UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

March 13, 2008

Laurene K. Janik
General Counsel
National Association of Realtors
430 North Michigan Avenue
Chicago, Illinois 60611-4087

Dear Ms. Janik:

Thank you for your comments on behalf of the National Association of Realtors ("NAR") regarding the consent agreement that the Federal Trade Commission accepted for public comment in *In the Matter of Multiple Listing Service, Inc.*, File No. 061 0090 (*MLS Inc.*). NAR requests that the Commission not give final approval to the consent agreement with MLS Inc. until no sooner than the conclusion of the administrative proceeding in *In the Matter of Realcomp II., Ltd.*, FTC Docket No. 9320 (*Realcomp II*).

The Commission has reviewed NAR's comment and has placed it on the public record of the proceeding.[1] As discussed below, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification.

NAR asserts that it would be inconsistent for the Commission to give final approval to the consent with MLS Inc. when Chief Administrative Law Judge McGuire's Initial Decision in *Realcomp II* found similar conduct did not violate Section 5 of the FTC Act. There is no inconsistency between giving final approval to this consent while *Realcomp II* is pending. Here, the Commission is not making a final determination on the merits; rather, it has determined that there is reason to believe that MLS Inc. has violated Section 5 of the FTC Act. The Commission made a similar decision when it issued the administrative complaint against Realcomp II.

Further, the Commission has not yet made a final determination on the merits in *Realcomp II.* The Initial Decision by the Administrative Law Judge is not "final agency action" under the Administrative Procedure Act, *see* 16 C.F.R. § 3.51(b). Moreover, the Commission exercises *de novo* review of the record by considering "such parts of the record as are cited or as may be necessary to resolve the issues presented and . . . exercis[ing] all the powers which [the

[1]Public comments filed in Commission proceedings can be found at http://www.ftc.gov/os/publiccomments.shtm.

Commission] could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). Indeed, NAR necessarily concedes that the Commission has the authority to either affirm or reverse the Initial Decision.

NAR argues further that waiting until the *Realcomp II* matter is resolved before finalizing the consent with MLS Inc. would not result in any "anticompetitive consequences" because MLS Inc. has already rescinded the challenged policy. The Commission addressed this issue when it accepted the consent for public comment, stating that it is appropriate to order prospective relief to ensure that "MLS Inc. cannot revert to the old rules or policies, or engage in future variations of the challenged conduct." Analysis to Aid Public Comment at 4. The Commission continues to believe that it is appropriate to order prospective relief against MLS Inc.

Next, NAR argues that finalizing the consent with MLS Inc. would "constitute pre-judgment of the issues that will be presented to the Commission" in the appeal of *Realcomp II.* The standard for prejudgment has been established in the case law on recusal. The D.C. Circuit has stated that "[i]n an adjudicatory proceeding, recusal is required only where 'a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)). The court explained that this standard would require recusal only where the decisionmaker has "'demonstrably made up [his] mind about important and specific factual questions and [is] impervious to contrary evidence.'" *Id.* (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980)). As for disputed legal issues, the standard for prejudgment is whether the decision-maker's mind is "irrevocably closed." *FTC v. Cement Institute*, 333 U.S. 683, 701 (1948).

As noted above, the Commission has determined that there is reason to believe that MLS Inc. has violated Section 5 of the FTC Act. When the Commission issued the administrative complaint against Realcomp II, it made a similar determination. It is well accepted that the Commission can issue an administrative complaint without prejudging the factual and legal issues to be resolved in its ultimate determination on the merits. By the same reasoning, final acceptance of a consent does not mean the Commission has prejudged the factual and legal issues in a separate administrative proceeding.

The Commission is able to make a determination in one matter while a similar matter is pending. As the Supreme Court has noted, it is not a "violation of procedural due process" when judges "frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Cement Institute*, 333 U.S. at 702-03. Similarly, the Commission has concluded that:

> "A tribunal which in the context of a prior proceeding has passed on factual issues is not precluded from passing upon identical issues in a subsequent adjudication even when the two proceedings derive from the same set of facts."

American Home Products, 95 F.T.C. 381 (1980) (citing *Pangburn v. CAB*, 311 F.2d 349, 358 (1st Cir. 1962)). The Commission's final approval of the consent with MLS Inc. does not prejudge any other pending matter.

NAR contends further that finalizing the consent agreement against MLS Inc. would discourage other parties under investigation from entering into consents "while the relevant issues are being litigated by another respondent." NAR asserts that respondents will not enter into consent orders when those orders will be finalized or not rescinded even if "the conduct on which the order is based is ultimately adjudicated to be lawful."

MLS Inc. entered into the consent agreement with the Commission while *Realcomp II* was pending. At that time, therefore, MLS Inc. was aware of and presumably considered the possibility that the ALJ would find similar conduct did not violate Section 5. As discussed above, the Commission has not yet made a final decision in *Realcomp II*. Respondents who settle understand that they are giving up the certainty of knowing how their cases would have been resolved if adjudicated.

Moreover, the proper way to deal with future legal developments is not to keep matters pending; instead, a respondent under order can seek a modification if "changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part." 15 U.S.C § 45(b).

Thank you again for your comment. The Commission is aided in its analysis by hearing from a variety of sources, and we appreciate NAR's interest in this matter. A copy of the final Decision and Order is enclosed for your information. Relevant materials also are available from the Commission's website at http://www.ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary