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MEMORANDUM

November 14, 2011

TO:

FROM: Thomas N. Jacobson

RE: National Association of REALTORS® legal seminar, November 10, 2011

On November 10, 2011, I attended the annual Legal Seminar sponsored by the legal department of the National Association of REALTORS®. The following constitutes a report of the meeting.

The first speaker was Ralph Holmen. Mr. Holmen touched on two matters, Antitrust Law and REALTORS® Party Political Advocacy Initiative.

As part of the antitrust update we were provided with the annual Department of Justice Antitrust Compliance Review. This review is required by the consent decree entered into between the National Association of REALTORS® and the Department of Justice settling the litigation arising from NAR's VOW policy and rules. Mr. Holmen reported during the past year there were no complaints regarding an MLS or Association being out of compliance with the Consent Decree. Mr. Holmen urged all Associations and MLS to continue to be vigilant about maintaining compliance with the Consent Decree and the current VOW rules and regulations.

With regard to recent antitrust matters, the first matter reported on by Mr. Holmen was the case of *MLSONline.com, Inc., and Keith Castonguay vs. Regional Multiple Listing Service of Minnesota, Inc., Minnesota Association of REALTORS®, Edina Realty, Inc., Henry Brandis, John Mosey and Aaron Dickinson*. This case alleges an unlawful restraint of trade arising from an ethics complaint filed by individual association members and adjudicated by the Association and relating to the plaintiffs' use of URLs which include the words "MLS". Because the Code of Ethics and MLS Rules and Regulations do not allow members to use the URL "MLS", the matter was adjudicated by a professional standards panel and the plaintiff was found in violation. The plaintiff challenges the right of a panel to find a violation and a Motion to Dismiss brought by the Association defendants is currently pending before the court.

In the case of *Bolinger, et al v. First Multiple Listing Service, et al.*, a consumer class action for damages alleging price fixing and RESPA violations was brought by an individual against an MLS. Though the MLS is not part of the NAR family of MLSs and is a private MLS, the allegations concern the manner in which the MLS bases its fees. This MLS bases its fees on a

flat fee plus a success fee. The success fee is tied to the sales price. The plaintiff in the matter charges an unlawful kickback under RESPA as well as a violation of the antitrust laws contending the fee is price fixing and signals the commission that shall be charged by the participating participants. A Motion to Dismiss has been filed and is currently pending in this matter.

In the case of *Hyland and Poland vs. HomeServices of America, Coldwell Banker, McMahan Company, Semonin Realtors®*, et al., a consumer class action was brought for damages alleging price fixing and a conspiracy among real estate broker defendants facilitated through NAR, the Kentucky Association of REALTORS® and Kentucky MLSs. This consumer class action alleges price fixing relating to the compensation offered through an MLS.

In *Keller and Century 21 Jeff Keller Realty v. Greater Augusta Association of REALTORS®, Inc.*, Keller was fined for violating an MLS rule precluding advertising in MLS fields viewable by the public, such as property description fields. Keller claimed the MLS action violated the Sherman Act because it suppresses competition from real estate brokers who use the internet to deliver services. The court held Keller only alleged harm to himself and not to the competition in general because the allegations in plaintiff's complaint recount personal grievances about harm to his business and not about the negative consequences to the competitive market.

In the ongoing case of *FTC v. RealComp II, and Allan vs. RealComp II, et al*, the court determined that RealComp could not protect itself under the single entity rule relating to whether or not a matter constitutes a violation of the Sherman Act. The courts have developed a concept known as the single entity rule, which if found in a case, precludes allegations against an entity for violating the Sherman Act. In order to violate the Sherman Act a conspiracy, contract or combination between two or more parties is required. If there is a single entity it cannot conspire with itself to violate the antitrust laws. The court in this instance found that the single entity rule did not apply because the MLS was composed of numerous associations that have used the MLS as a means to facilitate its goals. The court made the analogy with the National Football League case where the 32 teams in the NFL combine their efforts to market through a company known as NFL properties. When an antitrust action was brought by one vendor against NFL properties the vendor was able to circumvent the single entity rule by proving that the NFL teams are independent entities combining for the purpose of marketing and it was really not a single entity but 32 separate entities. In the *RealComp* case the court found the shareholder associations exist to serve their members and the shareholders implemented the will of more established brokers to reduce competition from discount brokers. The court found the shareholders associate for the reasons of primarily promoting the common interest of their members and the MLS was formed for their own members and was really not a single entity.

In *Robertson vs. Sea Pines, et al, and Boland v. Consolidated MLS, et al*, the issue before the court concerned the action by private MLSs to restrict entry to persons living within a jurisdiction or meeting certain other criteria. These rules also included restricting the types of contracts which can be used and entered into the MLS. The MLSs lost this matter previously before the FTC and the case presently pending is a class action suit seeking recovery of damages. These cases are pending and there has not been a final decision on any of these cases.

The next item discussed by Mr. Holmen concerned the REALTORS® Party Political Advocacy Initiative. Many associations are involved in political activities and it is important the associations understand their state laws with regard to participating in political activities. For the

most part *Internal Revenue Code* Section 501(c)(6) corporation can participate in political activities so long as it is not its primary activity. The element that needs to be considered is the tax effect on any donations made to political causes. By way of example, if an association donates \$1,000 it may be liable for 35% or \$350.00 in taxes. Each state has its own reporting requirements, and by way of example, California, through its Fair Political Practices Commission, has extensive reporting requirements which must be followed if political contributions are made.

The next presentation was made by Mike Thiel. Mr. Thiel's first presentation concerned marketing and the law. Mr. Thiel made a presentation concerning the class action suit against America's Got Talent, American Idol, Deal or No Deal and The Apprentice. In each of these instances a call in to a premium telephone number was used as the entry mechanism and the caller was charged 99 cents. The question before the court was whether the call-in constitutes a contest, raffle or sweepstakes. The lawsuit was settled with each plaintiff essentially getting a 99 cent credit and ironically, the lawyers getting more than five million dollars.

The issue raised in these lawsuits is important to associations and MLSs because sometimes a party decides to engage in a contest, raffle or sweepstakes. It is important to understand the difference between a contest, raffle and a sweepstakes and the elements of each one. A raffle consists of three elements: (1) a prize, (2) random chance determining the winner, and (3) consideration given for a chance to win. Almost universally, raffles are considered to be illegal gambling. The one exception of course is lotteries in the various states.

A sweepstakes contains two elements: (1) a prize, and (2) a random chance determining a winner. Normally consideration is not part of a sweepstakes.

A Contest contains three elements: (1) a prize, (2) Skill predominates in determining a winner, and (3) there may or may not be consideration. Though the general advice is to set up a situation that only involves two of the items, a contest has the most likely chance of not being subject to violating a law. If an association or MLS conducts a contest it must make sure the rules are clear to all the participants and is legal in the jurisdiction.

Mr. Thiel also discussed the case of *NAR v. Champions Real Estate*. This case involved an attempted misuse of the REALTOR® marks. In 2008, a group of licensees agreed to drop their association membership in 2009. When the membership was not renewed the membership was terminated and it was acknowledged by the broker. Several individuals continued to use some of the REALTOR® marks. Though non-judicial efforts were initially used to try to persuade the users not to use REALTOR® marks they continued to do such, including providing responses such as all real estate agents are allowed to use the marks and be called a realtor irrespective as to whether or not they were a member. They also alleged all real estate agents are REALTORS® and the United States Supreme Court ruled no person can own any one word. Of course, none of these contentions are true. In January 2010 NAR filed suit against the offending agents and their broker, and on August 22, 2011, the court granted Summary Judgment in favor of NAR. The court found the broker is responsible for the acts of its affiliated licensees. Those licensees used the REALTOR® marks in their real estate business in the same manner as REALTOR® members. The evidence also established the REALTOR® marks are strong marks. By finding the REALTOR® marks are strong marks the court gave a level of credence to the REALTOR® marks that makes it very difficult to challenge those marks as being in the public domain.

The next presentation was a joint presentation by Gregg Larson and Katie Johnson. The presentation concerned syndication. The presenters provided counsel with a checklist of items to be addressed in syndication agreements. Though many of the counsel in the seminar have their own checklist and have done several syndication agreements, the items provided by the presenters was very informative and helpful.

The next presentation was by Cliff Niersbach. Mr. Niersbach provided a report concerning the Internet Data Exchange (IDX) and the actions that were being considered by the MLS committee. At the time of Mr. Niersbach's presentation IDX policy did not allow for IDX feeds to franchisors. I have been advised the MLS Committee decided to continue this policy. There are other groups seeking to obtain IDX feeds and these matters are being considered by the MLS committee.

The next presentation was made by Finley P. Maxson. Mr. Maxson made a presentation concerning the status of the MAP, MARS and SAFE rules.

The MAP rule relates to the Mortgage Acts and Practices Act and applies when providing information about mortgage products to consumers. The Act covers lenders, mortgage brokers, home builders and real estate professionals when providing this information. MAP is triggered when there is a commercial communication about a mortgage credit product. A commercial communication consists of a statement designed to create an interest in a product or service and covers all forms of communications, such as electronic, oral or written. A mortgage credit product is any form of credit offered to a consumer primarily for personal household expenses and secured by a residence. It is a broad definition and covers a long list of items such as mortgage terms, taxes, products sold by the vendor. This application to real estate professionals is significant with regard to lenders daily rate sheets, estimated property ownership costs prepared by lenders and providing consumers with loan product information. The MAP rules require there be no misrepresentation and requires a specified level of record keeping. Persons and entities subject to the MAP Rules must maintain records of all such communications for a period of two years. The penalties for failing to comply can range up to sixteen thousand dollars per day for each violation.

Mr. Maxson noted there had been a stay on the MARS rules as FTC transfers jurisdiction to the CFPB.

The SAFE Act requires each state to create licensing requirements for mortgage loan origination. HUD has a model law and the main issue is seller financing exceptions.

The next presentation was by Laurie Janik and related to litigation and a legislative update. Ms. Janik noted there were 17 cases brought in 2011 that including cases relating to employment, defamation, tortious interference, arbitration challenges, antitrust, professional standards, breach of contract, termination of membership and removal of listings from the MLS.

Ms. Janik first discussed the case of *The Land Man Realty, Inc. v. Weichert, Inc.* In *The Land Man Realty* case, the owner wanted to sell their property but they were not ready to list. They spoke to a broker and told the broker if they found someone the owner would pay a commission. The broker brought someone over, showed them the property and for whatever reason the transaction did not close at that time. Later, the buyer hired another broker and the buyer

eventually purchased the property and paid a commission. During the litigation there were several issues, including whether or not the oral agreement between the owner and the original broker was enforceable. In states such as California, this agreement would be found to be unenforceable because of the statute of frauds and the requirement of having a written agreement. Brokers should never enter into agreements to show property or participate in any brokerage activity without obtaining a written agreement. The other issue in the case concerned whether the case should go to arbitration. Because there was no written agreement concerning sending a dispute to arbitration, the court could not order the matter to go to arbitration.

Sleeper v. Ruffner, involved a commission dispute. The matter was arbitrated before the Association of REALTORS® and \$8,200.00 was awarded to Sleeper. The respondent attempted to challenge the award in court arguing (1) the panel did not allow a brochure regarding procuring costs to be introduced, (2) a letter from the buyer was allowed into evidence but only admitted with the comment that it was of marginal use because the buyer was not present and (3) the respondent was denied a right to be represented by legal counsel despite the fact there were two letters in the file advising respondent of the right to have counsel and the MLS rules and regulations provide for such. The court's analysis found that (1) the arbitration could not be overturned based on an error of law not reviewable by a court following an arbitration and therefore the issue of the brochure was not proper before the court, (2) the judge, after listening to the tape found the comment concerning the letter being of marginal use to the panel was a statement going to whether or not it would be afforded the same weight as in-person testimony, and (3) the question whether the matter should be overturned because of a failure to provide access to legal counsel was without merit because of the two letters that were contained in the file advising the respondent of the right to counsel and the manual which specifically provided for the rules concerning the right to counsel.

Mr. Janik also discussed the California case of *Wherry v. Award Realty, Inc.* In that action two sales associates were employed by a broker and signed the California Association of REALTORS® standard form agreement. The agreements provided for arbitration in the event of any dispute. The sales associates left the firm and brought suit against the broker for gender discrimination and other causes of action. The brokerage firm attempted to invoke the arbitration clause and the Court of Appeals found the arbitration agreement unenforceable because it was procedurally and substantively unconscionable. The court found there was no meaningful opportunity to negotiate the agreement, and in particular the clauses relating to arbitration. The agreement was presented on a take it or leave it basis and the contract terms were found by the court to have shocked their conscience. Since that time the California Association of REALTORS® has changed their form to require mediation prior to going to arbitration. This change has not been tested in the courts.

In the case of *Wilkins V. Pike/Wayne Association of REALTORS®*, a broker had seven branch offices and attempted to input listings in to the Pike/Wayne Association of REALTORS® MLS taken by agents who were not part of Pike/Wayne Association of REALTORS®. The broker contested the MLS taking these listings out and eventually a settlement agreement was entered into between the parties. Thereafter, despite the existence of the settlement, the broker reassumed his practice of putting his listings into the MLS, despite the fact the agents were not members of the MLS. After attempting to enforce the settlement agreement on several occasions and bringing a contempt decree, the broker appears to have finally complied and is not putting listings into the MLS that were taken by agents who were not members of the MLS.

In the case of *Dawes-Ordonez v. Realtor® Association of Greater Fort Lauderdale, Inc.*, the court considered the issue of a photographer's right to photos that were taken for an agent and subsequently used by another agent when the property was resold. The court found the photographer did not have any proprietary rights to the photos, however, a caution should be used when relying on this case and western jurisdictions as photos have often found to be subject to copywriting and to be the proprietary right of the photographer. When such an instance arises, it is advisable for a broker to consult with legal counsel before using the photos taken by a photographer on a previous occasion for a different client.

During the afternoon session the attorneys had the opportunity to discuss amongst themselves various different legal issues including mortgage related issues and newly emerging issues involving such things as "MLS clubs".

Should you have any questions concerning any matter that's addressed in this memorandum, please contact me.