Burck (July 29, 2020)

U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

July 29, 2020

SUBJECT TO FEDERAL RULE OF EVIDENCE 408

VIA E-MAIL
William Burck
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Re: *NAR's July 14, 2020, Letter to Deputy Assistant Attorney General Michael Murray*

Dear Mr. Burck:

This letter is in response to NAR's settlement proposal outlined in your July 14 letter to me. First, the Division has considered NAR's proposal and accepts those commitments, in concept, to modify and/or amend NAR's rules and Code of Ethics as set forth in Terms 1 – 3 of your letter.

Second, we appreciate NAR's offer to discuss potential changes to NAR's Clear Cooperation Policy. To that end, the Division proposes modifying NAR's Clear Cooperation Policy as follows:

1. Revise NAR's Clear Cooperation Policy to extend from one business day to sixty (60) days the time by which listing brokers must submit listings to the MLS; and

2. Eliminate the exception to the Clear Cooperation Policy for "office exclusives."

Finally, the Division appreciates NAR's agreement to memorialize any such commitments in a consent decree. Should NAR be willing to accept these terms and the Court enters a resulting consent decree as a final judgment, the Division is willing to close its investigation into NAR's Participation Rule. Consistent with what we have previously noted, however, we cannot commit to never challenge NAR rules and policies in the future in light of longstanding Department policies on such commitments.

To keep this moving in a fruitful direction, please let me know by 5:00 p.m., Thursday, August 6, whether NAR accepts the Division's proposal.

Sincerely,

/s/

Michael Murray

EXHIBIT 5
Letter from William A. Burck to Michael Murray (Aug. 6, 2020)

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August 6, 2020

VIA E-MAIL **SUBJECT TO FEDERAL RULE OF EVIDENCE 408**

Michael Murray
Deputy Assistant Attorney General
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: *CID No. 29935 and CID No. 30360 to the National Association of REALTORS®*

Dear Michael,

We write in response to your July 29 letter, in which the Division outlined the terms of a counterproposal in response to NAR's July 14 settlement proposal. We appreciate that the Division took meaningful steps toward a workable compromise, and we now see a path forward to a mutually agreeable resolution of this matter. We have outlined a counterproposal in this letter for the Division's consideration, and we would like to land on terms that we can take to NAR's leadership and Board of Directors as soon as possible.

Before discussing the specifics of our counterproposal, however, we note that the Division's July 29 letter included two new requests regarding a different rule than we had previously discussed: the Clear Cooperation Policy. *First*, the Division asked NAR to revise the Clear Cooperation Policy "to extend from one business day to sixty (60) days the time by which listing brokers must submit listings to the MLS." *Second*, the Division asked NAR to "[e]liminate the exception to the Clear Cooperation Policy for 'office exclusives.'" We do not understand the purpose of the Division's requests regarding the Clear Cooperation Policy because, on their face, the Division's new proposals will reduce competition and access to fair housing opportunities. Because we have not previously discussed these matters with the Division, we take this opportunity to explain the impact of the Clear Cooperation Policy, and how the Division's requested relief would reduce competition and access to fair housing.

Any discussion of the competitive impact of the Clear Cooperation Policy must start by acknowledging that a federal judge has held that the Policy, as drafted, likely is pro-competitive. When evaluating claims that the Policy reduces competition, Judge Chhabria in the Northern

District of California recognized the Clear Cooperation Policy is pro-consumer and output-enhancing, stating: "It is far more likely that the policy benefits buyers and sellers by increasing access to information about the housing market, thus increasing market efficiency and stimulating competition." *Top Agent Network, Inc. v. National Association of REALTORS®,* No. 20-cv-03198-VC, ECF No. 43, at 2 (N.D. Cal. July 16, 2020). At the same time, Judge Chhabria considered and addressed arguments that the Clear Cooperation Policy violates the Sherman Act, concluding that "theories for how the policy hurts buyers and sellers are dubious." *Id.*

The relief sought by the Division would encourage a system with multiple, private listing networks in each area, many of which (like Top Agent Network) are not publicly available and only allow certain, select brokers, buyers, and sellers to use their services. That would harm consumers. Disparate private networks would give home buyers reduced access to properties and, as a result, sellers would have less competition for their homes. In fact, the specific relief the Division has requested would completely undermine the consumer benefits of the MLS system that are promoted by the Clear Cooperation Policy.

