

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 05 C 5140
)	
NATIONAL ASSOCIATION OF REALTORS,)	Judge Kennelly
)	
Defendant.)	
)	

**PLAINTIFF’S MOTION FOR THE COURT TO EXCLUDE
TESTIMONY OR, ALTERNATIVELY, TO ISSUE A REQUEST FOR INTERNATIONAL
JUDICIAL ASSISTANCE**

INTRODUCTION

This motion seeks to remedy the prejudice caused by Defendant National Association of Realtors’s (“NAR”) failure to disclose until one day before the discovery cutoff that it “may” call a representative of Point2 Technologies, Inc. (“Point2”), a Canadian company, as a trial witness. Although Point2 is not subject to this Court’s jurisdiction, it has agreed, at NAR’s request, to supply its Director of Marketing, Carey Tufts, as a trial witness on a purely voluntary basis. However, when the United States asked Point2 voluntarily to provide documents before taking Mr. Tufts’s deposition, Point2 refused to produce many of the documents that the United States believes are highly relevant to his testimony.

The United States requests that the Court address this situation by granting one of three forms of relief. First, the United States moves for an order excluding the testimony of Mr. Tufts or any other Point2 representative based on NAR’s late disclosure, which is neither justified nor harmless. NAR was aware of Point2 long before the November 20th discovery cutoff. Both of

NAR's expert witnesses discussed Point2 in their reports, the first of which was served on May 1, 2007. Nevertheless, NAR did not disclose any representative of Point2 in its March or September 2007 preliminary witness lists. Instead, NAR first disclosed that it might seek to call Brendan King, then Point2's CEO,¹ on November 19th, one day before the discovery cutoff. NAR has provided no justification for its tardy disclosure and has refused to take reasonable steps, given the circumstances, to lessen the prejudice to the United States. Though Point2 has agreed to have Mr. Tufts travel from Saskatoon, Saskatchewan to testify voluntarily at trial as a witness for NAR, NAR declined the United States's request for assistance in obtaining documents from Point2 and refused even to ask Point2 to produce the subject documents. NAR also refused to stipulate that it would refrain from presenting testimony from Mr. Tufts relating to the same topics on which Point2 has refused to produce documents.

Alternatively, the United States moves for an order that NAR may not call Point2's representative to testify at trial unless Point2 substantially complies with the government's document production requests, without delay. Such an order would make clear that if Point2 chooses to participate in a federal court proceeding in the United States by volunteering a trial witness at NAR's request, it must also voluntarily produce documents relevant to the testimony of that witness. As with any other witness, NAR should not be allowed to call a representative from Point2 if that company – which is outside this Court's subpoena power – chooses to volunteer in this process only selectively.

A third alternative, which provides no assurance that the prejudice will be remedied, would be for this Court to issue a Request for International Judicial Assistance to the Court of

¹Mr. King has since resigned. As a result, on January 7, 2008 NAR disclosed to the United States that it would seek to call Carey Tufts in place of Mr. King.

Queen's Bench of Saskatchewan in the Province of Saskatchewan, Canada, where Point2 is located, seeking the production of documents from that company. NAR has no objection to the issuance of such an international request, which is the first step in the formal process for the United States to compel the production of documents from a Canadian company. However, this process can be expensive, burdensome and slow – often taking months and sometimes more than a year to complete. There is a significant risk that the United States will be unable to obtain the documents, or that the delays associated with the process will prejudice the United States by preventing it from receiving the documents in time to depose Point2's representative before trial. Nevertheless, the United States makes this request to try to minimize the prejudice resulting from NAR's last-minute disclosure and Point2's refusal to provide voluntarily the documents most relevant to its employee's expected trial testimony.

I. BACKGROUND

A. Alleged Relevance of Testimony from Point2 for NAR

This is an antitrust action seeking to enjoin NAR from inhibiting competition from real estate brokers who use innovative Internet-based tools to offer better services and lower costs to consumers. D.E. 6 (Amended Complaint at ¶¶ 1-8). Specifically, the action seeks to stop NAR from restraining competition from brokers who operate password-protected Internet sites that enable their customers to search for and receive real estate listings over the Internet (referred to by NAR as “virtual office websites” or “VOWs”). *Id.* The NAR policies at issue govern the operation of multiple listing services (“MLSs”). *Id.* MLSs collect detailed information about nearly all properties for sale in a given market area and are the primary source of listings information for brokers and their customers. *Id.* Through its local Realtor associations, NAR

controls the majority of MLSs in the United States. NAR's policies restrict VOW brokers from accessing and using MLS listings information to the same degree that traditional brokers can. *Id.*

Chief among these restrictions is NAR's "opt-out" provision. This rule allows brokers to withhold their clients' listings from display on VOW brokers' websites by opting out. *Id.* The opt-out provision applies only to VOWs – MLS rules do not permit a broker to withhold listings from competitors who deliver listings to customers using other means, such as hand delivery, email, or fax. In essence, the policies allow traditional brokers to block customers of web-based competitors from using the Internet to review the same set of complete MLS listings that the traditional brokers provide to their customers by other means. *Id.*

NAR's affirmative defense is that there is a justification for this restriction. NAR claims that the opt-out provision was necessary to prevent brokers from withdrawing from MLSs. *See* D.E. 75 (4/16/2007 letter from Jack R. Bierig, counsel for NAR, disclosing NAR's procompetitive justifications for the VOW Policy pursuant to Court Order). According to NAR, if brokers were unable to withhold listings from VOWs, some would allegedly withdraw from MLSs. *Id.* NAR argues that if a sufficient amount of withdrawal occurred, this would threaten the existence or stability of the MLS. *Id.* Since MLSs are themselves procompetitive, a rule that protects MLS stability is also procompetitive, NAR contends. *Id.*

There will be substantial evidence that NAR's "justification" is unfounded. Brokers are unlikely to withdraw even in the absence of an opt-out provision because they need to be in the MLS to be in business. Indeed, this necessity is what gives NAR power to impose its restrictions on competition. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-74 (5th Cir. 1980) (holding that defendant MLS had market power).

In an attempt to overcome this well-accepted proposition, NAR seeks to call a

representative from Point2 apparently to provide evidence that broker withdrawal from MLSs is feasible because there are technological alternatives to MLSs. Among other businesses, Point2 operates an Internet “peer to peer” network through which brokers can share their listings with one another. NAR maintains that brokers who withdraw from MLSs could use technology platforms like Point2’s as an alternative means of sharing listings data. On December 5, NAR described the subject matter of Point2’s testimony as “Point 2’s NLS [national listing service] technology, including how that technology is used by agents and MLSs, and the various features of that technology, including the handshake and syndication features.” Exhibit (“Ex.”) 1 (email exchanges between counsel for the parties concerning Point2).

For its part, the United States believes that such testimony would be irrelevant. The United States does not dispute that there are many technological database platforms that brokers could use to share listings data with one another. The relevant fact for purposes of NAR’s “MLS withdrawal” defense is that for economic reasons wholly unrelated to technological feasibility, no broker has ever withdrawn from an MLS because it could not opt out of VOWs, nor is any broker likely to withdraw for this reason in the foreseeable future. Moreover, even if brokers hypothetically did withdraw from MLSs to join MLS substitutes, such substitutes would also be subject to Section 1 of the Sherman Act, which prohibits any agreement among competitors that unreasonably restrains competition.

Nevertheless, because the parties’ disagreement over Point2’s relevance cannot be resolved until later, the United States seeks documents from Point2 relating to its business plans and strategies and the members of its national listing service, among other subjects. These documents relate directly to the subjects of Mr. Tufts’ expected voluntary testimony about whether Point2 currently functions, could function, or plans to function as an MLS alternative for

brokers.

B. NAR's Untimely Disclosure and Point2's Refusal to Produce Documents

NAR did not disclose Point2 in its March 2007 and September 2007 preliminary witness list exchanges, though NAR had been aware of the company for some time. NAR's first mention of Point2 appeared in the May 1, 2007 report of NAR's proffered industry expert, Steven Murray. Mr. Murray's report discusses Point2 very briefly, alleging that the company could have the technical capabilities to create "MLS-like systems." Ex. 2 (Murray Report 19-20). In support, Mr. Murray cited two pages from Point2's website. *Id.*

NAR's proffered economic expert, Dr. Frederick Flyer, claimed in his August 1, 2007 report that Point2 has created a "peer-2-peer" system where brokers may share listings. Ex. 3 (Flyer Report 20-21). Similar to Mr. Murray, Dr. Flyer's only cited basis for his conclusion were two pages from Point2's website. *Id.* Dr. Flyer mentioned Point2 in one paragraph of his 74-page report.²

In his September 2007 deposition, Mr. Murray identified Point2 as a company he believed would become capable of permitting real estate brokers to exchange offers of cooperation and compensation, a function of MLSs.³ Ex. 5 (Murray dep. 197-200). Based on this testimony, the United States arranged for the voluntary deposition of Brendan King, Point2's then Chief Operating Officer and acting Chief Executive Officer, in order to test the accuracy of Mr. Murray's

²Dr. Flyer testified that his assistant interviewed Point2 and discussed the interview with him, but Dr. Flyer hedged that he did not know whether what he learned about Point2's business model was pertinent to any of his opinions. Ex. 4 (Flyer dep. 47).

