MLS & ASSOCIATIONS

DOJ: Tossing pocket listing suit prevents competition with MLSs

In an amicus brief the antitrust enforcer argues that a lower court incorrectly tossed a case filed by Top Agent Network over the National Association of Realtors' pocket listing policy

BY ANDREA V. BRAMBILA

The U.S. Department of Justice on Monday put its thumb on the scale in an antitrust lawsuit filed against the National Association of Realtors over a controversial policy aimed at curbing pocket listings, arguing that a lower court's reasoning would improperly protect the NAR-affiliated multiple listing service system.

Attorneys for the DOJ filed the amicus brief in the U.S. Court of Appeals for the Ninth Circuit, which is currently weighing an appeal in a federal lawsuit filed by private listing service Top Agent Network against NAR in May 2020. TAN's suit alleges NAR and the San Francisco Association of Realtors violated a slew of antitrust and unfair competition laws for adopting the Clear Cooperation Policy, which requires listing brokers to submit a listing to their MLS within one business day of marketing a property to the public.

The rule is meant to effectively end the practice of publicizing listings for days or weeks without making them universally available to other agents. Some MLSs have instituted hefty fines to enforce the policy, including SFAR.

A U.S. district court in Northern California tossed TAN's case against the Realtor associations in August 2021 and TAN subsequently appealed that decision. The company submitted its opening brief to the appeals court in January. The DOJ sought permission to file an amicus brief in the case a few days later, which was granted.

In the brief, the federal agency says it is not weighing in on the merits of TAN's lawsuit, but rather to correct what the DOJ considers legal errors made by a federal district court in the case.

The antitrust enforcer's arguments boil down to this: The lower court should have considered the pocket listing policy's impact on the competition between listing services that agents and brokers pay for. Attorneys for the DOJ emphasized that the court should not automatically assume that any policy increasing visibility of properties to buyers is necessarily competitive because that would mean that no new service could challenge the dominance of MLSs who will inherently have more members — and therefore offer more visibility — than any service when it first launches.

NAR spokesperson Mantill Williams said the 1.5 million-member trade group expects the appellate court will recognize that the Clear Cooperation Policy increases competition and ensures transparent, equitable access to listings for consumers, according to an emailed statement.

"We hold steadfast that the trial court correctly dismissed this case back in August 2021," Williams said.

"The CCP ensures listings are widely available and accessible to all consumers. It does that by clarifying the longstanding policy that MLS participants must share their public listings with everyone. Without

those protections, some consumers would be disadvantaged, and competition reduced, because agents could refuse to give certain agents or certain customers access to certain listings."

TAN CEO David Faudman said the company was pleased the DOJ agreed that the lower court applied the incorrect legal standard in dismissing TAN's case, according to an emailed statement.

"We are confident the Ninth Circuit Court of Appeals will agree and that our lawsuit will be allowed to proceed on the merits," Faudman said.

"The NAR's so-called Clear Cooperation Policy is both unlawful and anti-competitive, and its rollout has been a disaster. Rather than accept that reality, the NAR buries its head in the sand and keeps pressing forward with this ill-guided policy."

NAR and SFAR have until April 20 to submit an answering brief.

Agents and brokers are consumers too

The DOJ laid out three legal errors the agency contends the district court made. The first is similar to an argument the DOJ made in another amicus brief in a similar pocket listing case against NAR filed by The PLS.com: That the lower court focused its analysis of antitrust injury on the wrong product market.

Rather than focusing on harm to competition between brokerages that help buyers and sellers with home sales, TAN's suit is alleging harm to competition between real estate listing services that help brokers and agents market homes — an alleged injury that the lower court never analyzed, according to the brief.

"TAN alleged that the Policy's deterrent effect on brokers' and agents' use of off-MLS listing services harms competition in the upstream market for listing services in two ways: (1) By depriving the relevant consumers (brokers and agents) of choice in how to serve their clients because 'agents who are not members of a large brokerage will be unable to properly serve customers seeking to market off-MLS,' … and (2) by impeding or eliminating listing networks that might compete with MLSs, resulting in 'a single dominant MLS' in most major markets," the brief reads.

"Restraints on consumer choice and exclusion of new market entrants are contrary to fundamental antitrust policy."

The brief points out that the Ninth Circuit a year ago overturned a lower court ruling dismissing The PLS.com case in part because it found that "it was sufficient for PLS to allege that brokers and agents, who 'are the consumers of PLS' and the MLSs' listing network services,' were harmed by the Policy."

Attorneys for the DOJ also said that the lower court had improperly disregarded TAN's claims, which must be taken as true when considering a motion to dismiss that the policy "has not forced more listings onto MLSs, but instead has forced off-MLS listings into 'office exclusives' at large brokerages." Office exclusives, which are listings that are marketed only within a brokerage and are an exception to the Clear Cooperation Policy, are controversial because some consider them to be pocket listings.

New companies should be able to compete with MLSs

The second error the lower court made, according to the brief, was to improperly determine at the motion to dismiss stage of the case that TAN's business model was inherently anticompetitive because TAN restricts its members to the top 10 percent of agents in a market. The lower court's analysis incorrectly assumes that increasing the visibility of properties to potential buyers necessarily enhances competition, attorneys for the DOJ said.

"On this view, any practice that adds property listings to MLSs would be procompetitive, while any rival service that is not available to all agents and takes listings away from MLSs would be anticompetitive," they said.

"That premise and the District Court's reasoning ignored market realities and the ways in which competition actually can work. Competition can include new rivals taking market share from a dominant provider, replacing the dominant provider altogether with a better product or service, or creating a niche product preferred by some segments of the market.

"The District Court's reasoning, however, effectively precludes any off-MLS competitor not available to all agents from challenging MLSs in that upstream market — improperly entrenching the dominant market position of the NAR-affiliated MLS system."

The lower court's reasoning would apply to nearly any service that would challenge a dominant MLS because the new service will always have fewer members than the dominant platform when it first launches, they added.

"[N] ew entrants — including those with differentiated business models — must have the opportunity to compete against MLSs at the listing-service level so brokers and agents can choose the service they consider superior, granting options and improved service to consumers in the downstream market," the brief reads.

Two wrongs don't make a right

The third error the lower court made, according to the brief, is suggesting that TAN's own alleged anticompetitive conduct barred the company from challenging NAR's Clear Cooperation Policy.

"The Supreme Court made clear long ago that the purposes of the antitrust laws, including promoting competition and deterring anticompetitive behavior, support private lawsuits against antitrust violators regardless of whether the plaintiff also acted anticompetitively," the brief reads.

"[I]f TAN could be said to have violated the antitrust laws (which the District Court did not determine), it could be held responsible in another case. But TAN's supposed anticompetitive conduct does not preclude it from challenging NAR's Policy," the brief adds.