Specifically, if NAR agreed to "extend from one business day to sixty (60) days the time by which listing brokers must submit listings to the MLS," it would reduce output by creating a disincentive for brokers to submit all their listings (especially the best ones) to their local MLS. If MLS participants are not required to promptly submit all of their listings to the MLS, the value of the MLS will diminish and brokers would no longer participate. That in turn would reduce the number of homes available in the MLS system for buyers and reduce the exposure that sellers receive for their properties. Moreover, in many cases, homes that are not submitted to the MLS are not made available to Zillow and other consumer-facing real estate portals, which means they will not be publicized to prospective home buyers who are using those portals to browse local inventory. These output effects will undoubtedly harm consumers by increasing the transaction and search costs associated with residential real estate transactions.

The Clear Cooperation Policy aligns seller and broker incentives to market properties as broadly as possible, thereby enhancing output by making more homes available to consumers through the MLS. As Judge Chhabria held, the antitrust laws do not give agents "a right to benefit from the contributions of fellow NAR members while withholding listings of their own." *Id.* at 1-2. And as we all recognize, it is pro-competitive and consistent with the goals of the antitrust laws for a joint venture "to discourage any one participant from appropriating an undue share of the fruits of the collaboration or to align participants' incentives to encourage cooperation in achieving the efficiency goals of the collaboration." U.S. Department of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors § 3.36(b) (2000). That is one of the primary reasons the Clear Cooperation Policy exists.

As for the office exclusives, which existed for decades before the adoption of the Clear Cooperation Policy, they increase competition between brokers to the benefit of consumers. That increased competition would be lost if NAR made the change the Division has requested. For example, a seller who does not want the broadest public marketing available through the MLS can choose the exact amount of publicity she wants by selecting a brokerage that fits her needs (the

bigger the brokerage, the greater the exposure). Office exclusives have long been considered alternatives to the MLS, and they ensure that sellers who want some marketing, but not full publicity, have an option to comfortably sell their homes. Thus, the office exclusives portion of the Clear Cooperation Policy, in conjunction with the one business day requirement, increases consumer choice, output, and competition.

Finally, we are confused by the inherent tension between the two changes to the Clear Cooperation Policy the Division has requested. By asking NAR to expand the time a property can be marketed outside of an MLS to 60 days, the Division suggests that it wants more homes marketed outside of an MLS. But the Division's request to eliminate the exception for office exclusives would increase the volume of homes available in the MLS. These conflicting outcomes cannot be reconciled.

NAR believes that the best outcome for consumers is the one endorsed by Judge Chhabria: listings should be promptly placed on the MLS (except for office exclusives). NAR and the Division should discuss how many days would amount to "prompt" submission to the MLS. NAR believes the 60 days of private marketing requested by the Division is too long. Such a long period of time would eviscerate the Clear Cooperation Policy and result in the negative consumer effects discussed above. NAR is, however, willing to discuss whether one business day is too short. After consulting with some of its members, NAR believes that anything longer than three business days would be tantamount to repealing the Clear Cooperation Policy, as most of the best properties are sold within days of going on the market.

Considering everything we have discussed above, and subject to approval by the NAR Board of Directors, NAR would agree to:

1. change its rules to require MLSs to publish to consumers offers of compensation;

2. amend Article 12 of NAR's Code of Ethics to prohibit buyer brokers and buyer agents from representing that their services are free or available to buyers at no cost;

3. change its rules to require MLSs to prohibit participants from filtering listings displayed to customers based on the level of compensation offered;

4. change the Clear Cooperation Policy to allow properties to be marketed outside of the MLS for three (3) business days before they must be submitted to the MLS; and

5. enter into a consent decree memorializing these commitments.

In return, to obtain complete closure regarding the Division's open investigations, NAR asks the Division to agree that it will:

1. close its investigations regarding NAR's rules and policies;

2. send a closing letter to NAR confirming that it has closed its investigations and that NAR has no obligation to provide additional information or documents in response to CID No. 29935 or CID No. 30360; and

3. issue a public closing statement indicating that (i) the Division investigated both the Participation Rule and the Clear Cooperation Policy; and (ii) the relief reflected in the consent decree addresses all of the concerns the Division identified with respect to those policies (emphasizing what would be reflected in the competitive impact statement submitted as a part of the Tunney Act proceedings).

We look forward to continuing our dialogue and reviewing your response to NAR's proposal.

Very truly yours,

William A. Burck

cc: Ethan Glass (Quinn Emanuel)
Mike Bonanno (Quinn Emanuel)
Jack Bierig (Schiff Hardin)
Suzanne Wahl (Schiff Hardin)

EXHIBIT 6
Letter from Michael Murray to William Burck (Aug. 12, 2020)

U.S. Department of Justice

Antitrust Division

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

August 12, 2020

SUBJECT TO FEDERAL RULE OF EVIDENCE 408

VIA E-MAIL
Mr. William Burck, Esq.
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Re: *NAR's August 6, 2020 Letter to Deputy Assistant Attorney General Michael Murray*

Dear Mr. Burck:

This letter is in response to your August 6 letter to me outlining NAR's counterproposal for settlement. The Division appreciates that NAR sees "a path forward to a mutually agreeable resolution of this matter" and we remain in agreement with respect to the terms numbered 1, 2, 3, and 5 in the list on the third page of your letter.

