

Testimony Summary of

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before

**Federal Trade Commission
Office of Policy Planning
Public Workshop on E-Commerce**

**October 10, 2002
Washington, D.C.**

I. eRealty's Business Model

eRealty, Inc. is a licensed real estate brokerage company headquartered in Houston, Texas with "bricks and mortar" offices located in twelve (12) major markets throughout the United States. The licensed real estate brokers who manage eRealty's offices are all members of a local Association of Realtors®. As a result, eRealty participates in the Realtor® Association Multiple Listing Services (MLSs) that serve these market areas. eRealty performs the same full range of real estate brokerage services as so called "traditional" brokerage companies. eRealty agents show property, take listings, prepare comparative market analyses of properties, negotiate sales contracts, and assist in the closing of real estate transactions.

But the similarity ends there. eRealty delivers brokerage services to consumers quicker and less expensively than traditional competitors because eRealty invested several million dollars in web based technology. This technology enables eRealty registered customers to receive MLS market information quickly and conveniently via the Internet. By employing new advanced systems and processes eRealty enables eRealty agents to devote their time and expertise to those functions that truly demand the services of a real estate professional; namely, negotiating the terms of a sales contract, and managing the closing of the transaction. As a result, eRealty agents are significantly more productive than agents in offices that do not utilize equivalent technology.

eRealty passes on to consumers the benefits of its agents' increased productivity in the form of less expensive fees. Where permitted by law, eRealty offers buyers a cash rebate, funded from eRealty's commission, of up to one percent (1%) of the sale price of the property. For sellers, eRealty lists property for 4.5% commission, which is 1.5% to 2.5% less than the typical commission charged by a traditional real estate brokerage firm.

II. eRealty's Intranet System.

eRealty can offer lower fees to its customers and clients because it operates a web based "Intranet System" that is accessible at eRealty's web site. An "Intranet" System is distinguished from an "Internet" System by passwords and other security devices that confine access to an "Intranet" System only to certain persons who have pre-qualified for such access. eRealty's Intranet System enables its "registered" customers and clients to request and receive via the World Wide Web the same type of MLS Data that real estate agents routinely deliver to homebuyers upon request via hand delivery, mail, facsimile or email. eRealty's Intranet System is sometimes known as a "Virtual Office Website" or "VOW."

eRealty's Intranet System is **not** simply another Internet site advertising real estate listings to the general public. Before a visitor to eRealty's web site can gain access to MLS Data about available properties for sale, the visitor must "register" as a user of eRealty brokerage services. The eRealty online registration process requires a visitor to supply an email address, and create a User ID and password to be used to access eRealty's Intranet System. The visitor must then "click" on an "I accept" icon signifying the visitor's acceptance of eRealty's Terms of Use (TOU) Agreement. The eRealty TOU creates a "customer" or "client" relationship between eRealty and the visitor. eRealty's TOU is a legally enforceable contract, which obligates the registered eRealty user to refrain from using MLS Data for any purpose other than the non-commercial identification of property that the registrant is legitimately ready, willing and able to acquire.

eRealty's registration process and TOU are not "shams" designed solely to evade local MLS rules that regulate the advertising of MLS Data on MLS Participants' unrestricted public web sites. eRealty's statistics show that only fifteen percent (15%) of the visitors to its web site agree to the TOU and actually complete the registration process, which enables eRealty to supply them with MLS Data about listings that meet their criteria.

In addition to requiring acceptance of eRealty's TOU, eRealty's Intranet System will not allow a registrant to actually access any MLS Data until the registrant enters a "confirmation code" that eRealty emails to the registrant when the registration process is complete. The confirmation code insures that the email address provided by the registrant is valid and operational. eRealty's Intranet System technology also includes devices that minimize the likelihood that its registrants will access MLS Data for unauthorized purposes. For example, eRealty registrants may receive no more than 100 properties in response to a single search request. Such limitations are designed to prevent a person from posing as an eRealty registrant and extracting all, or significantly all, of an MLS Database compilation for unauthorized purposes.

III. Marketplace Opposition to eRealty's Business Model

Since it commenced operations in 1998, eRealty has encountered various forms of opposition from competing real estate brokerage companies to eRealty's price competition. This opposition has taken the form of refusals by individual competitors to do business with eRealty on the same terms as they do business with "traditional" brokerage firms. eRealty's business model has also been the object of organized attacks by local Associations of Realtors and their wholly owned MLSs. This latter form of attack has most recently been manifested by a set of proposed amendments to the Multiple Listing Policy of the National Association of Realtors® (NAR) designed specifically to empower eRealty competitors to prevent eRealty from delivering MLS Data about the competitors' listings to eRealty customers and clients via eRealty's Intranet System

The NAR MLS Policy is an industry self regulatory scheme that controls the operations of MLSs operated by Associations of Realtors®. Almost all MLSs in the United States are operated by entities owned and operated by local Associations of Realtors®. NAR promulgates a Multiple Listing Policy that establishes a uniform set of local MLS Rules and Regulations. All MLSs owned or controlled by local Associations of Realtors® must adopt Rules and Regulations that are consistent with NAR's MLS Policy, or the local Associations face revocation of their NAR charter.

The NAR affiliated Association of Realtors® in Austin, Texas attacked eRealty's business model soon after eRealty commenced its Austin operations in 1999. In early 2000, the Austin Board of Realtors (ABOR) and its wholly owned MLS, the Austin/Central Texas Realty Information Service, Inc. (ACTRIS), contended that eRealty's use of its Intranet System to deliver MLS Data to its clients in the Austin market violated a **new** rule that ABOR adopted shortly after eRealty launched its operations in Austin. The new rule prohibited the Internet display of ACTRIS MLS Data except on ACTRIS "approved" sites. ACTRIS also contended that eRealty was infringing upon ACTRIS' copyright in its MLS Database compilation. ACTRIS threatened to terminate eRealty's MLS privileges unless it removed ACTRIS MLS Data from its Intranet System. When eRealty declined to do so, ACTRIS and ABOR sued eRealty for copyright infringement.

eRealty responded with a counterclaim for violation of the Sherman Act and moved for a preliminary injunction to prohibit ACTRIS from terminating eRealty's MLS privileges. The district court granted eRealty's petition for the preliminary injunction, holding that ACTRIS and ABOR did not have any legitimate procompetitive justification for prohibiting eRealty from delivering MLS Data to its customers and clients through eRealty's Intranet. Absent any legitimate justification for discriminating against eRealty's business model, the court concluded that ACTRIS' and ABOR's actions were likely violations of the Sherman Act.

Since the beginning, MLS listing database exchange systems have been used to allow participants to effectively service their customers and clients by sharing with them

a "reasonable number" of property listings, regardless of who listed the property, that fit the customer or client's criteria. eRealty based its business model on an innovative way to share a "reasonable number" of property listings with the company's customers and clients. As Chief United States District Judge James R. Nowlin ruled on March 30, 2000, "The evidence has shown that traditional Realtors distribute the MLS Data to clients via paper, e-mail, and fax. eRealty distributes MLS Data to its clients using its web site as the medium of distribution instead of paper, e-mail or fax. The Court finds all these methods of distribution equal."

Shortly after the injunction ruling, NAR mandated a new set of MLS Rules ("IDX Policies") for all Realtor Association MLSs that required them to offer a platform that would allow MLS Participants to display on their broker owned public advertising sites MLS information about the listings of other MLS Participants, subject to the right of a listing broker to withhold his or her listings from such display. ABOR and ACTRIS immediately adopted the new NAR IDX Policy, and thereafter withdrew their copyright infringement claims against eRealty, and disavowed their intent to terminate eRealty's MLS privileges. ABOR and ACTRIS then asked the court to dissolve its preliminary injunction and also to dismiss with prejudice eRealty's antitrust counterclaim.

Since ABOR and ACTRIS were no longer threatening eRealty with termination of its MLS privileges, the court agreed to dissolve its preliminary injunction. But the court refused to dismiss eRealty's antitrust claims. The court found that eRealty had stated an antitrust claim based on ABOR's and ACTRIS' attack on eRealty's Intranet System. The court expressly invited eRealty to renew its preliminary injunction application if eRealty competitors used their right to "opt out" of ACTRIS' IDX Program to deprive eRealty of the ability to deliver MLS Data via its Intranet System.