³Under NAR's MLS rules, brokers must submit a unilateral offer of cooperation and compensation when they submit information about properties to the MLS. By doing so they offer to pay the stated compensation (usually a percentage of the commission) to any broker who "cooperates" in the sale of the property listed in the MLS by finding a buyer for the property.

prediction. Point2's in-house counsel, Jason Golding, identified Mr. King as a witness with knowledge of Point2's technology and business model. The United States and Point2 agreed that Mr. King's deposition would occur at Point2's offices in Saskatoon, Saskatchewan, Canada on November 19 to permit the United States enough time to apply to Canada's Department of Foreign Affairs and International Trade through the United States Department of State for permission to conduct Mr. King's voluntary deposition in Canada. The United States gave notice of Mr. King's deposition to NAR on October 1, 2007. Ex. 6. At no point did NAR cross-notice Mr. King's deposition.

Faced with competing demands on resources, the United States ultimately determined that because it was not the proponent of Point2's relevance, there was no need to go forward with the deposition. Accordingly, on November 15, the United States informed NAR and Point2 that it had elected not to go forward with Mr. King's deposition. Ex. 1. NAR did not indicate that it wished to proceed with Mr. King's testimony. Rather, on November 19, the day before discovery closed, NAR informed the United States for the first time that it "may" call Mr. King as a trial witness. *Id.*

On November 27, the United States sought confirmation from NAR that it was adding Mr. King to its witness list, requested a description of his anticipated testimony as required by the Court's scheduling order, and informed NAR that the United States would be seeking deposition and document discovery from Point2. *Id.* Although the United States had not sought documents from Point2 in connection with the previously scheduled November 19th deposition, NAR had not disclosed before then that it would be calling a witness from Point2. Prior to that disclosure, the United States was planning on taking the deposition for the limited purpose of using publicly

available information about Point2 to disprove the predictions of NAR's expert regarding the company.

In addition, when the United States scheduled Mr. King's subsequently canceled deposition, it was not aware that Point2 had any interest in this case. The United States has since learned that, although Point2 is a third party, it is not a disinterested one. After canceling the deposition scheduled for November 19, the United States then learned that, although Point2 is a Canadian company with no legal obligation to provide a trial witness at NAR's request, it has volunteered to do so. The United States has also since learned that counsel for NAR and Point2 were in communication at least as early as October 1, 2007. Ex. 7 (10/1/07 email exchanges between Point2 and NAR's counsel). Indeed, Point2's CEO and in-house counsel – Mr. King and Mr. Golding – agreed to travel to Chicago on October 29 to discuss anticipated testimony with NAR's lawyers (the meeting ultimately did not take place). *Id.* Moreover, since November 19, Point2 produced a document showing that it had sided publicly with NAR in this lawsuit in an effort to attract business from NAR's membership. *See* Jason Golding, "Point2 NLS White Paper, DOJ v. NAR: A Third Way" (June 15, 2007) (alleging that the Department of Justice, as well as the Federal Trade Commission, the media, and "limited service" brokers, "have joined together to take aim at the REALTOR commission"; stating that the "DOJ ... are [sic] effectively 'choosing winners' through government intervention"; and marketing Point2's services as a "third way"), *available at* <http://nls.point2.com/Content/documents/Point2NLSWhitepaperDOJvsNAR.pdf>.

On December 3, in response to the government's November 27 request, NAR confirmed that it was adding Point2 to its witness list. Ex. 1. Shortly thereafter, the United States asked Point2, through its in-house counsel Mr. Golding, to produce documents voluntarily prior to Mr.

King's deposition. Mr. Golding agreed that Point2 would voluntarily produce documents, thus precluding the need then for Plaintiff to request a letter rogatory.

On December 11, the United States learned that Mr. King had resigned from Point2, reportedly based on differences over Point2's strategic direction.⁴ On the following day, the United States and Point2 discussed whether the company would be providing another witness to testify on behalf of NAR. Point2 advised that it was not sure, but would make a decision after the holidays. Based on this discussion, the United States sent its document requests to Point2 with the understanding that Point2 would produce documents only if and when it agreed to volunteer a new witness to testify for NAR. Ex. 8 (emails between counsel for Plaintiff and Jason Golding of Point2). On January 7, 2008, NAR informed the United States that it intended to call Carey Tufts, Point2's Director of Marketing, to testify about the company's technology at trial. Ex. 1.