That said, we remain far apart on the Clear Cooperation Policy. Your previous letter invited us to discuss potential changes to that policy. We proposed extending from one business day to sixty days the time by which listing brokers must submit listings to the MLS and eliminating the exception for "office exclusives." Your counterproposal—extending the time to three business days and retaining the "office exclusives" exception—does not reflect a meaningful change in NAR's position. And your rationale—that consumers now, after decades of experience with pocket listings, need the new Clear Cooperation Policy to prevent them from choosing private listings but that the "office exclusives" exception is required to allow them to choose private listings—is internally inconsistent and blatantly protectionist with respect to, in your words, the "bigger" brokerages. In any event, it seems we are too far apart to resolve this issue at this stage. Consequently, the Division will take the Clear Cooperation Policy off the settlement track and staff will continue to investigate this policy separately for its effects on competition. The Division, accordingly, expects NAR to immediately comply with CID No. 30360 and produce information and documents in response.

You also proposed one modified and two new terms in a list spanning pages three and four of your letter. As we have previously stated, and in response to your first such

term in light of the preceding discussion of the Clear Cooperation Policy, we will close our investigation into NAR's Participation Rule as a part of this settlement. With respect to your second (and new) term, we agree to send a closing letter to NAR confirming that the Division has closed its investigation into the Participation Rule and stating that NAR has no obligation to provide additional information or documents in response to CID No. 29935. We cannot, however, agree to the third (and new) term of a public closing statement. Doing so would imply that the Division has conducted a complete investigation into the competitive effects of the Participation Rule and that NAR has substantially complied with its CID obligations addressing this issue. Neither is correct and the Division cannot so publicly state. Moreover, as I have written previously, the Division cannot commit to never investigating or challenging NAR's rules and policies in the future.

This is the Division's best and final offer. Please let me know by 5:00 pm, Monday, August 17, whether NAR accepts the Division's proposal.

Sincerely,

/s/

Michael Murray

EXHIBIT 7
Letter from William A. Burck to Michael Murray (Aug. 18, 2020)

quinn emanuel trial lawyers | washington, dc
1300 I Street NW, Suite 900, Washington, District of Columbia 20005-3314 | TEL (202) 538-8000 FAX (202) 538-8100

WRITER'S DIRECT DIAL NO.
(202) 538-8120

WRITER'S EMAIL ADDRESS
williamburck@quinnemanuel.com

August 18, 2020

VIA E-MAIL **SUBJECT TO FEDERAL RULE OF EVIDENCE 408**

Michael Murray
Deputy Assistant Attorney General
United States Department of Justice, Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: *CID No. 29935 and CID No. 30360 to the National Association of REALTORS®*

Dear Michael,

We write on behalf of NAR to accept the Division's August 12 settlement proposal concerning the Participation Rule. NAR's understanding of the terms proposed by the Division, including the clarification you provided in our recent discussions, is set forth in this letter.

Subject to approval by the NAR Board of Directors, NAR would agree to:

1. change its rules to require MLSs to publish to consumers offers of compensation;

2. amend Article 12 of NAR's Code of Ethics to prohibit buyer brokers and buyer agents from representing that their services are free or available to buyers at no cost;

3. change its rules to require MLSs to prohibit participants from filtering listings displayed to customers based on the level of compensation offered; and

4. enter into a consent decree memorializing these commitments.

In return, the Division will agree to:

1. close its investigation regarding the Participation Rule; and

2. send a closing letter to NAR, which will confirm (a) the Division has closed its investigation of the Participation Rule; (b) NAR has no obligation to respond to CID

No. 29935 (in its entirety); and (c) NAR has no obligation to respond to Document Demand Nos. 3-7 and Interrogatory Nos. 1-3 in CID No. 30360.

NAR looks forward to a prompt resolution of this matter.

Very truly yours,

William A. Burck

cc: Ethan Glass (Quinn Emanuel)
Mike Bonanno (Quinn Emanuel)
Jack Bierig (Schiff Hardin)
Suzanne Wahl (Schiff Hardin)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF REALTORS,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil Action No. 21-cv-2406 (TJK)
	)	
UNITED STATES, et al.	)	
	)	
Respondents	)	

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

The Petition to Set Aside, or in the Alternative Modify, Civil Investigative Demand No. 30729, ECF No. 1, is hereby DENIED.

IT IS SO ORDERED.

Date:

TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE