APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5065

NATIONAL ASSOCIATION OF REALTORS,

Appellee

v.

UNITED STATES OF AMERICA, *et al.*,

Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02406)

Argued December 1, 2023 Decided April 5, 2024

Frederick Liu, Attorney, U.S. Department of Justice, argued the cause for appellants. On the briefs were *Daniel E. Haar*, *Nickolai G. Levin*, and *Steven J. Mintz*, Attorneys.

Christopher G. Michel argued the cause for appellee. With him on the brief were *Michael D. Bonanno*, *William A. Burck*, and *Rachel G. Frank*.

Andrew R. Varcoe, *Djordje Petkoski*, and *Jacob Coate* were on the brief for *amicus curiae* Chamber of Commerce of the United States of America in support of appellee.

Before: HENDERSON, WALKER and PAN,
Circuit Judges.

Opinion for the Court filed by *Circuit Judge* PAN.

Dissenting opinion filed by *Circuit Judge* WALKER.

PAN, *Circuit Judge*. The Antitrust Division of the United States Department of Justice ("DOJ") opened an investigation of potentially anticompetitive practices in the real-estate industry that were implemented by the National Association of Realtors ("NAR"). In November 2020, DOJ and NAR settled the case. In addition to filing a Proposed Consent Judgment in the district court, DOJ sent a letter to NAR stating that DOJ had closed its investigation of certain NAR practices and that NAR was not required to respond to two outstanding investigative subpoenas. Eight months later, in July 2021, DOJ exercised its option to withdraw the Proposed Consent Judgment, reopened its investigation of NAR's policies, and issued a new investigative subpoena. NAR petitioned the district court to set aside the subpoena, arguing that its issuance violated a promise made by DOJ in the 2020 closing letter. The district court granted NAR's petition, concluding that the new subpoena was barred by a validly executed settlement agreement. We disagree. In our view, the plain language of the disputed 2020 letter permits DOJ to reopen its investigation. We therefore reverse the judgment of the district court.

I.

NAR is a trade organization with 1.4 million members who work in the real-estate industry. For decades, NAR has promulgated a "Code of Ethics," along with other related rules, which set policies that NAR mem-

bers must follow when brokering real-estate transactions.

In 2018, DOJ's Antitrust Division opened a civil investigation into certain NAR policies, after receiving a complaint from an industry participant. As part of the investigation, DOJ issued two subpoenas, or Civil Investigative Demands ("CIDs"),[1] seeking information and documents related to NAR's operation of "multiple-listing services" ("MLSs"). An MLS is an online, subscription-based database that lists properties that are on the market in a particular geographic area. Brokers representing sellers (or "listing brokers") post information about homes that are for sale on an MLS, where buyer-brokers can view that information. There are hundreds of MLSs operating in the United States, and some MLSs have tens of thousands of participants, comprised primarily of members of NAR's local associations and boards.

DOJ served its first CID — CID No. 29935 ("CID No. 1") — in April 2019. That CID sought information regarding various practices and procedures adopted by NAR, including a longstanding policy known as the "Participation Rule." Under the Participation Rule, which NAR first implemented in the 1970s, listing brokers must offer the same commission to all buyer-brokers when listing a property on an MLS. *See* NAR, *Handbook on Multiple Listing Policy* 34 (2018), https://perma.cc/AA7S-UFSB. According to DOJ, the

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[1] A CID is a type of administrative subpoena. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 585 (D.C. Cir. 2001). The Antitrust Civil Process Act authorizes DOJ to issue a CID whenever it "has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a).

Participation Rule restrains price competition among buyer-brokers and causes them to steer customers to higher-commission listings.

In June 2020, DOJ served its second CID — CID No. 30360 ("CID No. 2") — which sought information from NAR about a newly adopted rule called the "Clear Cooperation Policy." That policy requires listing brokers to post a property on an MLS within one day of when they begin to market the property. *See* NAR, *Handbook on Multiple Listing Policy* 32 (2020), https://perma.cc/8BPG-UBGT. DOJ believes that the Clear Cooperation Policy restricts home-seller choices and precludes competition from new listing services.

NAR expressed its desire to settle the case. Thus, in July 2020, the parties began proposing "the outlines of a possible resolution." J.A. 243. During the negotiations, NAR asked DOJ to agree to refrain from investigating the Participation Rule for ten years.[2] DOJ refused, stating that "a commitment to not challenge NAR rules and policies in the future [was] a nonstarter, especially in light of longstanding Department policies concerning settlements that affect future potential investigations." *Id*. at 248. Thereafter, DOJ reiterated during the negotiations that it would not "commit to never challeng[ing] NAR rules and policies in the future in light of longstanding Department policies on such commitments." *Id*. at 252 (July 29, 2020, letter); *see also id*. at 258–59 (Aug. 12, 2020, letter).

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[2] NAR requested that DOJ (1) "stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years"; and (2) "send a closing letter to NAR confirming that it has no obligation to provide additional information or documents in response to CID No. [1] or CID No. [2]." J.A. 247.

The parties ultimately agreed to enter a Proposed Consent Judgment, which specifically addressed four NAR policies other than the Participation Rule and the Clear Cooperation Policy.[3] The Proposed Consent Judgment also included a "Reservation of Rights" clause that generally preserved DOJ's ability to bring actions against NAR in the future. The Reservation of Rights clause provided that "[n]othing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards." J.A. 176. NAR agreed to that language, which was proposed by DOJ, but only on the condition that DOJ provide a "closing letter" concerning the then-pending investigation of the Participation Rule and the Clear Cooperation Policy. *Id*. at 126 ("NAR will only agree to sign a consent decree including this [Reservation of Rights] provision if DOJ provides written confirmation, prior to the execution of the decree, that it will issue a closing letter."). NAR asked that the closing letter confirm that DOJ closed the existing investigation and that NAR had no obligation to respond to the two outstanding CIDs. DOJ agreed, stating that it would send the requested closing letter

[3] The policies addressed in the Proposed Consent Judgment were: (1) NAR's "Commission-Concealment Rules," under which affiliated brokers could conceal from homebuyers the unilateral blanket commission offered to buyer-brokers; (2) NAR's "Free-Service Rule," under which buyer-brokers were permitted to represent to homebuyers that their services were free; (3) NAR's "Commission-Filter Rules and Practices," under which brokers could filter properties on an MLS by the rate of commission; and (4) NAR's "Lockbox Policy," which prohibited non-NAR brokers from accessing the lockboxes that contain the keys to listed properties.

"once the consent decree is filed." *Id*. at 128 (Oct. 28, 2020, email).

On November 19, 2020, the government did two things: (1) It filed the signed Proposed Consent Judgment in the district court, along with a Complaint and a "Stipulation and Order"; and (2) it sent the closing letter to NAR's counsel. None of the documents filed in court mentioned the Participation Rule or the Clear Cooperation Policy. DOJ's Complaint alleged that the four other NAR policies that were the subject of the Proposed Consent Judgment violated Section 1 of the Sherman Act, while the Proposed Consent Judgment contained settlement terms related to those four other policies. *See supra* note 3 (describing the NAR policies covered by the Proposed Consent Judgment). The Stipulation and Order stated that NAR would "abide and comply" with the Proposed Consent Judgment, pending the entry of a final judgment in the case by the district court. J.A. 148. It also provided that "[t]he United States may withdraw its consent at any time before the entry of the proposed Final Judgment." *Id*. at 147.

The closing letter sent to NAR's counsel ended the then-pending investigation of the Participation Rule and the Clear Cooperation Policy, stating:

> Dear Mr. Burck [NAR's counsel]:
>
> This letter is to inform you that the Antitrust Division has closed its investigation into [NAR's] Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.
>
> No inference should be drawn, however, from the Division's decision to close its investigation

> into these rules, policies or practices not addressed by the consent decree.
>
> Sincerely,
>
> /s/ Makan Delrahim [Assistant Attorney General Antitrust Division]

J.A. 178.

DOJ published the Complaint, the Proposed Consent Judgment, and a Competitive Impact Statement in the Federal Register, as mandated by the Tunney Act. *See United States v. National Association of REALTORS® Proposed Final Judgment and Competitive Impact Statement*, 85 Fed. Reg. 81,489 (Dec. 16, 2020); 15 U.S.C. § 16(b). The Competitive Impact Statement included a "description of events" giving rise to the allegations in the Complaint, and explained the parties' Proposed Consent Judgment, the remedies available to potential private litigants, the procedures available to modify the negotiated terms, alternatives to settlement that the government considered, and the standard of review governing the court's approval of the Proposed Consent Judgment. *See* J.A. 179–200. The Tunney Act requires that the United States "receive and consider any written comments" pertaining to the published materials during a mandatory 60-day period. 15 U.S.C. § 16(d). Thereafter, the district court must determine whether the proposed consent judgment is in the "public interest" before issuing a final judgment. *Id*. § 16(e).

In July 2021, after an unsuccessful negotiation to modify the parties' settlement agreement, DOJ exercised its option to withdraw the Proposed Consent Judgment. The government voluntarily dismissed the Complaint and filed a notice informing the district court of the withdrawal of its consent. Five days later, DOJ issued

a new subpoena — CID No. 30729 ("CID No. 3") — which requested information from NAR regarding the Participation Rule and the Clear Cooperation Policy, as well as several policies addressed in the withdrawn Proposed Consent Judgment.

NAR petitioned the district court to set aside CID No. 3, arguing that its issuance contravened the parties' binding settlement agreement, which included DOJ's promise in the November 2020 closing letter to close its investigation of the Participation Rule and the Clear Cooperation Policy. Specifically, NAR argued that it had satisfied its obligations under the settlement agreement by beginning to perform the requirements of the Proposed Consent Judgment, and that DOJ breached the overall agreement by issuing CID No. 3 in contravention of the closing letter. The district court granted NAR's petition, agreeing with NAR that CID No. 3 was barred by "a validly executed settlement agreement." *Nat'l Ass'n of Realtors v. United States*, 2023 WL 387572, at *3 (D.D.C. Jan. 25, 2023). The court concluded that the parties' settlement agreement included the November 2020 closing letter; and that "the government breached the agreement by reopening the investigation into those same rules and serving the new CID." *Id*. at *4.[4] DOJ timely appealed. We have jurisdiction under 15 U.S.C. § 1314(e) and 28 U.S.C. § 1291.

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[4] NAR also petitioned the district court to modify CID No. 3 because it "ma[de] demands that are overly broad, unduly burdensome, and irrelevant to any permissible investigation." J.A. 15. The district court declined to address NAR's breadth and burdensomeness objections because it set aside the CID in full. Because the district court did not rule on NAR's request for modification, we decline to reach the issue.

II.

The Antitrust Civil Process Act ("ACPA") authorizes courts to "set[] aside" a CID based on "any failure of such demand to comply with the provisions of [the ACPA], or upon any constitutional or other legal right or privilege." 15 U.S.C. § 1314(b). The parties agree that a CID is unenforceable if it is barred by a valid settlement agreement. *See* NAR Br. 18; DOJ Br. 28. The party served with a CID bears the burden of demonstrating that it should be set aside. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

A settlement agreement is a contract. *See Vill. of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). The "[i]nterpretation of the plain language of a contract is a question of law subject to de novo review by this court." *LTV Corp. v. Gulf States Steel, Inc. of Ala.*, 969 F.2d 1050, 1055 (D.C. Cir. 1992); *see also Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 278 (D.C. Cir. 2014) (de novo review for the question of whether a contract is ambiguous). We give deference, however, to the district court's factual findings if they are at issue on appeal. *See United States v. Microsoft Corp.*, 147 F.3d 935, 945 n.7 (D.C. Cir. 1998). In determining the meaning of federal contracts, we apply "federal common law," which looks to the Restatement of Contracts. *United States v. Honeywell Int'l Inc.*, 47 F.4th 805, 816 (D.C. Cir. 2022); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001).

The district court determined that the Proposed Consent Judgment and the closing letter were components of a single, binding settlement agreement. *See Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4. The parties have not meaningfully briefed the potential unenforceability of the closing letter due to the withdrawal of the Proposed Consent Judgment, and

both parties agree that "[t]he key question is . . . whether DOJ's promise [in the closing letter] to close the investigation and rescind the CIDs left it free to resume the investigation and reissue the CIDs based solely on its preference to do so." NAR Br. 14; *see also* Oral Arg. Tr. at 3:13–16, Nat'l Ass'n of Realtors v. United States (No. 23-5065) (counsel for the government stating that "[t]he question is whether in addition to agreeing to close its investigation the Division made a commitment not to reopen it. The answer is no.").

We therefore accept the parties' apparent assumption that the closing letter is a binding agreement that remains enforceable, notwithstanding the withdrawal of the Proposed Consent Judgment. *See, e.g.*, NAR Br. 43 n.11; Oral Arg. Tr. at 11:16–12:6. We adopt the framing of the dispute that is advanced by the parties because "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). In other words, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).[5]

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[5] Nevertheless, we observe that the closing letter likely became unenforceable when the Proposed Consent Judgment was lawfully withdrawn because both documents were essential parts of the parties' settlement agreement: NAR agreed to enter the Proposed Consent Judgment on the condition that DOJ issue the closing letter, J.A. 126; and NAR contends that the terms of the closing letter are in effect because it had begun performing its obligations under the Proposed Consent Judgment "in reliance on the terms of the settlement," NAR Br. 8 (citing J.A. 23–24). The closing letter and Proposed Consent Judgment thus do not appear to be severable. *See Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (holding that an unenforceable term is severable from an agreement if it is "not [] essential to a contract's

III.

As framed by the parties, the issue before us is narrow. DOJ argues only that the plain language of the closing letter does not bar it from reopening its investigation and issuing a new CID regarding the Participation Rule and the Clear Cooperation Policy. We agree.

A.

"Under general contract law, the plain and unambiguous meaning of an instrument is controlling." *WMATA v. Mergentime Corp.*, 626 F.2d 959, 960–61 (D.C. Cir. 1980). Thus, if the text of the closing letter is unambiguous, "that is the end of the matter" and we need not address the parties' negotiation history or any other extrinsic evidence. *Brubaker v. Metro. Life Ins. Co.*, 482 F.3d 586, 590 (D.C. Cir. 2007); *Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010).

The disputed language of the closing letter states:

> [T]he Antitrust Division has closed its investigation into [NAR's] Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.

J.A. 178.

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consideration" (citing *Restatement (Second) of Contract*s § 184 (Am. L. Inst. 1981)) (additional citations omitted)). Moreover, we note that the closing letter, viewed on its own, appears to be a unilateral promise unsupported by consideration or partial performance, which typically would be unenforceable as a matter of contract law. *See Restatement (Second) of Contracts* § 71 (Am. L. Inst. 1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

The plain meaning of that provision is that DOJ closed its then-pending investigation and relieved NAR of its obligation to respond to two specifically identified CIDs. We discern no commitment by DOJ — express or implied — to refrain from either opening a new investigation or reopening its closed investigation, which might entail issuing new CIDs related to NAR's policies. Put simply, the fact that DOJ "closed its investigation" does not guarantee that the investigation would stay closed forever. The words "close" and "reopen" are unambiguously compatible. *See Close*, Merriam-Webster Dictionary ("to bring to an end or period"); *Reopen*, Merriam-Webster Dictionary (legal definition) ("to resume the discussion or consideration of (a *closed* matter)" (emphasis added)). Thus, DOJ's decision to "reopen" the investigation and to issue CID No. 3 was consistent with the closing letter's "plainly expressed intent." *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015) (cleaned up).

Our interpretation of the operative language is supported by another provision in the closing letter, as well as an interpretive canon of construction. First, DOJ included a "no inference" clause in the closing letter, which states that "[n]o inference should be drawn . . . from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." J.A. 178. That clause confirms that DOJ did not intend to imply any additional terms in the letter, such as one prohibiting a reopened investigation. Second, the unmistakability principle, a canon of construction, instructs that "a contract with a sovereign government [should] not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act . . . , nor [should] an ambiguous term of a grant or contract be construed as a conveyance or

surrender of sovereign power." *United States v. Winstar Corp*., 518 U.S. 839, 878 (1996) (plurality op.). In other words, we will not interpret a contract to cede a sovereign right of the United States unless the government waives that right unmistakably. The closing letter contains no "unmistakable term" ceding DOJ's power to reopen its investigation: To the contrary, it includes a "no inference clause" that explicitly disclaims any intent to include unstated terms. We therefore decline to read an unwritten term into the agreement that limits the government's prosecutorial authority. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).[6]

We note that NAR should not have been misled by the words used in the closing letter because investigations are routinely "closed" and then later "reopened." For example, in *Schellenbach v. SEC*, the National Association of Securities Dealers ("NASD"), a self-regulatory organization, "reopen[ed]" a securities-law investigation after initially issuing a letter "signaling the end of [its] investigation." 989 F.2d 907, 909–11 (7th Cir. 1993). The Seventh Circuit held that "even if

[6] Although the government did not raise the unmistakability principle before the district court, that principle cannot be forfeited because it is a "canon of contract construction." *Winstar*, 518 U.S. at 860. We can consider "interpretive canons" even if a party "intentionally left them out of [its] brief." *Guedes v. BATFE*, 920 F.3d 1, 22 (D.C. Cir. 2019) (per curiam). But even if the doctrine were forfeitable, it was not forfeited here because NAR itself put the doctrine at issue before the district court in citing an Office of Legal Counsel opinion discussing *Winstar* and the rule against waiver of sovereign power. *See* Resp. to the Gov't's Opp. to NAR's Pet. 3, *Nat'l Ass'n of Realtors v. United States*, Civ. No. 21-02406 (D.D.C. Nov. 12, 2021), ECF No. 21-2 (citing *Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion*, 23 Op. OLC 126 (June 15, 1999)). NAR therefore cannot claim to be surprised by our consideration of the unmistakability principle.

the . . . letter signaled that the NASD had closed its investigation of [the petitioner], the NASD was perfectly free to reconsider the matter." *Id.* at 911. In fact, the court found no "support [for] the proposition that the NASD may not reopen [the] investigation" following the issuance of the closing letter. *Id*. Although NAR distinguishes *Schellenbach* by arguing that the letter in that case was not part of a contract, that fact does not cast doubt on our conclusion that the plain meaning of the word "close" does not preclude DOJ from "reopening" its investigation.

Investigations initiated by the government are no different. For example, in *Marinello v. United States*, the Supreme Court noted that between 2004 and 2009, the IRS "opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello." 138 S. Ct. 1101, 1105 (2018). And in *J. Roderick MacArthur Foundation v. FBI*, we emphasized that the FBI had an interest in retaining certain intelligence it had gathered because "information that was once collected as part of a now-closed investigation may yet play a role in a new or reopened investigation." 102 F.3d 600, 604 (D.C. Cir. 1996); *see also Senate of the Commonwealth of P.R. on Behalf of Judiciary Comm. v. DOJ*, 823 F.2d 574, 586 (D.C. Cir. 1987) (noting that a "DOJ investigation . . . was closed officially on April 16, 1980, and did not reopen until August 1983").

In sum, the closing letter unambiguously permits DOJ to reopen its investigation of the Participation Rule and the Clear Cooperation Policy. Our interpretation is supported by the letter's plain language, its inclusion of the "no-inference" clause, and our application of the unmistakability principle.

B.

NAR's counterarguments do not persuade us. As a textual matter, NAR argues that we should adopt the district court's reasoning that, in plain English, "[o]pening an investigation is the opposite of closing one." *Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4. Based on that logic, the district court held that reopening the investigation of the disputed policies violated DOJ's promise to close it. *See id*. As discussed above, the words "close" and "reopen" are not mutually exclusive, and we reject NAR's argument that the closing letter imposed any future obligation on DOJ. Rather, the letter stated only that "NAR will have no obligation to respond" to the CIDs identified in the closing letter — namely, "CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively." J.A. 178.

NAR also analogizes the closing letter to a parent instructing a child to "close the door when you leave for school," arguing that the parent "would surely feel misunderstood if the child closed the door and then immediately reopened it before departing for the day." NAR Br. 22 (citing *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–82 (2023) (Barrett, J., concurring)). But a hypothetical parent instructing a child to "close the door when you leave for school" does not intend that the child never open the door again, and the approximately eight months that elapsed between the issuance of the closing letter and the reopening of the investigation do not factually support a claim of an "immediate" reopening.

Next, NAR urges us to consider extrinsic evidence to support its interpretation of the closing letter. Specifically, NAR relies on the parties' negotiating history, DOJ's "course of performance," and NAR's own

priorities and incentives to support its argument that DOJ agreed not to "reopen" the investigation of the Participation Rule and Clear Cooperation Policy. Those arguments have no traction because, as we have discussed, we do not consider extrinsic evidence where the plain text of an agreement is unambiguous. *See NRM Corp. v. Hercules, Inc.*, 758 F.2d 676, 682 (D.C. Cir. 1985) ("Only if the court determines as a matter of law that the agreement is ambiguous will it look to extrinsic evidence of intent to guide the interpretive process."); *Iberdrola*, 597 F.3d at 1304. In any event, NAR's extrinsic evidence is unconvincing.

First, NAR asserts that the parties' agreement to omit any mention of the Participation Rule and Clear Cooperation Policy in the Proposed Consent Judgment "make[s] clear that DOJ's promise in the Closing Letter was a deliberate carveout from the reservation-of-rights provision in the consent decree." NAR Br. 25. But the text of the Reservation of Rights clause supports DOJ's position that it retained the right to investigate the Participation Rule and the Clear Cooperation Policy: The clause generally preserves the government's authority to investigate and bring actions "concerning *any* Rule or practice adopted or enforced by NAR or any of its Member Boards." J.A. 176 (emphasis added). Moreover, during the parties' negotiations, DOJ explicitly declined to accept any agreement that constrained future investigations — and did so on three separate occasions.[7] Thus, the

[7] First, when NAR requested that DOJ "stipulate that NAR's Participation Rule would not be subject to further investigation any time in the next ten years," J.A. 247, DOJ responded that any "commitment to not challenge NAR rules and policies in the future," was "a nonstarter." *Id*. at 248. Second, when NAR proposed that "any changes to the Participation Rule and/or the Clear Cooperation Policy . . . will completely address all of the

negotiating history of the Reservation of Rights provision is inconclusive.

Second, NAR contends that DOJ's "course of performance" — *i.e.*, its eventual withdrawal of the Proposed Consent Judgment — demonstrates that DOJ "understood that the Closing Letter 'prevented' it from investigating NAR's Participation Rule and Clear Cooperation Policy." NAR Br. 28. According to NAR, DOJ withdrew the Proposed Consent Judgment because it wished to reopen its investigation of those policies but recognized that it could not do so without modifying the overall settlement agreement. But we decline to allow NAR to take contradictory positions with respect to the relationship between the Proposed Consent Judgment and the closing letter. NAR may not implicitly assume that these are separate agreements such that the closing letter remained enforceable despite the withdrawal of the Proposed Consent Judgment, *see supra* note 5, while also arguing that the two documents were part of the same settlement agreement for purposes of interpreting the meaning of the closing letter. "Simply put, [NAR] cannot have it both ways." *See United States v. Philip Morris USA Inc.*, 840 F.3d 844, 853 (D.C. Cir. 2016) (rejecting defendant's contradictory positions about the effect of a district court order); *Nat'l Ass'n of Crim. Def. Laws., Inc. v. DOJ*, 182 F.3d 981, 985 (D.C. Cir. 1999) (noting that "a

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Division's concerns and that the Division will close its investigation," *id*. at 251, DOJ again responded that "we cannot commit to never challenge NAR rules and policies in the future." *Id*. at 252. And third, when DOJ agreed to send NAR a closing letter, it reiterated that "the Division cannot commit to never investigating or challenging NAR's rules and policies in the future " *Id* at 259.

party may not blow hot and cold" in taking inconsistent positions).

Lastly, NAR argues that it would not have agreed to the Proposed Consent Judgment without a commitment from DOJ not to investigate the Participation Rule and the Clear Cooperation Policy in the future. According to NAR, without such a commitment, "the agreement contemplated only a letter worth nothing but the paper on which it was written." NAR Br. 24 (quoting *Nat'l Ass'n of Realtors*, 2023 WL 387572, at *4). We disagree. Contrary to NAR's contention, NAR gained several benefits from the closing of DOJ's pending investigation in 2020. Most obviously, NAR was relieved of its obligation to respond to the two outstanding CIDs, which required the production of substantial information. Moreover, NAR gained some value from the possibility that DOJ would not reopen its investigation at all, or for a substantial period of time. In addition, NAR avoided the risk that its responsive documents would be publicized in conjunction with a potential future complaint filed by DOJ.

Significantly, NAR also used the closing letter to its advantage in other, private litigation that was pending when the closing letter was negotiated and issued. Plaintiffs in the private litigation asserted claims under the Sherman Act and California's Cartwright Act, stemming from NAR's adoption of the Clear Cooperation Policy. *See PLS.com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 831 (9th Cir. 2022). One day after DOJ issued the closing letter, NAR submitted the letter to the court presiding over the private litigation as evidence that DOJ was no longer investigating NAR's policy. *See* NAR's Response to Plaintiff's Notice of Supplemental Authority at Ex. B, *PLS.com, LLC v. Nat'l Ass'n of Realtors*, 516 F. Supp. 3d 1047 (C.D. Cal.

2021) (Case No. 2:20-cv-04790), ECF No. 88 (filed on Nov. 20, 2020). NAR's filing asserted that "for the Clear Cooperation Policy at issue in [the private litigation], on the same day it commenced the Tunney Act proceedings, the Department of Justice sent NAR a closing letter, attached hereto as Exhibit B, . . . 'clos[ing] its investigation into the . . . Clear Cooperation Policy and Participation Rule.'" *Id.* at 1 (quoting J.A. 178). NAR thus used the closing letter to bolster its litigating position in the private lawsuit, thereby plainly benefitting from the letter's issuance.

C.

We agree with our dissenting colleague that DOJ promised to "close" its investigation of the Participation Rule and Clear Cooperation Policy, in exchange for NAR's concessions regarding four other policies, embodied in the Proposed Consent Judgment. *See* Dissenting Op. at 1–2. But the dissent goes on to assert that it would be a violation of the settlement agreement if DOJ "*immediately*" reopened the investigation it had agreed to close, while NAR was still bound by the contract. *Id*. at 1 (emphasis in original); *see also id*. at 5 n.7 ("So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force."). We take no position on the hypothetical situation addressed by the dissent. In the case before us, DOJ exercised its option to withdraw the Proposed Consent Judgment, thereby releasing NAR from its obligations under the agreement; only then did DOJ reopen its investigation and issue a new CID for information related to the Participation Rule and Clear Cooperation Policy — and that reopening occurred eight months after the original settlement agreement was reached. Because the reopening was not "immediate" and there was never a time when

NAR was bound by the settlement agreement while DOJ was not, the dissent's analysis is inapposite.[8]

The dissent contends that DOJ "unilaterally reneged" on the settlement agreement, and states that "[for] purposes of this appeal, it doesn't matter that DOJ withdrew the consent decree when it reopened the investigation." Dissenting Op. at 3 & n.5. Those statements overlook that NAR agreed to the term of the settlement agreement that gave DOJ the unfettered right to withdraw its consent at any time. *See* J.A. 147. When DOJ exercised that option, it put the parties back to where they were before they entered the settlement — *i.e.*, it restored the status quo ante. Thus, DOJ did nothing nefarious or underhanded when it

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[8] As we have noted, *supra* pp. 9–10 & n.5, we confined our opinion to the meaning of the closing letter, as the parties asked us to do. The dissent, however, interprets the overall settlement agreement, including the *quid pro quo* in which NAR signed the Proposed Consent Judgment in exchange for DOJ's issuance of the closing letter. *See generally* Dissenting Op. As we explained, *supra* note 5, consideration of the overall agreement would likely lead to the conclusion that DOJ's withdrawal from the Proposed Consent Judgment had the effect of canceling the entire deal — *i.e.*, the closing letter would not be enforceable if the Proposed Consent Judgment were withdrawn because the two components of the agreement are not severable. DOJ, however, chose not to rely on that argument, and instead asked us to interpret the language in the closing letter as if it were enforceable. *See supra* pp. 9–10 & n.5; Oral Arg. Tr. at 11. The dissent apparently misunderstands DOJ's position — it transforms DOJ's decision not to argue that both parts of the deal were canceled into a concession that the court may interpret the overall settlement agreement while ignoring DOJ's withdrawal from the Proposed Consent Judgment. *See* Dissenting Op. at 5 n.7 ("DOJ disavowed the argument that its unilateral withdrawal had anything to do with this case."); *id*. ("So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force.").

withdrew from the settlement, as NAR had agreed it could do.

Finally, we cannot agree with the dissent that "the sole question [in this appeal] is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation." Dissenting Op. at 4. As the dissent acknowledges, the facts before us do not demonstrate an "immediate" reopening of the investigation after it was closed. *See id*. at 3 (stating that "about eight months after contracting to close its investigation into the two remaining policies, DOJ reopened the investigation"). We therefore have no occasion to consider that scenario and we decline to opine on whether such conduct by DOJ would constitute a breach of the agreement.

* * *

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

So ordered.

WALKER, *Circuit Judge*, dissenting: The National Association of Realtors made a contract with the Antitrust Division of the Department of Justice. As in every contract, each side gained something, and each side gave something up. The Realtors agreed to give up four policies that DOJ considered anticompetitive. In exchange, DOJ promised that it had "closed" its investigation into two other policies.

DOJ doesn't deny that it made a contract. Nor is there any dispute about what it gained. Instead, the sole question is — what did DOJ give up when it "closed" the investigation?

Nothing, if we believe DOJ. As it sees things, it could *immediately* reopen its investigation because anything "closed" can be reopened at any time.

No court identified by DOJ has endorsed such a reading. Nor should we. Because DOJ misreads one isolated word ("closed") to nullify what the Realtors gained from an otherwise comprehensive and comprehensible contract, I respectfully dissent.

I

In 2019, the Antitrust Division of the Department of Justice opened a civil investigation into the National Association of Realtors' policies. In 2020, several months into the investigation, each side came to the bargaining table. DOJ identified six policies that it wanted changed. The Realtors expressed a willingness to change four of them. But the Realtors repeatedly insisted that they would "not agree" to change those four policies "without prior written assurances" that DOJ "has closed its investigation" into the other two. JA 109 (Realtors expressing these demands via email

to DOJ); *see also* JA 126 (Realtors attaching these demands to DOJ's draft reservation of rights provision).[1]

Eventually, DOJ decided that securing changes to the four anticompetitive policies outweighed the risks of bringing a lawsuit that might change *none* if DOJ took the case to court and lost.[2] So DOJ finally acquiesced to the Realtors' demand. And with that, they had a deal.

The parties captured their deal in a settlement agreement. The agreement detailed the extensive changes the Realtors would need to immediately undertake. JA 165-74.[3] As for DOJ's promise to close, one page of the agreement stated:

> **[T]he Antitrust Division has closed its investigation into the [two remaining policies]. Accordingly, [the Realtors] will have no obligation to respond to [two Civil Investigative Demands regarding those two remaining policies].**

JA 178 (emphasis added).[4]

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[1] When describing what happened in 2019 and 2020, I will refer to the government as "DOJ" or "the Antitrust Division of the Department of Justice," rather than DOJ's preferred nomenclature: "the previous leadership of the Division." DOJ Br. at 11.

[2] *Cf. United States v. United States Sugar Corp.*, 73 F.4th 197 (3d Cir. 2023) (failed DOJ civil antitrust suit); *United States v. UnitedHealth Group Inc.*, 630 F. Supp. 3d 118 (D.D.C. 2022) (same); *United States v. Booz Allen Hamilton Inc.*, No. CCB-22-1603, 2022 WL 16553230 (D. Md. Oct. 31, 2022) (same).

[3] This portion of the settlement agreement is called the "consent decree."

[4] This portion of the settlement agreement is called the "closing letter."

With that agreement in place, the Realtors immediately began to comply. But unexpectedly, DOJ later insisted on modifying the agreement. When the Realtors refused, DOJ unilaterally reneged. In July 2021, about eight months after contracting to close its investigation into the two remaining policies, DOJ reopened the investigation.[5]

The Realtors sued, arguing that the reopened investigation is not what they bargained for. *National Association of Realtors v. United States*, No. 21-2406, 2023 WL 387572, at *2 (D.D.C. Jan. 25, 2023). The district court agreed with the Realtors. It explained that the "government, like any party, must be held to the terms of its settlement agreements." *Id.* at *5; *cf. United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."). It also noted that "the government itself understood the broader settlement to require closure of the investigation" — a "common-sense interpretation of the parties' settlement" that DOJ does not dispute. *National Association of Realtors,* 2023 WL 387572, at *4. So, as the district court said, "it is not hard to conclude that the new [reopening] violates the agreement." *Id.*

DOJ appealed.

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[5] For the purposes of this appeal, it doesn't matter that DOJ withdrew the consent decree when it reopened the investigation. *See* Maj. Op. at 16-17 (rejecting course of performance arguments in this case). That's because the contract's meaning depends on what it unambiguously says, not on what happened eight months after its formation. And as DOJ repeatedly insists, the meaning of "closed" *at the time of contract formation* is the sole issue before the Court. *See infra* n 6.

II

The question presented is not whether DOJ's promise to close an investigation means the investigation must stay closed forever. Nor is the question whether DOJ can reopen an investigation eight months after it contracts to close it, as DOJ did here. Rather, the sole question is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation.[6]

Because DOJ's sole argument is wrong, I would affirm the district court on the narrow grounds presented to us by DOJ's appeal.[7]

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[6] DOJ readily admits that this is its one and only argument. *See* Oral Arg. Tr. at 4 (Question: "If we disagree with you about [the meaning of closed], do you have another theory where you can win; or do you concede that's the case?" DOJ: "That is our theory in this Court which is that when the Antitrust Division made the commitment to close, that did not apply any additional commitment to refrain from reopening, and that's clear throughout the record."); *id.* at 8 (Question: "[D]o you have any concern that what DOJ is doing here will make it harder for future DOJs to convince parties in [the Realtors'] shoes that when DOJ says it will close an investigation, it will stay closed for more than a half minute?" DOJ: "No, because we made clear throughout the process that we weren't making that commitment."); *id.* at 12 (Question: "So, you're just relying on your interpretation of the closing letter[?]" DOJ: "Correct. Correct."); *see also* DOJ Reply Br. at 8 (arguing that DOJ is permitted to reopen investigations "at any time").

[7] Some readers may wonder, "Should DOJ lose just because their only argument is unpersuasive?" Yes. "But shouldn't they win if we can come up with a winning argument for them?" Not usually, and not here. "We adopt the framing of the dispute that is advanced by the parties because 'in our adversarial system of adjudication, we follow the principle of party presentation.'" Maj. Op. at 10 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)) (cleaned up).

A

Let's start with some common ground. DOJ says "closed" and "reopen" are not mutually exclusive. And sometimes that's true. In the abstract, a promise to close something does not always include a promise to keep it closed forever.

But this abstract understanding of "closed" and "reopen" is only the starting point of our analysis. That's because "context matters." *Caraco Pharmaceutical*

Here's what that means: DOJ disavowed the argument that its unilateral withdrawal had anything to do with this case. Oral Arg. Tr. at 11 (Question: "And it seems to me that there is a plausible argument that this closing letter, if it's part of an overall agreement that included the consent decree, was withdrawn when the consent decree was withdrawn. Are you not making that argument?" DOJ: "We're not pressing that argument as a stand-alone argument here . . . ."). So any arguments about unilateral withdrawals don't matter — even if they might otherwise have been winning ones. *See* Maj. Op. at 9 ("The parties have not meaningfully briefed the potential unenforceability of the closing letter due to the withdrawal of the Proposed Consent Judgment . . . ."). *But see id.* at 19 ("In the case before us, DOJ exercised its option to withdraw the Proposed Consent Judgment, thereby releasing [the Realtors] from [their] obligations under the agreement . . . eight months after the original settlement agreement was reached. Because the reopening was not 'immediate' and there was never a time when [the Realtors were] bound by the settlement agreement while DOJ was not, the dissent's analysis is inapposite.").

So as DOJ sees things, it had the right to reopen the investigation (immediately) even if the contract remained in force. That is the *only* argument DOJ made on appeal. *See supra* n.6. And if that argument isn't a winner, DOJ's appeal can't be a winner. *But see* Maj. Op. at 20 ("Finally, we cannot agree with the dissent that 'the sole question [in this appeal] is whether DOJ is correct that it could have immediately reopened its investigation of the Realtors' two remaining policies after contracting to close that investigation.'").

Laboratories, Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 414 (2012). And depending on the context, a promise to close something might mean the closer cannot immediately reopen it. *See* Oral Arg. Tr. at 6 (DOJ: "context is critical").

A hypothetical presented by the Realtors illustrates the point. Consider the following:

A parent tells a child,
"Close the door."

Without context, we can't know *when* the child may reopen the door. Read literally, the child may close the door and then immediately reopen it. But a "good textualist is not a literalist." *See* Antonin Scalia, A Matter of Interpretation 24 (1997). So to know more, we need context.

Now imagine:

A parent says,
"Close the door when you leave for school."

In that case, even if DOJ's literalist reading works in the abstract, it fails to capture the command's true meaning. Perhaps Dennis the Menace would close the door and then immediately reopen it before he runs toward the school bus and mockingly calls back, "You didn't say to *keep* it closed!" But an obedient child would not.

We encounter situations like this all the time, both in life and the law. Consider the following:

A gate agent tells a late passenger,
"Sorry, I've closed the jet bridge."

A sign on a barricade says,
"Road Closed."

The late passenger understands that the gate agent means, "I've closed the jet bridge and I won't reopen it for your flight." And if the "Road Closed" sign is on Glacier Park's Going-to-the-Sun Road in December, the sign means the road ahead is closed for the rest of the season. As these examples illustrate, "ultimately, context determines meaning." *Caraco*, 566 U.S. at 413-14 (cleaned up); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning.").

So to sum up, I accept DOJ's abstract contention that "closed" and "reopen" are sometimes compatible. But because "context may drive such a statement in either direction," a promise to close something may at times preclude an immediate reopening. *Pulsifer v. United States*, 601 U.S. at __ (2024) (slip op. at 12 n.5). "Really, it all depends." *Id*. at __ (slip op. at 15).

B

By context, I mean the rest of the contract's text. And here, the text suggests a quid-pro-quo bargain that precludes DOJ's sole argument.[8]

Start with the terms of the quid pro quo. The *quid* was DOJ's closure of its investigation into the two

[8] I do not rely on extrinsic evidence outside the contract's four corners because "closed" is unambiguous when read in context. *See Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1304 (D.C. Cir. 2010) ("If a contract is not ambiguous, extrinsic evidence cannot be used as an aid to interpretation.") (quoting *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985)). In any event, the extrinsic evidence is something of a wash. DOJ said it would never promise what the Realtors wanted, and the Realtors said they would never settle without that promise — so the extrinsic evidence just tells us that someone was bluffing. *See* Maj. Op. at 4-5, 15-18.

remaining policies, promised in the one-page "closing letter" portion of the contract. The *quo* was the Realtors' surrender of the four anticompetitive policies. That surrender was described in painstaking detail across 15 pages. For example, the agreement required the Realtors to immediately "undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects" of the four policies. JA 162. The agreement then listed the Realtors' "prohibited conduct," "required conduct," "antitrust compliance," and requirements for "compliance inspection." JA 165-74 (cleaned up).

Read together, it's apparent from the four corners of the contract that the Realtors' extensive commitments about the four anticompetitive policies came at a cost to DOJ, and this bargained-for cost is the context that must inform the meaning of "closed."[9]

So when properly read in the context of the entire comprehensive agreement, DOJ's promise to close is best understood to mean:

DOJ has closed its investigation into two remaining policies *in exchange for* the Realtors' promise to change four anticompetitive policies.

I again emphasize "in exchange for" — the *pro* in quid pro quo — because the nature of the parties' exchange is what moves us beyond abstract propositions like "[t]he words 'close' and 'reopen' are un-

[9] Recall that none of the following contextual points are disputed: The settlement agreement is a binding contract. Maj. Op. at 9. The contract includes DOJ's letter promising to close its investigation into the two remaining policies. *Id.* And DOJ's promise to close the investigation was in exchange for the Realtors' promise to change the four anticompetitive policies *Id* at 5-6.

ambiguously compatible." Maj. Op. at 12. When construing one side's promise in a quid pro quo, we "avoid constructions of contracts that would render promises illusory." *M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015). And here, that fundamental and well-settled contract principle means we must construe "closed" to preclude "immediately reopen." *See, e.g.*, *Irwin v. United States*, 57 U.S. 513, 519 (1853) (our "court can make no new contract for the parties").

This reading is also entirely logical. In any bargain, you give up something in order to get *something* in return. That's what separates a contract from a commandment, and a compromise from a ukase. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (a provision "reads like a ukase" because it "commands," "requires," "orders," and "dictates"). So both sides of the exchange in this agreement must have real meaning.

Under the Realtors' reading, both do: The Realtors gave up something (the four anticompetitive policies) to get something (non-illusory relief from DOJ's investigation into the two remaining policies). In contrast, DOJ's reading invests one side of the exchange with no real meaning at all. It says that the Realtors gave up something (a lot, actually) in exchange for nothing more than a promise by DOJ to close an investigation it could immediately reopen — in other words, for a promise "worth nothing but the paper on which it was written." *National Association of Realtors v. United States*, No. 21-2406, 2023 WL 387572, at *4 (D.D.C. Jan. 25, 2023).

C

Several counterarguments were made in DOJ's brief and by its exceptionally able counsel at oral argument. But none can change this bottom line: DOJ needs you to believe that the Realtors gave away something for nothing.

First, DOJ says the Realtors actually did benefit from DOJ closing the investigation, including from the inertia that kept it closed for eight months. Sure, but DOJ isn't arguing for an eight-month rule; rather, it argues that it can reopen a closed investigation immediately. The Realtors would have received no benefit from *that*. So DOJ's theory still depends on reading its promise as meaningless — a reading prohibited by basic contract principles. *See M & G Polymers USA*, 574 U.S. at 440; *Irwin* 57 U.S. at 519

Second, DOJ cites other cases where the government reopened investigations that it previously closed. *See* Maj. Op. at 13-14. But DOJ has not cited a single precedent allowing it to reopen an investigation after contracting to close it in exchange for consideration. It relies instead on immaterial precedents about unilateral promises, not binding contracts. *See Marinello v. United States*, 584 U.S. 1 (2018) (describing no settlement negotiations whatsoever); *J. Roderick MacArthur Foundation v. FBI*, 102 F.3d 600 (D.C. Cir. 1996) (same); *Schellenbach v. SEC*, 989 F.2d 907, 910 (7th Cir. 1993) ("Petitioner and NASD officials discussed a settlement, but they could not agree").[10]

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[10] *See also* Oral Arg. Tr. at 29 (Question: "[C]an you point me to a precedent where the Government has made a promise in exchange for consideration to close an investigation and the Court has said that the Government can reopen the investigation?" DOJ: "Not in a case where we made a promise to do it . . . .").

Third, DOJ cites the "unmistakability" principle. It disfavors interpretations that "cede a sovereign right of the United States unless the government waives that right unmistakably." Maj. Op. at 12. But that principle doesn't apply here where DOJ did unmistakably cede its right to immediately reopen its investigation into the two remaining policies — for the reasons explained above.

Finally, DOJ points to a sentence in one part of the settlement agreement that states: "No inference should be drawn" from DOJ's "decision to close its investigation into these rules, policies or practices not addressed by the consent decree." JA 178.[11]

That sentence provides no answer to the one question in this case: Whether DOJ promised to refrain from immediately reopening its "closed" investigation (not whether we should "infer[]" something beyond that promise). Once we identify the scope of DOJ's promise, then "under the law of contract [DOJ] was not free to unilaterally change the terms of the settlement agreement by adding an ambiguous sentence to a letter designed to simply confirm that it had upheld its side of the deal." *National Association of Realtors*, 2023 WL 387572, at *5.

So much for what DOJ's "ambiguous sentence" did *not* do. As for what it *did* do, consider that several of the Realtors' policies were being challenged in court by third parties seeking a class action verdict in excess of a billion dollars.[12] The "ambiguous sentence" is best

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[11] Recall that the consent decree described the Realtors' contractual obligations.

[12] *See Burnett v. National Association of Realtors*, 19-cv-0332, ECF 1294 (W.D. Mo. Oct. 31, 2023) (jury verdict awarding class plaintiffs approximately $1.79 billion in damages against all defend-

read to "inform *third parties* that the government had not found one way or the other that the [two remaining policies] were lawful." *Id.* That message — if you want to keep suing the Realtors yourselves, go for it — does not conflict with DOJ's promise not to immediately reopen its own "closed" investigation.

* * *

The Antitrust Division of the Department of Justice bargained for a binding contract. That bargain required DOJ to close an investigation, and it did not allow DOJ to immediately reopen the "closed" investigation. In arguing otherwise, DOJ has invited our court to go where no court has gone before — or at least no court identified by DOJ.

For the sake of DOJ's credibility, I wish it had not done so. And for the sake of citizens who find themselves on the other side of the bargaining table, I wish our court had not agreed.[13]

After today, behind the facade of its promise to close an investigation, the government can lure a party into the false comfort of a settlement agreement, take what

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ants); National Association of Realtors, National Association of Realtors Reaches Agreement to Resolve Nationwide Claims Brought by Home Sellers (Mar. 15, 2024), https://perma.cc/86TR-YBRD (Realtors announcing a $418 million settlement of the class claims against them); *Burnett*, 19-cv-0332, at ECF 1399-1 (W.D. Mo. Mar 18, 2024) (judgment accepting the settlement).

[13] *Cf.* Makan Delrahim, Assistant Attorney General, Antitrust Division of the Department of Justice, Remarks at Bocconi University in Milan (May 25, 2018), https://perma.cc/8EBM-DJFU ("To ensure that businesses can enter contracts, make investments, and plan for the future, we must provide a stable and predictable environment that is free of arbitrary government action and characterized by transparent and fair procedures.").

it can get, and then reopen the investigation seconds later.

So if you ever find yourself negotiating with the Antitrust Division of the Department of Justice, let today's case be a lesson:

Buyer Beware.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5065

NATIONAL ASSOCIATION OF REALTORS,

Appellee

v.

UNITED STATES OF AMERICA, *et al.*,

Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-02406)

September Term, 2023

Filed on: April 5, 2024

Before: HENDERSON, WALKER and PAN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be

reversed and the case be remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: April 5, 2024

Opinion for the court filed by Circuit Judge Pan.

Dissenting opinion filed by Circuit Judge Walker.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-2406 (TJK)

NATIONAL ASSOCIATION OF REALTORS,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

MEMORANDUM OPINION

Before the Court is the National Association of Realtors' Petition to Set Aside, or in the Alternative Modify, Civil Investigative Demand No. 30729, which was issued by the Department of Justice's Antitrust Division. Because the civil investigative demand, or CID, violates a settlement agreement executed by the parties, the Court will set it aside.

I. Background

A. The Department of Justice Opens an Investigation into the National Association of Realtors

In 2019, the Department of Justice's Antitrust Division opened an investigation into certain practices and policies of the National Association of Realtors ("NAR"). *See* ECF No. 1-21 at 2. Among the NAR policies under review were its "Participation Rule" and its "Clear Cooperation Policy." *See* ECF No. 1-7 at 2.

As part of its investigation into potentially anticompetitive behavior, the Antitrust Division issued two CIDs seeking certain information from NAR. *See* ECF No. 1-21; ECF No. 1-22. Settlement talks ensued.

B. The Parties Settle and the Department of Justice Closes its Investigation

In 2020, NAR and the Antitrust Division began negotiating a potential settlement. *See* ECF No. 1-5. At first, the Antitrust Division would not agree that any of NAR's policies, current or otherwise, would be free from further investigation for a decade. *See* ECF No. 20-1 at 6; ECF No. 20-2 at 2. NAR pushed back, seeking reprieve from investigation. *See* ECF No. 1-6 at 2. After exchanging several rounds of emails negotiating settlement terms, the Antitrust Division sent a draft consent judgment including a proposed reservation-of-rights clause, which in sum declared that nothing in the judgment would limit the government's ability to investigate NAR's policies in the future. ECF No. 1-5 at 18.

NAR responded by striking that clause. ECF No. 1-5 at 18. NAR later explained that it would not agree to a consent decree without written assurances—specifically, a letter—confirming that the Antitrust Division had "closed its investigation" into the Participation Rule and Clear Cooperation Policy and providing that NAR "had no obligation" to respond to the still-pending CIDs. ECF No. 1-7 at 2, 19. After a call about the letter that would "give[] [NAR] relief from the investigations," the Antitrust Division conceded, agreeing to confirm in writing that it would close its investigation into those policies. ECF No. 1-8 at 2, 4; *see also* ECF No. 20-6 at 3 ("[W]e will close our investigation into NAR's Participation Rule as a part of this settlement."). But the Antitrust Division would

not confirm that certain changes to the policies satisfied its concerns or that it would refrain from challenging any future versions of the rules. *See* ECF No. 20-3 at 2–3; ECF No. 20-2 at 2.

In November 2020, the Antitrust Division filed a Complaint, Stipulation and Order, and Proposed Final Judgment with the Court. ECF Nos. 1-9–1-12. Neither the Complaint nor the Proposed Final Judgment addressed the Participation Rule or Clear Cooperation Policy. *See* ECF No. 1-10; ECF No. 1-12. The Proposed Final Judgment included a reservation of rights provision that read, "Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any Rule or practice adopted or enforced by NAR or any of its Member Boards." ECF No. 1-12 at 16. But neither the stipulation nor the consent judgment featured a merger or integration clause preventing other agreements from restraining the government along these lines. *See* ECF No. 1-11; ECF No 1-12.

The same day the Antitrust Division filed those papers, it sent a "closing letter" to NAR as agreed. *See* ECF No. 1-13. The letter confirmed "that the Antitrust Division ha[d] closed its investigation into [NAR's] Clear Cooperation Policy and Participation Rule" and that NAR "[a]ccordingly" had "no obligation to respond to" the corresponding CIDs. *Id*. The letter contained a "no inferences" provision, which read, "No inference should be drawn, . . . from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree." *Id*.

C. The Department of Justice Reopens its Investigation and Reissues its CIDs

After the parties reached their settlement, NAR began changing its policies to comply with the terms in the Stipulation and Proposed Final Judgment. ECF No. 1-1 at 3–4. The Participation Rule and Clear Cooperation Policy were not a part of the Stipulation and Proposed Final Judgment, though. Thus, those rules "have not been changed, modified, or amended since the Antitrust Division closed its investigation in 2020." ECF No. 21-1 at ¶ 15.

In January 2021, as the consent judgment required, NAR contacted the Antitrust Division to approve its policy changes. ECF No. 1-1 at ¶ 15. After the change in presidential administrations, the government did not respond to NAR until April. *See id.* at ¶ 18. When it did respond, rather than approving or rejecting the rule changes, the Antitrust Division tried to renegotiate the reservation-of-rights clause in the consent agreement. *Id*. NAR was skeptical. And during later discussions, the Antitrust Division refused to clarify whether the change was intended to modify any aspect of the settlement or its agreement to close its investigation and withdraw the CIDs. *See id*. at ¶ 19.

NAR would not agree to any changes without clarification of their impact on the settlement agreement, creating an impasse. *See* ECF No. 1-1 at 6. In July 2021, the Antitrust Division reopened the investigations it had previously agreed to close and issued a CID against NAR that is similar to the two CIDs addressed in the prior settlement. *See* ECF No. 1-3; ECF No. 1-23. The agency also withdrew its consent to the Proposed Final Judgment and voluntarily withdrew its complaint. ECF No. 1-17; ECF No. 1-18. The Antitrust

Division describes these actions as a "resum[ption of] its investigative efforts." ECF No. 20 at 14.

In response, NAR filed the instant petition under 15 U.S.C. § 1314(b)(1)(A) to set aside the new CID as a breach of the 2020 settlement agreement. In the alternative, NAR requests that the Court modify the CID, alleging excessive breadth and burdensomeness.

II. Legal Standards

Under the Antitrust Civil Process Act, the Antitrust Division may request, through a CID, the production of documentary material, answers to interrogatories, or the proffer of oral testimony relevant to a civil antitrust investigation. 15 U.S.C. § 1312(a). Any person served with a CID may petition for an order to modify its terms or to have it set aside "based on any failure of [the CID] demand to comply with the provisions of [the Antitrust Civil Process Act], or upon any constitutional or other legal right or privilege of such person." 15 U.S.C. § 1314(b)(2). The petitioner bears the burden of convincing the court that a CID should be set aside. *See United States v. Time Warner, Inc.*, 94-cv-338 (HHG), 1997 WL 118413, at *6 (D.D.C. Jan. 22, 1997); *see also United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991).

CIDs must comply with the standards applicable to grand jury subpoenas and civil discovery. 15 U.S.C. § 1312(c)(1); *see also Time Warner*, 1997 WL 118413, at *3 ("[T]he standard for enforcement of regulatory subpoenas is the same as that applied to grand jury investigations." (citing *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 216 (1946)). To that end, CIDs—like grand jury subpoenas and civil discovery—may be subject to restrictions under a settlement agreement.

Courts generally preclude civil discovery barred by a validly executed settlement. *See, e.g.*, *Blake v. Architect of the Capitol*, No. 19-cv-3409 (TSC-RMM), 2021 WL 5990949, at *3 (D.D.C. Sep. 22, 2021) (considering whether prior settlement agreement barred certain discovery requests). Courts also preclude the government from compelling testimony via grand jury subpoena when doing so conflicts with a plea or settlement agreement. *See United States v. Singleton*, 47 F.3d 1177, at *4 (9th Cir. 1995) (Table); *In re Grand Jury Proc.*, 819 F.2d 984, 987 (11th Cir. 1987); *see also In re U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232, 1239 (D.C. Cir. 1981) (holding that the government could enforce a legislative subpoena through civil contempt because "[t]he terms of the [witness's] plea bargain agreement plainly [did] not preclude [Congress] from seeking to secure the testimony of [the witness]").

These rules track the general principle that the government must be held to the terms of its contracts. Regardless of the identity of the official that signs a contract, "a settlement contract may not be unilaterally rescinded," and government agencies that enter into settlement agreements are bound by their terms. *Burton v. Adm'r, Gen. Servs. Admin.*, No. 89-cv-2338 (NHJ), 1992 WL 300970, at *3, *6 (D.D.C. July 10, 1992); *see also Village of Kaktovik v. Watt*, 689 F.2d 222, 234 (D.C. Cir. 1982) (Greene, J., concurring in part and dissenting in part) ("There is no question that a settlement agreement is a contract which, like any other contract, may not be unilaterally rescinded. That principle applies to the government as to any other party, and it applies irrespective of whether or not the agreement has yet been approved by the court." (cleaned up)). Thus, a CID barred by the terms of a settlement agreement is invalid.

Additionally, even if validly issued, CIDs may be neither "unduly burdensome [n]or unreasonably broad." *Time Warner, Inc.*, 1997 WL 118413, at *6 (cleaned up).[1]

III. Analysis

Because NAR has shown that a validly executed settlement agreement bars the CID at issue, it must be set aside under 15 U.S.C. § 1314(b)(2).

To start, the parties dispute the terms of their settlement agreement. Thus, before the Court can enforce that agreement, it must first determine its terms. This task is essentially one of contract interpretation. As the D.C. Circuit has explained, "An agreement to settle a legal dispute is a contract. Each party agrees to extinguish those legal rights it [had] sought to enforce through litigation in exchange for those rights secured by the contract." *Watt*, 689 F.2d at 230.

The Court must first identify the terms of the parties' agreement. If the parties "executed a completely integrated written agreement, it supersedes all other understandings and agreements with respect to the subject matter of the agreement between the parties, whether consistent or inconsistent." *Ryan v. BuckleySandler, LLP*, 69 F. Supp. 3d 140, 145 (D.D.C.

[1] The Court acknowledges that the parties disagree as to whether this is a "summary proceeding" and, in turn, over what standards apply. *See* ECF No. 20 at 6 n.1; ECF No. 21 at 8–13. In the Court's view, this dispute is beside the point. While NAR argues that the Antitrust Division overstates its burden to show the CID should be set aside, the government never disputes that the CID would be invalid if precluded by a settlement agreement. Instead, it argues that it made no such commitment "that would preclude the Division from investigating NAR's potentially anti-competitive practices or issuing new CIDs in connection with any such investigation." ECF No. 20 at 16.

2014) (cleaned up). Put another way, when an agreement is completely integrated, that document alone controls. *See id*. On the other hand, when parties execute a "partially integrated agreement, where the writing represents the agreement of the parties [only] with respect to the matters stated therein, . . . a court may consider extrinsic terms that are consistent with the partially integrated agreement." *Id*. (citations omitted). To determine whether an agreement is completely integrated, a court "must examine [the parties'] intent by looking to the written contract, the conduct and language of the parties and the surrounding circumstances." *U.S. ex rel. D.L.I. Inc. v. Allegheny Jefferson Millwork, LLD*, 540 F. Supp. 2d 165, 172 (D.D.C. 2008) (cleaned up). "In particular, the presence of an integration clause weighs heavily in favor of a complete integration." *Id.* at 173.

Here, the settlement agreement encompasses several written and oral commitments made by both sides in exchange for consideration. In other words, it is not a fully integrated written agreement—and neither party contends otherwise. To begin, the Stipulation and Proposed Final Judgment filed with the Court did not include a merger or integration clause. And while that alone may not be enough to prove partial integration, the parties' discussions before and after that filing make clear that their agreement extended beyond those documents. Indeed, the terms of the Stipulation and Proposed Final Judgment alone did not induce an agreement.

As recounted earlier, NAR refused to agree to the consent decree without written assurances that the Antitrust Division would send a letter confirming it "closed its investigation[s]" into the Participation Rule and Clear Cooperation Policy and that NAR "had no

obligation" to respond to the still-pending CIDs. ECF No. 1-7 at 2, 19. Only when the agency yielded to those demands did the parties settle their dispute. *See id*. The parties' communications illustrate that the Stipulation and Proposed Final Judgment were not the only ways their agreement was memorialized. The Antitrust Division's commitment to close its investigations into the Participation Rule and Clear Cooperation Policy and effectively rescind the CIDs—and to confirm those actions in writing—was essential to the parties' reaching a settlement and is consistent with the partially integrated written agreement. So those commitments must be considered part of the overall agreement. In fact, the Antitrust Division's own communications show that the government itself understood the broader settlement to require closure of the investigation. *See, e.g.*, ECF No. 20-6 at 3 ("[W]e will close our investigation into NAR's Participation Rule as a part of this settlement.").

With that common-sense interpretation of the parties' settlement in hand, it is not hard to conclude that the new CID violates the agreement. Because the agreement included the Antitrust Division's commitment to close its investigation into NAR's current Participation Rule and Clear Cooperation Policy, the government breached the agreement by reopening the investigation into those same rules and serving the new CID. The word "close" means "to bring to an end." *Close*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/close. The word "open" means "to begin a course or activity." *Open*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/open. Opening an investigation is the opposite of closing one. So by reopening the same investigation it had agreed to close, the Antitrust

Division breached the settlement agreement.[2] From there, it follows that the agreement bars enforcement of the new CID, issued to advance the same. *See* 15 U.S.C. § 1312(c).

The government's arguments otherwise do not sway the Court. The government begins by disputing the reach of its agreement to close its investigation. *See* ECF No. 20 at 16–17. The government is correct that NAR asked for, and it agreed to provide, a letter confirming closure of its investigation. *See* ECF No. 1-8 at 2. But that does not mean, as the government suggests, that the agreement contemplated only a letter worth nothing but the paper on which it was written. NAR explicitly negotiated for a letter "giv[ing it] relief from the investigations." ECF No. 1-8 at 4. The letter would hardly provide such "relief" if the Antitrust Division was free to reopen the investigations into both the Participation Rule and Clear Cooperation Policy and reissue substantially similar CIDs right after closing the same. In response, the government emphasizes that it refused to stipulate that either rule would not be subject to another investigation in the next decade, and it declined to give them its seal of approval. *See* ECF No. 20 at 17. But these arguments

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[2] Resisting this outcome, the Antitrust Division at times characterizes its present investigation as a "new investigation." *See* ECF No. 20 at 14, 16. But as the Court sees it, the investigation is not "new," but a reopening—or "resumption"—of the investigation the agency had agreed to close. The Participation Rule and Clear Cooperation Policy have not "been changed, modified, or amended since the Antitrust Division closed its investigation in 2020." ECF No. 21-1 at ¶ 15. Furthermore, the newly issued CID is similar to the CIDs issued previously—the same CIDs to which the agency agreed NAR need not respond. ECF No. 1-23. Indeed, the agency itself has described its actions as "*resum[ing]* its investigative efforts." ECF No. 20 at 14.

change nothing about the agreement the government eventually struck, which required it to close its investigations into those policies. The agency's reservations, in context, are best understood as relating to any future versions of the policies in question.

Nor can the "no inferences" provision in the closing letter bear the weight the government assigns it. As noted above, that statement reads: "No inference should be drawn, from the Division's decision to close its investigation into these rules, policies or practices [that are] not addressed by the consent decree." ECF No. 1-13. The Antitrust Division suggests that this sentence reinforces its view that the closing letter did not preclude *any* future investigation—even one into the same, unchanged Participation Rule and Clear Cooperation Policy. *See* ECF No. 20 at 17. Not so.

Nothing about the "no inferences" clause changes the Court's view of the parties' bottom-line agreement. The Antitrust Division might have included such a statement in its letter for many reasons that are consistent with the Court's interpretation of the agreement. Most obviously, such a statement would inform *third parties* that the government had not found one way or the other that the Participation Rule and Clear Cooperation Policy were lawful, and so similar policies should not be assumed to pass muster. But more fundamentally, under the law of contract the Antitrust Division was not free to unilaterally change the terms of the settlement agreement by adding an ambiguous sentence to a letter designed to simply confirm that it had upheld its side of the deal. *See Keepseagle v. Vilsack,* 99-cv-3119 (EGS), 2016 WL 9455764, at *6 n.5 (D.D.C. Apr. 20, 2016) (""To be effective a modification requires assent of all parties to the agreement' because 'there is no such thing as a unilateral modification."

(quoting Howard O. Hunter, Modern Law of Contracts § 5.20 (2016 ed.)).

Similarly, the Proposed Final Judgment signed by the parties fits with the Court's interpretation. The reservation-of-rights clause in the document states that nothing *in that final judgment*, which mentioned neither the Participation Rule nor the Clear Cooperation Policy, would restrain the Antitrust Division's future investigations. *See* ECF No. 1-12 at 16. As the Court has already explained, the settlement agreement was not contained exclusively within the four corners of the Proposed Final Judgment. So even though that document said nothing about future investigations, it does not then follow that no such limits were a part of the settlement agreement as a whole.

None of this is to say that the Antitrust Division has agreed to never investigate NAR or some future version or application of NAR's Participation Rule and Clear Cooperation Policy. The Court holds only that the government, in committing to close an investigation into these policies one year and then reopening it the next—when the only intervening change was that in presidential administrations—violated the parties' agreement. For that reason, the CID issued to further that investigation must be set aside.[3]

IV. Conclusion

At bottom, not setting aside the CID at issue would deprive NAR of the benefit for which it bargained: the closure of the Antitrust Division's investigation into its Participation Rule and Clear Cooperation Policy. The government, like any party, must be held to the terms

[3] Because the Court is setting aside the CID, it need not resolve NAR's objections to its breadth and burdensomeness.

of its settlement agreements, whether or not a new administration likes those agreements. For this reason, the CID at issue must be set aside. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: January 25, 2023

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 21-2406 (TJK)

NATIONAL ASSOCIATION OF REALTORS,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ORDER

For the reasons set forth in the Court's accompanying Memorandum Opinion, it is hereby **ORDERED** that Petitioner's Petition to Set Aside Civil Investigative Demand No. 30729, ECF No. 1, is **GRANTED**. Civil Investigative Demand No. 30729 is hereby **SET ASIDE.**

This is a final appealable Order. The Clerk of the Court is directed to close the case.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: January 25, 2023

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5065

1:21-cv-02406-TJK

NATIONAL ASSOCIATION OF REALTORS,

Appellee

v.

UNITED STATES OF AMERICA, *et al*.,

Appellants

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia*, Circuit Judges

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September Term, 2023

Filed On: July 12, 2024

ORDER

Upon consideration of appellee's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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* Circuit Judge Garcia did not participate in this matter.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX F

15 U.S.C. § 16. Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could give rise to a claim for relief under the antitrust laws.

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and

any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite –

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct –

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b),

(iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file

with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemination of the public comments received and the response to those comments.

(e) Public interest determination

(1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider –

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.

(f) Procedure for public interest determination

In making its determination under subsection (e), the court may –

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceeding before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title no constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Suspension of limitations

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

15 U.S.C. § 1311. Definitions

For the purposes of this chapter –

(a) The term "antitrust law" includes:

(1) Each provision of law defined as one of the antitrust laws by section 12 of this title; and

(2) Any statute enacted on and after September 19, 1962, by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to any restraint upon or monopolization of interstate or foreign trade or commerce;

(b) The term "antitrust order" means any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law;

(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or in any activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation;

(d) The term "antitrust violation" means any act or omission in violation of any antitrust law, any antitrust order or, with respect to the International Antitrust Enforcement Assistance Act of 1994 [15 U.S.C. 6201 et seq.], any of the foreign antitrust laws;

(e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;

(f) The term "person" means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law;

(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, and any product of discovery;

(h) The term "custodian" means the custodian or any deputy custodian designated under section 1313(a) of this title;

(i) The term "product of discovery" includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial litigation or in any administrative litigation of an adversarial nature; any digest, analysis, selection, compilation, or any derivation thereof; and any index or manner of access thereto; and

(j) The term "agent" includes any person retained by the Department of Justice in connection with the enforcement of the antitrust laws.

(k) The term "foreign antitrust laws" has the meaning given such term in section 12 of the International Antitrust Enforcement Assistance Act of 1994 [15 U.S.C. 6211].

15 U.S.C. § 1312. Civil investigative demands

(a) Issuance; service; production of material; testimony

Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation or, with respect to the International Antitrust Enforcement Assistance Act of 1994 [15 U.S.C. 6201 et seq.], an investigation authorized by section 3 of such Act [15 U.S.C. 6202], he may, prior to the institution of a civil or criminal proceeding by the United States thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General or the Assistant Attorney General in charge of the Antitrust Division shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and notify the person to whom such demand is issued of the date on which such copy was served.

(b) Contents; return date for demand for product of discovery

Each such demand shall—

(1) state the nature of—

(A) the conduct constituting the alleged antitrust violation, or

(B) the activities in preparation for a merger, acquisition, joint venture, or similar transaction, which, if consummated, may result in an antitrust violation,

which are under investigation and the provision of law applicable thereto;

(2) if it is a demand for production of documentary material—

(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available; or

(3) if it is a demand for answers to written interrogatories—

(A) propound with definiteness and certainty the written interrogatories to be answered;

(B) prescribe a date or dates at which time answers to written interrogatories shall be submitted; and

(C) identify the custodian to whom such answers shall be submitted; or

(4) if it is a demand for the giving of oral testimony—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify an antitrust investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted.

Any such demand which is an express demand for any product of discovery shall not be returned or returnable until twenty days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(c) Protected material or information; demand for product of discovery superseding disclosure restrictions except trial preparation materials

(1) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony, if such material, answers, or testimony would be protected from disclosure under –

(A) the standards applicable to subpenas or subpenas duces tecum issued by a court of the United States in aid of a grand jury investigation, or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this chapter.

(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this chapter) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege, including without limitation any right or privilege which may be invoked to resist discovery of trial preparation materials, to which the person making such disclosure may be entitled.

(d) Service; jurisdiction

(1) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) any[1] such demand or any petition filed under section 1314 of this title may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this chapter by such person that such court would have if such person were personally within the jurisdiction of such court.

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[1] So in original. Probably should be capitalized.

(e) Service upon legal entities and natural persons

(1) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or

(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or of any petition filed under section 1314 of this title may be made upon any natural person by –

(A) delivering a duly executed copy thereof to the person to be served; or

(B) depositing such copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

(f) Proof of service

A verified return by the individual serving any such demand or petition setting forth the manner of such

service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(g) Sworn certificates

The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(h) Interrogatories

Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(i) Oral examinations

(1) The examination of any person pursuant to a demand for oral testimony served under this section

shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(2) The antitrust investigator or investigators conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. The provisions of section 30[2] of this title shall not apply to such examinations.

(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the antitrust investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the antitrust investigator or the officer shall afford the witness (who may be accompanied by counsel) a reasonable opportunity to examine the transcript; and the transcript shall be read to or by the witness, unless such examination and reading are waived by

[2] See References in Text note below.

the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the antitrust investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to examine it, the officer or the antitrust investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor.

(5) The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the officer or antitrust investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

(6) Upon payment of reasonable charges therefor, the antitrust investigator shall furnish a copy of the transcript to the witness only, except that the Assistant Attorney General in charge of the Antitrust Division may for good cause limit such witness to inspection of the official transcript of his testimony.

(7)(A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason

for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the antitrust investigator conducting the examination may petition the district court of the United States pursuant to section 1314 of this title for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of Part V of title 18.

(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

15 U.S.C. § 1313. Custodian of documents, answers and transcripts

(a) Designation

The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this chapter, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(b) Production of materials

Any person, upon whom any demand under section 1312 of this title for the production of documentary material has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d)[1] of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.

(c) Responsibility for materials; disclosure

(1) The custodian to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall be responsible for the use made

[1] See References in Text note below.

thereof and for the return of documentary material, pursuant to this chapter.

(2) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any duly authorized official, employee, or agent of the Department of Justice under regulations which shall be promulgated by the Attorney General. Notwithstanding paragraph (3) of this subsection, such material, answers, and transcripts may be used by any such official, employee, or agent in connection with the taking of oral testimony pursuant to this chapter.

(3) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof.

(4) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe, (A) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by any duly authorized representative of such person, and (B) transcripts of

oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

(d) Use of investigative files

(1) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

(2) The custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to the Federal Trade Commission, in response to a written request, copies of such material, answers, or transcripts for use in connection with an investigation or proceeding under the Commission's jurisdiction. Such material, answers, or transcripts may only be used by the Commission in such manner and subject to such conditions as apply to the Department of Justice under this chapter.

(e) Return of material to producer

If any documentary material has been produced in the course of any antitrust investigation by any person pursuant to a demand under this chapter and –

(1) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

(2) no case or proceeding, in which such material may be used, has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

(f) Appointment of successor custodians

In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this chapter, or the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Assistant Attorney General in charge

of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such material, answers, or transcripts, and (2) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such material, answers, or transcripts all duties and responsibilities imposed by this chapter upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.

15 U.S.C. § 1314. Judicial proceedings

(a) Petition for enforcement; venue

Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter.

(b) Petition for order modifying or setting aside demand; time for petition; suspension of time allowed for compliance with demand during pendency of petition; grounds for relief

(1) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any antitrust investigator named in the demand, such person may file and serve upon such antitrust investigator, and in the case of any express demand for any product of discovery upon the person from whom such discovery was obtained, a petition for an order modifying or setting aside such demand –

(A) in the district court of the United States for the judicial district within which such person resides, is found, or transacts business; or

(B) in the case of a petition addressed to an express demand for any product of discovery, only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending.

(2) The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such person.

(c) Petition for order modifying or setting aside demand for production of product of discovery; grounds for relief; stay of compliance with demand and of running of time allowed for compliance with demand

Whenever any such demand is an express demand for any product of discovery, the person from whom such discovery was obtained may file, at any time prior to compliance with such express demand, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any antitrust investigator named in the demand and upon the recipient of the demand, a petition for an order of such court modifying or setting aside those portions of the demand requiring production of any such product of discovery. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such portions of the demand to comply with the provisions of this

chapter, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of such petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(d) Petition for order requiring performance by custodian of duties; venue

At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance with any such demand, such person, and, in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.

(e) Jurisdiction; appeal; contempts

Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

(f) Applicability of Federal Rules of Civil Procedure

To the extent that such rules may have application and are not inconsistent with the provisions of this chapter,

the Federal Rules of Civil Procedure shall apply to any petition under this chapter.

(g) Disclosure exemption

Any documentary material, answers to written interrogatories, or transcripts of oral testimony provided pursuant to any demand issued under this chapter shall be exempt from disclosure under section 552 of title 5.

APPENDIX G

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MAKAN DELRAHIM
Assistant Attorney General

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November 19, 2020

VIA E-MAIL

William Burck
Quinn Emanuel Urquhart & Sullivan, LLP
1300 I Street, NW, Suite 900
Washington, DC 20005-3314

Dear Mr. Burck:

This letter is to inform you that the Antitrust Division has closed its investigation into the National Association of REALTORS' Clear Cooperation Policy and Participation Rule. Accordingly, NAR will have no obligation to respond to CID Nos. 29935 and 30360 issued on April 12, 2019 and June 29, 2020, respectively.

No inference should be drawn, however, from the Division's decision to close its investigation into these rules, policies or practices not addressed by the consent decree.

Sincerely,

/s/ Makan Delrahim
Makan Delrahim

APPENDIX H

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, July 1, 2021

Justice Department Withdraws from Settlement with the National Association of Realtors

Today the Justice Department's Antitrust Division filed a notice of withdrawal of consent to a proposed settlement with the National Association of Realtors (NAR). The department has also filed to voluntarily dismiss its complaint without prejudice. The department determined that the settlement will not adequately protect the department's rights to investigate other conduct by NAR that could impact competition in the real estate market and may harm home sellers and home buyers. The department is taking this action to permit a broader investigation of NAR's rules and conduct to proceed without restriction.

"The proposed settlement will not sufficiently protect the Antitrust Division's ability to pursue future claims against NAR," said Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division. "Real estate is central to the American economy and consumers pay billions of dollars in real estate commissions every year. We cannot be bound by a settlement that prevents our ability to protect competition in a market that profoundly affects Americans' financial well-being."

As the real estate industry's leading trade association, NAR has rules and policies that affect millions of real estate brokers and agents and, in turn, impact millions of American home buyers and sellers, who, according

to reported industry data, paid over $85 billion in residential real estate commissions last year. The department filed a complaint and proposed settlement on Nov. 19, 2020. The complaint alleged that NAR established and enforced certain rules and policies that illegally restrained competition in residential real estate services. The proposed settlement sought to remedy those illegal practices and encourage greater competition among realtors, but it also prevented the department from pursuing other antitrust claims relating to NAR's rules.

Under a stipulation signed by the parties and entered by the court, the department has sole discretion to withdraw its consent to the proposed settlement. The proposed settlement may also be modified with consent from the department and from NAR. The department sought NAR's agreement to modify the settlement to adequately protect and preserve the department's rights to investigate and challenge additional conduct by NAR, but the department and NAR could not reach an agreement. Because the settlement resolved only some of the department's concerns with NAR's rules, this step ensures that the department can continue to enforce the antitrust laws in this important market.

Topic(s):
Antitrust

Press Release Number:
21-620

Component(s):
Antitrust Division

Updated July 1, 2021