UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Civil No. 72-499
	)	Filed:
GREATER PITTSBURGH BOARD OF REALTORS,	)	
EAST SUBURBAN MULTILIST REAL ESTATE BROKERS, INC.,	)	Entered:
SOUTH HILLS MULTILIST, INC.,	)	
NORTH SUBURBAN MULTILIST, and GREATER PITTSBURGH MULTILIST COUNCIL,	)	
	)	
Defendants.	)	
_____	)	

PRESIDING JUDGE TO BE DETERMINED

MOTION OF THE UNITED STATES
FOR MODIFICATION OF THE FINAL JUDGMENT

The United States moves this Court to modify the Final Judgment entered in this case.

I. BACKGROUND

The Complaint, filed on June 21, 1972, alleged that the defendants violated Section 1 of the Sherman Act by agreeing to fix commission rates in connection with the sale of property in the Pittsburgh metropolitan area. The complaint alleged, *inter alia*, that the defendants published, circulated, and adhered to the agreed-upon uniform rates of commissions and fees. On April 16, 1973, the United States filed its proposed consent judgment. The Court entered the judgment on May 21, 1973.

The Realtors Association of Metropolitan Pittsburgh ("RAMP") is the successor-in-interest to defendant Greater Pittsburgh Board of Realtors. RAMP is a local real estate board

which governs the membership and professional responsibility of the Realtors who list and show properties in the Pittsburgh metropolitan area. Pursuant to section III of the Final Judgment, the consent decree is binding on RAMP.

Traditionally, real estate agents have charged sellers of property a commission based on a percentage of the sales price of the property sold. The majority of real estate agents still price their services in this manner. However, some real estate agents are now using alternative business models and charging flat fees for their services. Typically, these models offer property sellers savings *vis a vis* traditional commission based services. At least one discount broker, Help-U-Sell Dixie Realty ("HUS"), has entered the Pittsburgh market with an alternative business model.

In order to educate consumers about the availability of alternatively priced services, discount brokers need to advertise information about their fees and service plans. RAMP currently publishes Pittsburgh Homes Guide by Realtors ("Homes Guide"), a real estate listings magazine. The magazine contains advertisements purchased by member real estate professionals with information about available homes for sale and the services they provide. Homes Guide is the only real estate advertising publication covering all of the Pittsburgh metropolitan area. Homes Guide is a popular vehicle for Pittsburgh area real estate brokers to advertise their services to consumers and is significantly less expensive than newspaper advertising.

HUS has attempted to advertise fees and potential savings in Homes Guide. RAMP has informed HUS that it will not publish advertising containing commission rates or cost savings claims because the Final Judgment prohibits such publication. Section IV(C) of the Final Judgment enjoined the defendants from "[a]dopting, suggesting, publishing or distributing any

rate or amount of commissions or other fees for the sale, lease or management of real estate. . . ."

Section IV(C) of the Final Judgment served a useful purpose and was entered to remedy the defendants' alleged price fixing which artificially raised prices above their competitive level. The intent of the decree was to eliminate collusive behavior and promote competitive commissions among real estate brokers. With the growth of discount brokerage services, however, the provision no longer serves competition and has the effect of restricting legitimate advertising of competitive rates. The United States, therefore, moves to eliminate the words "publishing" and "distributing" from section IV(C) of the judgment so that RAMP is not prohibited from publishing competing commission rates.

Because IV(C), due to changed circumstances, now serves principally to inhibit competition, the United States moves to modify section IV(C) to enjoin the defendants only from:

> (C) Adopting or suggesting any rate or amount of commissions or other fees for the sale, lease or management of real estate; provided, however, that surveys and studies may be conducted, published and distributed where not forbidden by Paragraph D of this Section IV of the Modified Final Judgment.

To further clarify the decree, the United States moves to amend paragraph IX, which begins, "[n]othing in this Final Judgment shall be deemed to prohibit," to add the following language:

> (C) The publication of advertisements that include the commission rates of individual brokers, provided that the Defendants shall not adopt or suggest rates as proscribed by Section IV(C).

To clarify that RAMP has not consented to the Modified Final Judgment, the United States moves to amend the preamble paragraphs of the Final Judgment. Specifically, the United States moves to replace each instance of the phrase "this Final Judgment" with "the original Final Judgment." In addition, the United States seeks to add the clause, "and upon the United States'

sole motion to modify the Final Judgment.

II. THE LEGAL STANDARDS APPLICABLE TO MODIFICATION OF AN ANTITRUST JUDGMENT WITH THE CONSENT OF THE GOVERNMENT

This Court has jurisdiction to modify the Final Judgment pursuant to Paragraph XI of the Judgment, the Federal Rules of Civil Procedure, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); *see also* In re Grand Jury Proceedings, 827 F. 2d 868, 873 (2d Cir. 1987). Where, as here, the United States, as plaintiff, unilaterally proposes a modification to a consent judgment and the modification does not further restrict the defendants' rights or actions, the Court should apply the same standard as when the United States and defendants both consent to a modification. When the government unilaterally seeks to modify a decree, the court evaluates the modifications in light of both how the additional burdens imposed by the proposed modifications affect the defendant's due process rights and the public interest. *Cf.* Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985). However, where both the government and the defendant consent to modifications, the court focuses solely on the public interest aspects of the calculus. *See, e.g.*, United States v. W. Elec. Co., 993 F. 2d 1572, 1576 (D.C. Cir. 1993); United States v. W. Elec. Co., 900 F. 2d 283, 305 (D.C. Cir. 1990); United States v. Loew's, Inc., 783 F. Supp. 211, 213 (S.D.N.Y. 1992); United States v. Columbia Artists Mgmt., Inc., 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03 (N.D. Ill. 1975)). Here, the proposed modifications do not further impinge the defendant's rights, so the court need only evaluate the proposed modifications in light of the public interest. Thus, the issue before the Court is whether modification is in the public interest. This is the same standard that a district court applies in reviewing an initial consent judgment in a

government antitrust case. The judiciary's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the government, is to "inquire . . . into the purpose, meaning, and efficacy of the decree." United States v. Microsoft, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

The purpose of the antitrust laws is to protect competition. *See, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170 (1964) (antitrust laws reflect "a national policy enunciated by the Congress to preserve and promote a free competitive economy"). The relevant question before the court therefore is whether modification of the Judgment would serve the public interest in "free and unfettered competition as the rule of trade." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *see also* United States v. W. Elec. Co., 900 F.2d at 308; United States v. Am. Cyanamid, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 405 U.S. 1101 (1984); United States v. Columbia Artists Mgmt., 66 2 F. Supp. 865, 870 (S.D.N.Y. 1987). Here, the Court should modify the decree as requested because it will remove a legal roadblock to brokers who want to advertise lower commissions to the benefit of home buyers and sellers.

Although the proposed modification is designed to allow RAMP more freedom in choosing what it can publish in its magazine, RAMP has declined to join the United States in its motion to modify the Final Judgment and has failed to offer an explanation to the United States as to why the public interest is served by the restriction.

III. THE PROPOSED MODIFICATION SATISFIES THE PUBLIC INTEREST STANDARD

The purpose behind the consent decree's prohibition on advertising stemmed from the publication of prices after the defendants had agreed on commission rates among themselves. The primary concern with the conduct that led to the decree was the agreement on prices, not the

publication of unilaterally determined prices. Modifying the consent decree as the United States' proposes will permit RAMP to allow price advertising but will still enjoin RAMP from "adopting" or "suggesting" fees for real estate services.

Further, "[r]estrictions on [truthful] advertising are a form of output restriction in the production of information useful to consumers."[1] Modifying the consent decree as the United States proposes will satisfy the public interest standard because price competition will be enhanced by allowing consumers access to more information about different prices charged by individual real estate agents. Further, the public will benefit from access to information about differing rate structures and fees charged by different agents and such information will reduce search costs by consumers seeking real estate services.

IV. PUBLIC COMMENT PERIOD

The United States does not believe that this modification is subject to the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h). However, in this case, the United States intends to follow the comment procedures outlined in the attached Explanation of Procedures.

It is the policy of the United States that an appropriate effort be taken to notify potentially interested persons of the pendency of the motion. In this case, the United States will publish a notice announcing the motion to modify in the Federal Register and the Pittsburgh Post Gazette, summarizing the motion and the proposed modified final judgment, describing the procedures for obtaining copies of the relevant papers and inviting the submission of comments within 30 days of publication. Within a reasonable time after the comment period, the United States will file any

[1]Philip Areeda, Antitrust Law, ¶ 2023b1, 184, Volume XI (2nd Ed.)

comments it receives and its responses with the Court. The United States requests that the Court not rule upon the motion until the United States has filed any comments and its responses or has notified the Court that no comments were received. The procedure is designed to notify all potentially interested persons that a motion to modify the Final Judgment is pending and provide them adequate opportunity to comment thereon.

V. CONCLUSION

For the foregoing reasons, the United States requests that the Court enter the proposed Order Modifying Judgment to enjoin the defendants from:

> (C) Adopting or suggesting any rate or amount of commissions or other fees for the sale, lease or management of real estate; provided, however, that surveys and studies may be conducted, published and distributed where not forbidden by Paragraph D of this Section IV of the Modified Final Judgment.

and to amend paragraph IX, which begins, "[n]othing in this Final Judgment shall be deemed to prohibit," to add the following language:

> (C) The publication of advertisements that include the commission rates of individual brokers, provided that the Defendants shall not adopt or suggest rates as proscribed by Section IV(C).

and to amend the preamble paragraphs to state:

> Plaintiff, United States of America, having filed its Complaint herein on June 21, 1972, and Plaintiff and Defendants by their respective attorneys, having consented to the making and entry of the original Final Judgment, without admission by any party in respect to any issue and without this Final Judgment constituting evidence or an admission by any party hereto with respect to any such issue;
>
> NOW, THEREFORE, before any testimony has been taken herein, without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties to the original Final Judgment, and upon the United States' sole motion to modify the Final Judgment, it is hereby ORDERED, ADJUDGED and DECREED as follows.

Dated this 28th day of June, 2005

Respectfully Submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

_____/s /_____

Leslie Peritz
PA Bar No. 87539
Litigation II Section
Antitrust Division
U.S. Department of Justice
1401 H Street, NW, Ste. 3000
Washington, DC 20530
202-514-9602

Erika L. Meyers
Joan Hogan
Litigation III Section
Antitrust Division
U.S. Department of Justice
325 7th St., NW, Ste. 300
Washington, DC 20530
202-514-8374