

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF KENTUCKY**

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**UNITED STATES OF AMERICA,**  
Department of Justice, Antitrust Division,  
325 7th Street, N.W., Suite 300,  
Washington, DC 20530,

Plaintiff,

v.

**KENTUCKY REAL ESTATE COMMISSION,**  
10200 Linn Station Road, Suite 201,  
Louisville, KY 40223,

Defendant.

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Civil Action No.

**COMPLAINT**

The United States of America, by its attorneys acting under the direction of the Attorney General of the United States, brings this antitrust action against the Kentucky Real Estate Commission (“the Commission”) for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Commission promulgated and enforces administrative regulations that ban real estate brokers and sales associates in Kentucky (collectively “Brokers”) from competing with each other by offering consumers cash rebates or other inducements (the “Rebate Ban”). The Commission’s promulgation, adoption, maintenance, and enforcement of these regulations is a result of agreements, combinations, or conspiracies among the Commissioners and others that unreasonably restrain competition. For example, the Rebate Ban prevents buyer Brokers from competing on price by offering cash rebates when they enter into agreements with clients.

## NATURE OF THE ACTION

1. By this action, the United States challenges regulations promulgated by the Commission that prohibit Brokers from competing with each other by offering rebates or inducements to consumers of real estate brokerage services.
2. The Commonwealth of Kentucky (“Kentucky”) created the Commission and empowered it to regulate the licensing and education of Brokers and to safeguard and protect the public interest.
3. In creating the Commission, the Kentucky Legislature sought to preserve price competition in real estate brokerage services for the good of its citizens. Toward that end, Kentucky specifically prohibits the Commission, which consists almost entirely of practicing Brokers, from “promulgat[ing] any administrative regulation which in any way fixes prices, establishes fees, or sets the rate at which [Brokers] are compensated.” Ky. Rev. Stat. § 324.282.
4. In conflict with Kentucky’s policy and statutory prohibition, the Commissioners, through their promulgation and enforcement of the Rebate Ban (*see* 201 Ky. Admin. Reg. 11:011, Section 1(5); 201 Ky. Admin. Reg. 11:121, Section 1(2)), have enabled Brokers to raise, fix, peg, or stabilize the prices and rates at which Brokers are compensated. The Rebate Ban is the result of agreements, combinations, or conspiracies among its Commissioners and others, and it unreasonably restrains competition to the detriment of consumers.
5. The Rebate Ban deprives consumers of the benefits of price competition among Brokers in the provision of real estate brokerage services in Kentucky. The Rebate Ban makes it more difficult for consumers of real estate brokerage services to obtain lower prices for these services.

6. Brokers have substantially resisted attempts to eliminate the Rebate Ban. In a Commission survey, many Brokers conceded that repealing or modifying the Rebate Ban would generate a bidding war and lead to lower prices for consumers:

- a. “If we give rebates and inducements, it would get out of control and all clients would be wanting something. The present law keeps it under control.”
- b. “This would turn into a bidding war, lessen our profits and cheapen our ‘so-called’ profession.”
- c. “I am for the law as it stands now. If inducements were allowed, they could lead to competitive behavior, which would make us look unprofessional in the eyes of the public.”
- d. “I think this would just take money right out of our pocket.”
- e. “We work too hard to give it away.”

7. A few Brokers, who supported eliminating the Rebate Ban, cited some of the procompetitive benefits that repeal would foster:

- a. “Rebates and inducements will increase competition and give consumers more choices in service.”
- b. “Current law inhibits free trade. Most all other states allow inducement and rebates. Disclosure is all the police we need.”
- c. “Commissions and sales awards are common in other industries. The bigger wrong being committed by agents and broker is the informal unspoken price fixing that occurs.”
- d. “Buyer’s brokers need to be able to offer a commission based on negotiation for buyer broker services. An agency contract should not be dependent on what the listing company offers. All commissions are negotiable. Also, let the public decide what offer they want to take on inducements.”

8. The United States seeks to terminate this illegal restraint on competition and to obtain other equitable relief necessary to restore competition for the benefit of consumers of real estate brokerage services in Kentucky.

### **THE DEFENDANT**

9. The Commission is organized, exists, and transacts its business under and by virtue of the laws of Kentucky, with its principal place of business in Louisville, Kentucky.

10. The Commission is the sole licensing authority for Brokers. It is unlawful for a 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.

11. The Commission consists of five Commissioners. By statute, four of the Commissioners must be active Brokers (“the Broker-Commissioners”) before and during their term on the Commission. The fifth Commissioner, a citizen-at-large, may not be associated with or financially interested in the brokerage industry.

12. When there is a Broker-Commissioner vacancy, the Kentucky Association of Realtors (“the Association”), a private industry trade group for Brokers, selects 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 Association chooses to resubmit the Broker-Commissioner’s name on its new list of nominees.

13. The Commission promulgates and enforces regulations, including the regulations at issue in this Complaint.

14. The Association actively participates in the Commission’s rulemaking activities. Often, when the Commission has considered changing its regulations, it has formed a joint task

force with the Association consisting of Commission and Association representatives. Such joint task forces have prepared draft regulatory text for the Commission's consideration.

15. Kentucky law authorizes the Commission to take disciplinary action against any Broker who violates Kentucky real estate statutes or any of the Commission's regulations.

16. Neither the legislative nor the executive branch of Kentucky, however, oversee the Commission's regulations or enforcement actions, including the Commission's enforcement actions regarding alleged violations of the Rebate Ban.

17. Although the Commission has inhibited competition by banning rebates, neither the Commission nor the executive or legislative branches of Kentucky oversee the competitiveness or reasonableness of the pricing by Brokers for their services. Moreover, the Commission does not maintain or collect information concerning the level of real estate brokerage commissions.

#### **JURISDICTION AND VENUE**

18. This complaint is filed under Section 4 of the Sherman Act, as amended 15 U.S.C. § 4, in order to prevent and restrain the violation, as herein alleged, of Section 1 of the Sherman Act, 15 U.S.C. § 1.

19. This Court has subject matter jurisdiction under Section 4 of the Sherman Act, as amended 15 U.S.C. § 4, and under 28 U.S.C. §§ 1331, 1337(a), and 1345.

20. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because the Commission was created by Kentucky statute, it transacts business throughout Kentucky, and it maintains its principal place of business in Louisville, Kentucky.

## **TRADE AND COMMERCE**

21. The Commission's Rebate Ban and other activities substantially affect interstate commerce. Billions of dollars worth of real property is exchanged each year in Kentucky with the assistance of Brokers. Brokers assist in-state and out-of-state clients to buy, sell, lease, or manage real property. Interstate mortgage financing is affected by this exchange of property.

### **BACKGROUND OF THE OFFENSE**

22. The predominant form of payment for real estate brokerage services remains the "commission," a percentage of the price paid for the property. In a typical transaction, the seller pays the commission to his or her real estate broker. In Kentucky, the seller and his or her Broker negotiate the Broker's commission, but the Broker is prohibited from including any rebate or price-cutting inducement in their agreement. If the seller's Broker also finds the buyer, then that Broker keeps the full commission. In most cases, however, a second Broker represents the buyer. If the transaction is completed, then the buyer's and seller's Brokers each receive a portion of the commission. The seller's Broker or the seller typically sets the commission level and its allocation between Brokers.

23. As a result of the Rebate Ban, the buyer's Broker is prohibited from offering his or her buyer client any rebate or price-cutting inducement or discount off the commission set by the seller or the seller's Broker.

### **RELEVANT MARKETS**

24. The Commission's Rebate Ban has had, and will continue to have, anticompetitive effects in Kentucky's local real estate brokerage service markets.

25. The relevant service markets are no broader than the provision of real estate brokerage services to sellers of real property and the provision of real estate brokerage services to buyers of real property.

26. The real estate brokerage business is local in nature. Most sellers want to work with a Broker who is familiar with local market conditions and who maintains an office within a reasonable distance to the property. Likewise, most buyers want to purchase property in a particular city, community, or neighborhood, and they typically want a Broker who has knowledge of the area in which they have an interest.

27. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, Brokers compete with each other and with the Broker-Commissioners.

28. The Rebate Ban applies to all Brokers and consequently affects competition for real estate brokerage services throughout Kentucky.

### **CONDUCT**

29. The Kentucky Legislature enacted statutes that authorize the Commission to regulate the licensing and education of Brokers. Kentucky, however, forbids the Commission from promulgating any regulation that in any way fixes prices, establishes fees, or sets the rate at which Brokers are compensated.

30. In 1991, the Commission promulgated an administrative regulation that prohibits Brokers from offering to the general public any item or thing of value, including rebates that reduce fees, to induce clients to retain their services. (*See* 201 Ky. Admin. Reg. 11:011, Section 1(5); 201 Ky. Admin. Reg. 11:121, Section 1(2).) Specifically, the Commission forbids 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).

31. In interpreting its regulations, the Commission has warned Brokers that they cannot compete by offering cash rebates, refunds, or a free home inspection. Nor can Brokers, prior to closing, compete by taking clients out to dinner, donating money to a charity of the customer’s choice, or even offering a free photo with Santa Claus. The Commission has announced that, even after the closing of a real estate transaction, Brokers cannot give their clients anything more than a gift worth up to \$100 in value.

32. The Commission’s promulgation and enforcement of the Rebate Ban is the product of agreements, combinations, or conspiracies among its Broker-Commissioners and others that has restricted the ability of all Brokers to compete on the basis of price.

33. The Commission has engaged, and continues to engage, in acts in furtherance of these agreements, combinations, or conspiracies, including among other things:

- a. prohibiting Brokers from offering consumers any type of rebate or inducement, including but not limited to, cash rebates, free products and services such as televisions or home inspections, discounts or vouchers for products and services such as home moving services or home improvement stores, and donations to charities on the customer’s behalf, on the basis that such conduct violates the Commission’s administrative regulations;
- b. prohibiting rebates or other inducements in private contracts that involve Brokers; and

- c. preventing Brokers from offering rebates or other inducements by among other things:
  - i. investigating alleged violations of the Rebate Ban;
  - ii. asking Brokers to inform the Commission when one or more competing Brokers offers rebates or other inducements;
  - iii. instructing Brokers to cease offering rebates or other inducements;
  - iv. threatening to bring disciplinary actions against Brokers unless they cease offering rebates or other inducements;
  - v. bringing disciplinary actions against Brokers for offering rebates or other inducements; and
  - vi. sanctioning Brokers the Commission has found to have offered rebates or other inducements by one or more of the following: suspending licenses, revoking licenses, imposing monetary fines, issuing reprimands, and requiring completion of additional academic credit hours.

34. The Rebate Ban also enables sellers and/or seller Brokers to fix the commission at which the buyer's Broker is to be compensated in a particular real estate transaction, thereby insulating the buyer Brokers from competing among themselves on the basis of price when they enter into agreements with buyers.

35. As a result of the Rebate Ban, Brokers cannot—and thus need not—compete with one another by offering rebates or other valuable inducements.

36. The Commission has worked closely with Brokers and Brokers' associations, including the Association, in its continued enforcement of the Rebate Ban. Among other things, the Commission has rejected proposals to eliminate the Rebate Ban as recently as 2004 after receiving substantial opposition from Brokers.

### **ANTICOMPETITIVE EFFECTS**

37. The Rebate Ban has injured, and continues to injure, buyers and sellers of real property throughout Kentucky. The Rebate Ban restricts competition and deprives the property-buying and property-selling public of a myriad of price and non-price discounts, including, but not limited to, cash rebates, vouchers or coupons, and discounted or free services related to buying and selling property such as home inspections, title services, or moving services. These rebates and inducements benefit consumers. Real estate brokers and sales associates operating in states without a similar ban offer rebates, inducements, and many of the discounts set forth above to buyers and sellers as they compete to offer their services to buyers and sellers. Such rebates, for example, may amount to several thousand dollars in a single transaction.

38. The agreements, combinations, or conspiracies alleged herein have had, and will continue to have, anticompetitive effects, including:

- a. a suppression of price competition in the provision of real estate brokerage services;
- b. the limitation of products and services available to buyers and sellers of property; and

- c. the creation of barriers to entry into the provision of real estate brokerage services by companies that offer rebates, discounts, and reduced commissions as part of their business model.

### **VIOLATION ALLEGED**

39. The allegations of paragraphs 1 through 38 of this Complaint are re-alleged and incorporated by reference herein with the same force and effect as though set forth in full.

40. Defendant's promulgation, adoption, maintenance, and enforcement of regulations 201 Ky. Admin. Reg. 11:011, Section 1(5) and 201 Ky. Admin. Reg. 11:121, Section 1(2) arise from and result in agreements, combinations, or conspiracies that restrain competition in numerous Kentucky real estate brokerage service markets in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

### **REQUEST FOR RELIEF**

WHEREFORE, the United States prays that final judgment be entered against Defendant declaring, ordering, and adjudicating that:

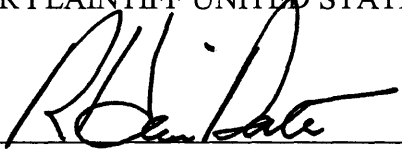
- a. the agreements, combinations, or conspiracies alleged herein restrain trade and are illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;
- b. Defendant be restrained and enjoined from, either directly or indirectly, prohibiting Brokers from advertising or offering rebates or inducements;
- c. Defendant's regulations 201 Ky. Admin. Reg. 11:011, Section 1(5) and 201 Ky. Admin. Reg. 11:121, Section 1(2) are preempted by the federal antitrust laws and are null and void;
- d. Defendant shall mail a copy of the Complaint, order, and explanatory notice to:


- i. each Commissioner, director, representative, agent, and employee of Defendant Kentucky Real Estate Commission; and
- ii. each person licensed to provide real estate brokerage in Kentucky;
- e. Defendant publish in its Newsletter the explanatory notice and an article stating that the regulations prohibiting rebates and inducements have been eliminated;
- f. the United States recover its costs in this action; and
- g. such other relief as the United States may request and that the Court deems just and proper.

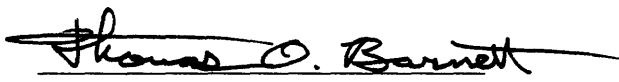
Dated: 3/30, 2005


Respectfully submitted,


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