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.	)	

FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on March 31, 2005, and Plaintiff and Defendant, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and this Final Judgment shall not be evidence against or an admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Defendant to take certain actions for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendant has represented to the United States that the actions required below can and will be made and that Defendant will later raise no

claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

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

I. JURISDICTION

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

II. DEFINITIONS

As used herein, the term:

A. "Defendant" means the Kentucky Real Estate Commission, its successors and assigns, and its commissioners, directors, officers, managers, committees, agents, and employees.

B. "Disciplinary Action" means:

1. the Defendant's revocation or suspension of, or refusal to grant, a license to provide Real Estate Brokerage Services in Kentucky;

2. the Defendant's imposition of a reprimand, fine, probation, or

other penalty or condition; or

3. the initiation, by the Defendant or at its request, of an administrative, criminal, or civil proceeding.

C. "Enforcing" a Regulation means any manner—formal or informal—in which Defendant requires compliance with any Regulation, including, but not limited to, investigations or hearings of purported violations of the Regulation, and any Disciplinary Actions for any violation of the Regulation.

D. "Inducement" means money, a free gift, a prize, or any other thing of value that a Licensee would offer a potential client or customer.

E. "Licensee" means any person who is licensed by Defendant under chapter 324 of the Kentucky Revised Statutes or any future recodification thereof and legally can perform acts of real estate brokerage, and any person who legally can perform acts of real estate brokerage while acting under the supervision of a licensed broker.

F. "Licensee Price" means any commission, fee, or charge that the Licensee offers to charge, or does charge, for its Real Estate Brokerage Services, and includes any discounts.

G. "Price Advertising" means advertising information about the Licensee

Price or any discount, Rebate, or Inducement.

H. "Real Estate" means real property, and includes timeshares, options, leaseholds, and other interests less than leaseholds.

I. "Real Estate Brokerage Services" means any service that only a Licensee is authorized to provide pursuant to applicable Kentucky statutes and regulations.

J. "Rebate" means a payment of monies or anything of value by, or on behalf of, a Licensee to a client or customer (or to a third party authorized by the client or customer to receive the payment) that is in connection with the provision of Real Estate Brokerage Services. Examples of Rebates directed to third parties include, but are not limited to, payments to charities, home inspectors, and moving services. A Rebate does not include compensation paid for Real Estate Brokerage Services to any third party who is not licensed in Kentucky to perform such services; this Final Judgment does not authorize a client or customer to permit or direct such payments to an unlicensed third party for performing such services.

K. "Rebate Ban" means any Regulation, including, but not limited to, the Defendant's Regulation at 201 Ky. Admin. Reg. 11:011, Section 1(5)

and 201 Ky. Admin. Reg. 11:121, Section 1(2), that might prevent Licensees from offering or using any Licensee Price, discounts, Rebates, or Inducements, or using any Price Advertising to notify consumers of any Licensee Price, discounts, Rebates, or Inducements.

L. "Regulation" means any Kentucky administrative regulation, and includes any formal or informal policy, restriction, rule or legal interpretation adopted or applied by Defendant.

III. APPLICABILITY

This Final Judgment applies to the Kentucky Real Estate Commission, as defined above, and all other persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

Defendant is enjoined from, directly or indirectly, or through any Regulation, Disciplinary Action or other conduct:

A. Entering into, continuing, maintaining, or renewing any agreement, contract, or Regulation to fix, establish, raise, stabilize, suppress, eliminate, regulate, or maintain the level of commissions, discounts, Rebates, Inducements, or the Licensee Price;

B. Prohibiting, restricting, impeding, or discouraging any Licensee from

Price Advertising or from offering any Licensee Price, discounts, Rebates, or Inducements;

C. Investigating any Licensee for Price Advertising or for offering any Licensee Price, discounts, Rebates, or Inducements;

D. Threatening or taking any Disciplinary Action against any Licensee for Price Advertising or for offering any Licensee Price, discounts, Rebates, or Inducements;

E. Enforcing the Rebate Ban; or

F. Inducing, urging, encouraging, or assisting any person or organization to take any of the actions prohibited by this Section of the Final Judgment.

