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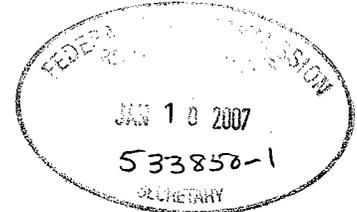
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By Federal Express

Federal Trade Commission
Office of the Secretary
Room 135-H
600 Pennsylvania Avenue, NW
Washington, D.C. 20580



Re: Multiple Listing Service, File No. 061 0090

Dear Secretary,

The National Association of Realtors® (“NAR”) respectfully urges the Federal Trade Commission not to give final approval to the consent decree against Multiple Listing Service, Inc. (“MLSI”) in this matter – at least until resolution of the Commission’s litigated proceeding in Matter of RealComp II, Ltd., FTC Docket No. 9320. The reasons for this request are set forth below. Preliminarily, however, we set forth the relevant facts.

FACTS

The consent decree in this matter arises out of a policy of MLSI by which MLSI determined not to feed exclusive agency listings to IDX sites or to third party websites such as Realtor.com. The proceeding against MLSI was one of several Commission actions against MLSs across the country that had adopted substantially similar policies. Several such proceedings resulted in consent decrees. See Analysis of Agreement Containing Consent order to Aid Public Comment (72 Fed. Reg. 72359, at n. 2).

Significantly, however, RealComp II, one of the MLSs which had adopted a policy substantially similar to that of MLSI, chose to litigate. At almost the same time that the consent decree in this matter was put out for public comment, the Administrative Law Judge (“ALJ”) in the RealComp II litigation, the Honorable Stephen J. McGuire, issued a 129-page, single-spaced Initial Decision concluding that the challenged policy does not violate §5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a). In essence, although finding that complaint counsel had “made a prima facie showing as to the anticompetitive nature of the alleged restraints,” the ALJ determined that those effects were outweighed by substantial procompetitive justifications. Accordingly, the ALJ found that complaint counsel had “not demonstrated that Realcomp unreasonably restrained competition” – and therefore dismissed the Complaint.

Complaint counsel in RealComp II has appealed the ALJ’s decision to the full Commission. NAR believes that the ALJ’s decision was correct and should be affirmed. At a minimum, however, the Commission will be called upon to adjudicate the legal issues presented on appeal – issues which are substantively identical to those that underlie the proceeding against



MLSI. Moreover, it is quite possible that those issues will be presented to the Court of Appeals – and possibly even to the Supreme Court.

DISCUSSION

There are at least three reasons that the Commission should not give final approval to the consent decree against MLSI – at least until the RealComp II proceeding is finally resolved:

1. To finalize the consent decree in the face of the ALJ decision in RealComp II would be to prohibit a practice that has been found, at least in the Initial Decision, not to violate §5.
2. To finalize the consent decree in the face of the ALJ decision in RealComp II would require the Commission to pre-judge legal issues that it will be called upon to resolve in the RealComp II appeal.
3. To finalize the consent decree in the face of the ALJ decision in RealComp II would be to discourage settlements of any matter in which the Commission is challenging similar conduct in more than one Docket.

For the reasons set forth below, each of these results reflects unsound policy.

A. Inconsistency Between MLSI Decree And ALJ Findings and Conclusions In RealComp II

In RealComp II, the ALJ determined, after an extensive trial and analysis of the record, that a policy which is identical in all material respects to the policy which is the subject of the consent decree against MLSI does not violate §5. In these circumstances, finalizing the decree against MLSI would, in effect, be an action to make permanent an Order predicated on a policy which has been found – in the only thorough (and at least thus far most authoritative) decision to consider the relevant issues – not to be unlawful. Entering an order against a practice that does not violate the law would be an abuse of the Commission’s discretion. As the Commission noted in Matter of National Fire Hose Corp., 1986 FTC Lexis 56, “(f)airness and the public interest require that the Commission apply its policies consistently and uniformly among all the members of the industry.” See also In re McDonald’s Corp., 82 F.T.C. 1779 (1973) (setting aside a consent decree after non-consenting respondents obtained a favorable judgment in subsequent litigation).

To be sure, there may be facts that could be said to differentiate the conduct of MLSI from the conduct of RealComp II. But any notion that those facts should lead to a different result in the two cases would have to gloss over the ALJ’s findings and reasoning in RealComp II. The underpinnings of the ALJ’s decision in RealComp II are his findings with respect to the procompetitive justifications for the challenged policy and his conclusions that those justifications outweigh any purported anticompetitive effects of the policy. The same analysis should lead to the same result with respect to MLSI – regardless of any minor factual distinctions between the two proceedings.

Nor is it relevant that the Commission has already finalized orders against several MLSs which had each adopted a policy similar to the one in RealComp II. In none of those cases was there an ALJ decision finding the policy to be lawful. Thus, finalizing the consent decrees in those cases did not constitute upholding an order based on a policy known to have been held not to violate §5. Of course, if the ALJ's recommended dismissal of the Complaint in RealComp II is ultimately upheld, the Commission should rescind all previous consent decrees based on similar policies.

It is also no answer to say that the decision in RealComp II is only an Initial Decision of an ALJ. While we believe that that Decision is correct, NAR recognizes that the Commission could reverse it on appeal. If the Initial Decision is reversed – and if any reversal is upheld in the courts, it will be time enough to finalize the decree against MLSI.

In this connection, it is noteworthy that the Board of Directors of MLSI voted to rescind the challenged policy in October of 2006 – prior to agreeing to the consent order and prior to the Commission's initial acceptance of that order. If it should turn out that the policy in RealComp II is ultimately found to have been unlawful, no anticompetitive consequences will have occurred by reason of a decision not to finalize the consent decree against MLSI at this time. After all, the policy will not have been in effect while RealComp II is on appeal.

B. Pre-Judgment of Issues Before The Commission In RealComp II

It is axiomatic that no Commissioner should pre-judge any issue to come before the Commission. Rather, each Commissioner should decide each case after reviewing the facts and legal arguments presented in the briefs and at oral argument. Indeed, pre-judgment of the relevant issues would violate the due process rights of the respondent.

Here, finalizing the consent decree against MLSI would constitute pre-judgment of the issues that will be presented to the Commission in the appeal of RealComp II. Finalizing the consent decree would be tantamount to a conclusion that the policy on which the decree is based is unlawful. Thus, that action would perforce require the Commissioners to take a position now on a matter that they will be called upon to resolve after full briefing of the RealComp II appeal. At a minimum, such an action would give the appearance of pre-judgment of that matter.

As noted above, there is no need to finalize the consent decree before the RealComp II proceeding is ultimately resolved. Thus, there is no need to give the appearance of having pre-judged the issues in that proceeding. Rather, the more judicious course would be to hold the MLSI consent decree pending final resolution of RealComp II – and to rescind that decree if the Initial Decision is ultimately upheld.

C. Discouragement of Consent Decrees

There is one more reason not to finalize the consent decree against MLSI at this time – and to rescind the consent decrees against other MLSs based on policies substantially similar to the policy in RealComp II if the ALJ decision in that case is ultimately upheld. Specifically, any other course would discourage parties under investigation from entering into consent decrees. If such parties know that any order to which they voluntarily agree will be finalized (or not

rescinded) even if the conduct on which the order is based is ultimately adjudicated to be lawful, these parties will be motivated to resist an offer of a consent decree while the relevant issues are being litigated by another respondent. Conversely, if such parties know that any decree to which they consent will not be finalized (or will be rescinded) if the underlying conduct is later adjudicated to be lawful, they are far more likely to accept a consent decree.

Needless to say, it is in the public interest to encourage consent decrees. Peaceful resolution of disputes, if possible, is generally preferable. Moreover, consent decrees avoid expenditure of Commission resources that can be used on other matters. See, e.g. Johnson Products Co. v. FTC, 549 F.2d 35 (7th Cir. 1977) (Consent procedures, “by avoiding protracted litigation in a significant number of cases, enable the Commission to more efficiently allocate its limited resources in order to maximize the protection of the public...”). Therefore, the Commission should not adopt an approach that will discourage consent decrees. But that is precisely what finalizing the decree against MLSI at this juncture would do with respect to all future investigations of more than one entity engaging in the same practice under review.

CONCLUSION

For the reasons set forth above, the consent decree against MLSI should not be finalized at this time. If the ALJ decision in RealComp II is ultimately reversed, the consent decree can be finalized at that time. If that decision is ultimately affirmed, the decree should be rescinded. In that event, moreover, all previous consent decrees based on substantially similar conduct should also be rescinded.

Respectfully submitted,

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LKJ/asn