The parties eventually settled the litigation in early 2001, but not before the NAR's General Counsel issued an opinion that eRealty's Intranet System or "VOW" was not subject to ACTRIS' IDX Policy that regulated Internet advertising of MLS Data, but rather was governed by the same ACTRIS Rules that govern the delivery of MLS Data to Participants' customers or clients in an "offline" medium. Simply put, the NAR General Counsel adopted the exact reasoning adopted by the federal district court when it issued its preliminary injunction against ABOR and ACTRIS.

After the settlement of the ABOR litigation, eRealty did not encounter significant attacks from other MLSs until eRealty implemented a Joint Marketing Agreement with Yahoo in early 2002. Under the terms of eRealty's Yahoo Agreement, Yahoo directs homebuyers and sellers interested in a potential transaction in an eRealty market area to an eRealty web site created specifically to serve Yahoo users.

When the eRealty sites serving Yahoo users went "live", eRealty's competitors flooded eRealty, local MLSs, and NAR, with complaints and demands that "something be done" about eRealty's delivery of MLS Data to clients and customers via the Intranet. Although the proceedings were never commenced, one MLS threatened both Yahoo and eRealty with copyright infringement litigation, and eRealty with violations of the

MLS's Rule and Regulations, in terms very similar to the unsuccessful claims advanced by ABOR and ACTRIS.

IV. NAR's Response to eRealty's Business Model

As soon as eRealty and Yahoo implemented their Agreement, NAR immediately withdrew its position first articulated in the settlement of the ABOR litigation that VOWs, like eRealty's, are to be governed by the same MLS Rules governing Participants' "offline" delivery of MLS Data to customers and clients. Professing in the Spring of 2002 that it had "no policy" on VOWs, NAR then formed an Internet Marketing Work Group to "study" VOW operations. In May of 2002 the NAR Work Group proposed a set of amendments to the NAR MLS Policy that would permit any eRealty competitor who is threatened by eRealty's price competition to prohibit eRealty from using its Intranet System to deliver to eRealty customers and clients MLS Data about the competitor's listings. These amendments are scheduled to be acted upon by the NAR Board of Directors at their upcoming meeting in early November.

NAR's announcement in the Spring of 2002 that it had "no policy" on VOW display of MLS Data effectively repudiates the 2001 opinion of NAR's General Counsel that formed the basis for the settlement of the eRealty/ABOR litigation. Before abandoning this position in early 2002, NAR reiterated at least twice in official statements explaining in its IDX Policy that VOWs are to be governed by the same MLS Rules that apply to "offline" delivery of MLS Data to a Participants' customers and clients rather than the IDX Policy that applies to the Internet advertising of MLS Data.

Clearly, the growing success of eRealty's business model, powered in part by eRealty's Agreement with Yahoo, has prompted NAR to consider succumbing to pressure from eRealty's competitors to "do something" about eRealty's price competition. The proposed response that NAR is considering is to force Realtor® Association MLSs to adopt MLS Rules that would authorize eRealty competitors to prohibit eRealty from having all MLS listings available for delivery to eRealty's clients. The NAR Work Group justifies this proposed Electronic Data Display Policy ("EDD Policy") on the grounds that a listing broker has the unfettered right, based on purely competitive considerations, to control the medium through which competitors will deliver to their customers or clients MLS Data about the listing broker's listings.

This proposed EDD Policy represents a form of industry self regulation expressly designed to frustrate price competition resulting from the creative application of web based technology to the real estate brokerage business. Ironically, it also represents a frontal assault on the undisputed procompetitive effects that MLSs have had on real estate and real estate brokerage markets for generations, and which NAR has fostered since the 1960's. eRealty respectfully requests the FTC to use its consumer advocacy power to urge NAR's Directors to reject the proposed EDD Policy as currently drafted. Instead, NAR should adopt an EDD Policy that encourages, rather than stifles, the use of web based technology to make the real estate brokerage business more efficient and responsive to American homebuyers and sellers.