V. OTHER ACTIONS

A. Until the Rebate Ban is repealed and eliminated, Defendant shall treat the Rebate Ban as preempted by the federal antitrust laws and null and void.

B. Defendant shall address the substance of this Final Judgment—including that Licensees are free to compete by offering any Licensee Price, discounts, Rebates, or Inducements—in the training or educational materials that Defendant prepares, reviews, or

approves for the following courses (including any course in the future, which may have a different name, but covers substantially the same topics): the Kentucky Core course, the Brokerage Management course, and a pre-licensing course.

C. All Disciplinary Actions—to the extent they related to the offering of any discounts, Rebates, or Inducements—shall be null and void. Any records in the Defendant's possession, custody, or control relating to a Licensee subject to such Disciplinary Action shall reflect the same.

VI. NOTIFICATIONS

A. Within thirty (30) days from the filing of the proposed Final Judgment, Defendant shall notify in writing:

1. each Licensee who—as of the date the proposed Final Judgment is filed—is on probation or whose license is suspended or revoked for offering a discount, Rebate, or Inducement, that the license may be reinstated, at the Licensee's request, to the extent that the Licensee otherwise meets the contemporary licensing requirements under the Kentucky Revised Statutes.

2. each Licensee, who—as of the date the proposed Final

Judgment is filed—is being investigated or subject to a Disciplinary Action for offering a discount, Rebate, or Inducement, that such investigation or action—to the extent it relates to the offering of discounts, Rebates, or Inducements—has ceased with no further Disciplinary Action taken. Any records in the Defendant's possession, custody, or control relating to the affected Licensee shall reflect the same.

B. Within one-hundred-and-twenty (120) days from the filing of this proposed Final Judgment, Defendant shall display prominently on the first page of its newsletter the following language:

> On [the filing date], under the terms of a settlement with the U.S. Department of Justice Antitrust Division, the Kentucky Real Estate Commission agreed to stop enforcing regulations that restricted the use and advertisement of rebates, inducements or discounts by KREC licensees. The proposed Final Judgment effecting the settlement and a letter of explanation were mailed to each KREC licensee. Any licensee who did not receive this mailing may request another copy. Links to the proposed Final Judgment and the explanatory letter can also be found on the "Real Estate Licensing Laws in Kentucky" and "Legal Information" pages of KREC's website, http://www.krec.ky.gov/.

C. Within thirty (30) days from the filing of this proposed Final

Judgment, Defendant shall mail or deliver a copy of this proposed Final Judgment, under cover of the letter attached hereto as "Appendix A," to each active Licensee.

D. For a period of three (3) years from the filing of this proposed Final Judgment, Defendant shall mail or deliver a copy of this proposed Final Judgment, under cover of the letter attached hereto as "Appendix A," to:

1. each escrowed Licensee (those who requested the Defendant in writing to place its license in escrow), within forty-five (45) days when such escrowed Licensee seeks to reactivate its license; and

2. each new Licensee of Defendant within forty-five (45) days of each such person's acceptance by Defendant as a Licensee.

E. Within thirty (30) days from the filing of this proposed Final Judgment, and for a period of sixty (60) days thereafter,

1. Defendant shall prominently publish this proposed Final Judgment and the letter attached hereto as "Appendix A" on the home page of its website, http://www.krec.ky.gov/.

2. After such sixty (60) day period, and for a following period of

three (3) years, Defendant shall maintain a link from its "Real Estate Licensing Laws in Kentucky" and "Legal Information" web pages, or their equivalent, to the Final Judgment and the letter attached hereto as "Appendix A" in a manner that provides reasonable notice to interested parties.

F. Defendant shall notify Plaintiff at least thirty (30) days prior to any proposed change to its Regulations that may affect Defendant's compliance obligations arising out of the Final Judgment.

G. As soon as Defendant is aware of any proposed change to any statute or executive order that may affect its compliance obligations arising out of the Final Judgment, Defendant shall immediately notify Plaintiff.

VII. LIMITING CONDITIONS

A. With the exception of such actions that are prohibited elsewhere in this Final Judgment, nothing shall alter the Defendant's general authority to adopt and enforce reasonable Regulations, or to take Disciplinary or other action designed to prevent violations of the Kentucky Revised Statutes. Such authority includes the right to prohibit:

1. advertising that is fraudulent, false, deceptive, or misleading within the meaning of Kentucky Revised Statutes, Chapter 324, Section 160(4)(l);

2. any promise, assertion, representation, or statement of fact that is false, deceptive, or misleading; or constitutes under Kentucky law an otherwise illegal lottery scheme, whereby there is the payment of valuable consideration for the chance to receive a prize; or

3. for the protection of the client or customer, failure by Licensees to disclose in writing to their clients or customers the terms of any offered Rebates or Inducements.

VIII. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in

charge of the Antitrust Division, and on reasonable notice to Defendant, be permitted:

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

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

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendant shall submit written reports or interrogatory responses, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than

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

IX. RETENTION OF JURISDICTION

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

X. EXPIRATION OF FINAL JUDGMENT

This Final Judgment will expire ten (10) years from the date of its entry, but only if the Rebate Ban has been repealed and eliminated.

XI. NOTICE

For purposes of this Final Judgment, any notice or other communication shall be given to the person at the address set forth below (or such other addresses as the recipient may specify in writing):

For the United States:

Chief
Litigation III Section
U.S. Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530

For the Defendant:

Lee B. Harris
General Counsel
Kentucky Real Estate Commission
10200 Linn Station Road, Suite 201
Louisville, KY 40223

With a copy to:

John S. Reed
David J. Hale
Reed Weitkamp Schell & Vice PLLC
500 West Jefferson Street, Suite 2400
Louisville, KY 40202-2812

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest.

Date: _____

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

_____
United States District Judge

APPENDIX A

(Letterhead of the Kentucky Real Estate Commission)

Dear Licensee:

The Kentucky Real Estate Commission, under the terms of a settlement with the U.S. Department of Justice, has agreed to stop enforcing regulations that restricted the use and advertisement of rebates, inducements, or discounts by you or any other licensee. A copy of the proposed Final Judgment is enclosed.

In order that you may readily understand the terms of the proposed Final Judgment, we describe below its essential provisions, although you must realize that the proposed Final Judgment itself is controlling, rather than the following explanation of its provisions:

(1) The Commission must allow you or any other licensee to offer customers rebates, discounts, or other inducements. The Commission must also allow you or any other licensee to use truthful and non-misleading advertisements to notify consumers of rebates, inducements, or other discounts, which you may choose to offer.

(2) The Commission will no longer enforce any ban against rebates, discounts, or other inducements. Specifically, the Commission will not enforce the regulation at 201 Ky. Admin. Reg. 11:011, Section 1(5) and 201 Ky. Admin. Reg. 11:121, Section 1(2), that, in the absence of the proposed Final Judgment, had prevented you from offering rebates, discounts, or other inducements.

(3) You and any other licensee are now free to compete by offering consumers rebates, discounts, and other inducements.

(4) If you were disciplined for offering a rebate, discount, or other inducement, then that disciplinary action shall be deemed null and void, and the Commission will note that in its records.

Please note that the proposed Final Judgment does not alter the Commission's authority to enforce its regulations generally and to prohibit advertising or other conduct that is fraudulent, false, deceptive, or misleading. Moreover, licensees still cannot offer illegal lottery schemes. Also enclosed are the relevant portions of a new Kentucky Administrative Regulation filed July __, 2005. This regulation requires licensees to disclose in writing to their clients and customers the terms of all rebates and inducements.

Sincerely yours,

[appropriate Commissioner or officer]

(Enclosures)