ELECTRONICALLY FILED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3:05-cv-00188-S
KENTUCKY REAL ESTATE COMMISSION,	)	
Defendant.	)	

COMPETITIVE IMPACT STATEMENT

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

On March 31, 2005, the United States filed a civil antitrust Complaint pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, against Defendant, the Kentucky Real Estate Commission (the "Commission"). The Complaint alleges that the Commission and others entered into and engaged in a combination and conspiracy to restrict competition among real estate brokers through the Commission's promulgation and enforcement of regulations banning rebates and inducements (the "Rebate Ban"). The Complaint further alleges that this combination and conspiracy is an unreasonable restraint of interstate trade that is illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint seeks an order to terminate the Defendant's Rebate Ban, to enjoin future conduct in furtherance of any such Rebate Ban, and to obtain such other equitable relief necessary to restore competition for the benefit of consumers in

Kentucky.

The United States filed on July 13, 2005 a Stipulation and Proposed Order, and on July 15, 2005, a Proposed Amended Final Judgment, which constitute the parties' settlement.

This Proposed Amended Final Judgment, as explained more fully below, (i) enjoins the Commission from enforcing any regulations that prohibit licensed real estate brokers in Kentucky from offering non-misleading rebates or inducements; (ii) requires the Commission to notify brokers that they can offer rebates and inducements to attract clients; (iii) permits any broker, whose license is currently suspended or revoked on account of offering a rebate or inducement, to request to have his or her license reinstated; (iv) requires the Commission to cease any current investigations or disciplinary actions relating to the offering of rebates and inducements; and (v) provides that any disciplinary action against rebates and inducements are null and void.

The Stipulation and Proposed Order require the Commission to take actions required under the Proposed Amended Final Judgment. The United States and the Commission have also stipulated that the Proposed Amended Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the Proposed Amended Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the Proposed Amended Final Judgment and to punish violations thereof.

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

A. Defendant

In creating the Commission, the Commonwealth of Kentucky empowered it to regulate the licensing and education of brokers and to safeguard and protect the public interest. The Commission consists of five Commissioners, four of which, by statute, must be active real estate brokers before and during their term on the Commission. When there is a broker-Commissioner vacancy, the Kentucky Association of Realtors, a private industry trade group for brokers, creates a list of not less than three nominees from which the Governor of Kentucky must appoint the new Commissioner. The Governor may reappoint a particular broker-Commissioner only if the trade association chooses to resubmit the broker-Commissioner's name on its new list of nominees.

The Commission is the sole licensing authority for real estate brokers in Kentucky. It is unlawful for any person to provide, or to offer to provide, real estate brokerage services in Kentucky unless he or she holds a current license issued by the Commission. The Commission also promulgates and enforces regulations, including the regulations that prohibit rebates and inducements to customers.

B. The Benefits of Rebates and Inducements

The predominant form of payment for real estate brokerage services remains the "commission," a percentage of the price paid for the property. Brokers may compete by offering their services at different commission levels. To compete against one another, brokers in other states also frequently offer customers rebates and inducements. Examples of rebates and inducements include cash (whereby the buyer's broker offers some percentage or amount of his

or her commission to the buyer), free products and services (such as televisions or home inspections), discounts or vouchers for other products and services (such as home moving services or home improvement stores), and donations to charities on the customer's behalf.

Rebates and inducements benefit home buyers and sellers. Under the traditional structure of a real estate contract, the seller and seller's broker determine the amount of the commission, and how it is allocated between the seller's and buyer's broker. If the seller's broker also finds the buyer, then that broker keeps the full commission. If, instead, different brokers represent the seller and buyer, the seller's broker pays the commission of the buyer's broker, and the size of that payment is not controlled by the buyer. Being able to offer rebates and inducements allows brokers to compete for the buyer's business by reducing the compensation they receive for representing a buyer. For example, the broker can offer prospective home buyers $1,000 (payable from the broker's commission) at the time of closing, if the buyers agree to have that broker as their agent.[1]

Rebates also benefit sellers. Rebates, for example, could be selectively offered to more price-sensitive home sellers. Thus, a broker could keep his or her commission fixed (for example at six percent), but discount to certain sellers through a rebate or inducement.

Buyers and sellers may also benefit from inducements, such as free or reduced-priced non-real estate brokerage services, for which a broker may be able to contract at lower prices

[1] Although home sellers in Kentucky are permitted to offer inducements directly to the buyer, this does not mitigate the anticompetitive effects of the Commission's Rebate Ban. Such a discount is attached to a particular house (and not the broker's services). Thus, it is not a factor when a buyer chooses the broker who should represent the buyer in finding and purchasing a home. Brokers in Kentucky have been prohibited from competing to become the buyer's agent by lowering their prices through rebates and inducements.

than would normally be available to buyers and sellers.

More generally, a more competitive and more efficiently-operating marketplace will tend to generate greater benefits for both home sellers and home buyers. All buyers and sellers benefit if the process of selling homes is less expensive. Consequently, allowing non-misleading rebates and inducements is procompetitive and represents an important component of price competition. Such price competition is permitted in most states. National discount brokers, for example, advertise rebates and inducements in the many states where they are permitted. Customers in these states then ask for rebates and inducements.

C. The Rebate Ban

The Kentucky Legislature enacted statutes that authorize the Commission to regulate the licensing and education of brokers. Kentucky, however, expressly forbids the Commission from promulgating any regulation that fixes prices, establishes fees, or sets the rate at which brokers are compensated. *See* Ky. Rev. Stat. § 324.282. This statute confirms that Kentucky intended that consumers of real estate brokerage services enjoy the benefits of price competition among brokers. Despite this staute, in 1991, the Commission promulgated administrative regulations that banned rebates and inducements. *See* 201 Ky. Admin. Reg. 11:011, Section 1(5); 201 Ky. Admin. Reg. 11:121, Section 1(2). Specifically, the Commission's regulations forbid a broker "[t]o offer, either through advertising, direct contact or by others, to the general public, any prize, money, free gift, rebate, or any other thing of value as an inducement." 201 Ky. Admin. Reg. 11:121, Section 1(2).

The Commission warned brokers that they could not compete by offering rebates or inducements. Nor could brokers, prior to closing, even compete by taking clients out to dinner,

donating money to a charity of the customer's choice, or offering a free photo. The Commission announced that, even after the closing of a real estate transaction, brokers could not give their clients anything more than a gift worth up to $100 in value.

To prevent brokers from offering rebates or other inducements, the Commission took several steps, including:

- teaching brokers in licensing courses to refrain from offering rebates and inducements;
- asking brokers to inform the Commission when one or more competing brokers offer rebates or other inducements;
- bringing disciplinary actions against brokers for offering rebates or other inducements; and
- sanctioning brokers for offering rebates or other inducements.

D. The Agreement to Ban Rebates and Inducements Is an Unreasonable Restraint of Trade That Is *Per Se* Illegal

As alleged in the Complaint, the Commission's promulgation and enforcement of the Rebate Ban is the product of an agreement, combination, or conspiracy among Broker-Commissioners and others that has restricted the ability of brokers to compete on the basis of price. "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the [Supreme Court] has held that certain agreements or practices are so 'plainly anticompetitive' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason." *Catalano v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980) (conspiracy to eliminate short-term credit to retailers *per se* illegal) (citations omitted); *see also United States v. Socony-Vacuum Oil*

Co., 310 U.S. 150, 221 (1940) (any combination which tampers with price structures is unlawful); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (volume discount ban *per se* illegal). The agreement among the Broker-Commissioners and others to ban rebates and inducements through the promulgation and enforcement of the Rebate Ban is a *per se* violation of Section One of the Sherman Act. Given its pernicious effect on competition and lack of any redeeming virtue, the agreement is conclusively presumed to be unreasonable without the need for an elaborate inquiry into the precise harm that it caused or the potential business justification for its use. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

II. EXPLANATION OF THE PROPOSED AMENDED FINAL JUDGMENT

The effect of the Proposed Amended Final Judgment would be to restore competition that the agreement among the Broker-Commissioners and others had eliminated, and to prevent the broker-controlled Commission from engaging in similar conduct in the future. The Proposed Amended Final Judgment would enjoin the Commission from enforcing its Rebate Ban. The Commission must also take certain measures for those brokers, who were, or are being, disciplined for offering rebates and inducements. First, it must discontinue any investigations or disciplinary actions to the extent they relate to the offering of any rebates or inducements. Second, it must permit any broker, who currently is on probation or whose license is currently suspended or revoked for having offered a rebate or inducement, to have his or her license reinstated to the extent that the broker otherwise meets the contemporary licensing requirements under the Kentucky Revised Statutes. Third, the Commission must treat any past disciplinary actions for offering rebates or inducements as null and void.

III. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

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

IV. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED AMENDED FINAL JUDGMENT

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

The APPA provides a period of at least 60 days preceding the effective date of the Proposed Amended Final Judgment within which any person may submit to the United States written comments regarding the Proposed Amended Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the Proposed Amended Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with this Court and be published in the Federal Register (unless upon application by the United States, the Court, for good cause,

authorizes an alternative method of public dissemination). Written comments should be submitted to:

John Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530

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

V. ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

The United States considered, as an alternative to the Proposed Amended Final Judgment, a full trial on the merits against the Defendant. Given the inherent delays of a full trial and the appeals process, the United States is satisfied that the relief contained in the Proposed Amended Final Judgment, will quickly establish, preserve, and ensure competition for real estate brokerage services in Kentucky.

VI. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED AMENDED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the Proposed Amended Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms

> are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[2] Rather:

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[2] 119 CONG. REC. 24,598 (1973) (statement of Senator Tunney). *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[3]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public."[4] Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[5]

The Proposed Amended Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice

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Cong., 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538-39.

[3] *United States v. Mid-America Dairymen, Inc.*, Civ. Action No. 73 cv 681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

[4] *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1458.

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

or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[6]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint; the APPA does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id*. at 1459-60.

[6] *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 153 (D.D.C. 2002) (quoting *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983)); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (standard is not whether decree is one that will best serve society, but whether it is within the reaches of the public interest).

VII. DETERMINATIVE DOCUMENTS

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

Dated: 26 July 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2005, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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