On January 15, 2008, Point2, for the first time, stated that it would not voluntarily produce documents responsive to all of the United States's requests. Point2 refused to provide any documents related to its business strategies and plans (request no. 1) or its membership (request no. 2). Ex. 8. On January 17, Point2 produced only eight documents in a partial response to the remaining requests. *Id.* The only reason Point2 gave for not producing the requested documents was its concern regarding confidentiality. The United States sought to address this concern in written and oral communications with Point2, including by explaining the confidentiality protections contained in the Protective Order, but it failed to persuade Point2 to produce the documents. *Id.*

⁴*Point2 Technologies Confirms Group of Resignations*, Inman News (Dec. 11, 2007), Ex. 9.

In meet and confer communications pursuant to Local Rule 37.2, the United States also sought assistance from NAR's counsel in obtaining the documents, given that Point2 had volunteered to provide a trial witness at NAR's request. *See* Ex. 1. In writing and in a telephone conference, the United States asked NAR to join it in requesting that Point2 voluntarily produce the documents it had refused to turn over. NAR declined. *Id.* The United States then sought a stipulation from NAR that it would not make any arguments relating to Point2's future or potential plans for its NLS technology. NAR declined this request as well. *Id.* Instead, NAR argued that the United States should proceed with Mr. Tufts's deposition without documents, as the United States had planned to do on November 19th, while ignoring that Point2 was not then known to the United States as an interested party, volunteering to testify at trial for NAR. *Id.* Proceeding in this manner would insulate Mr. Tufts from cross examination based on Point2's documents and create an admissible deposition transcript for NAR to use at trial in lieu of having the witness testify live.

II. The Court Should Exclude Mr. Tufts's Testimony

The United States moves to exclude Mr. Tufts's testimony for two independent reasons.

A. NAR's Late Disclosure Is Unjustified and Prejudicial to the United States

The *Manual for Complex Litigation* advises that "[t]he need for evidence located outside the United States should be explored early in the proceedings to allow for the extra time that may be required to obtain it." *Manual for Complex Litigation* § 11.494, at 104 (4th ed.2004). NAR failed to identify a Point2 witness early in the proceedings to permit appropriate discovery. NAR did not amend its Rule 26(a)(1)(A) disclosures, add Mr. King to its March 2007 or September 2007 preliminary witness lists, nor even cross-notice Mr. King's November 19th deposition. Instead, it waited until the day before the discovery cutoff to disclose that it might offer

volunteered trial testimony from a Canadian witness from Point2. There is no legitimate reason for NAR's late disclosure.

Considering that discovery closed the day after NAR disclosed a Point2 witness and trial is just months away, there is precious little time to seek and obtain document production through judicial process in a foreign country. The United States should not be forced to expend its energies at this late date to try to obtain a foreign document production through compulsory process when this time has been reserved in the Court's scheduling order for trial preparation. The letters rogatory process will also consume judicial resources here and in Canada, yet there is a substantial risk that the entire exercise will be a waste of time given the late stage of these proceedings. This is precisely the type of situation that the Court sought to avoid when it reminded the parties at the January 16th status conference that discovery had closed over two months ago, and that the parties should avoid continuing prolonged discovery by stipulation.

Under Rule 37(c), "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Because NAR's tardy disclosure on the day before the Court's discovery cutoff that it "may" call a Point2 witness at trial is neither justified nor harmless, Rule 37(c) bars NAR from relying on Mr. Tufts' testimony. *See Musser v. Gentiva Health Services*, 356 F.3d 751, 755 & 758 (7th Cir. 2004) ("The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless").⁵

⁵ The Seventh Circuit does not require a showing of bad faith or willfulness before excluding evidence under Rule 37(c). *See Musser*, 356 F.3d at 760 (affirming exclusion because proponent of evidence failed to demonstrate substantial justification or harmlessness); *Salgado v.*

B. This Court Should Bar NAR from Offering Mr. Tufts's Testimony if Point2 Remains Unwilling to Produce Documents Bearing on the Truth of that Testimony

The Court should not allow NAR to gain an advantage by disclosing at the close of discovery a foreign witness who will voluntarily appear at trial on its behalf, but who refuses reasonable requests for documents related to the witness's anticipated testimony. Pursuant to Federal Rule of Evidence 611, the Court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth" Fed. R. Evid. 611(a). Under Rule 611(a), courts may "properly preclude parties from calling witnesses who refuse reasonable requests from their party opponents." MOORE'S FEDERAL PRACTICE § 611.02[2][b], at 611-28 (June 2004); *see also Neibur v. Town of Cicero*, 212 F. Supp. 2d 790, 806-07 (N.D. Ill. 2002) (excluding testimony of defendant's former attorney when the witness refused to travel from Florida when called during the plaintiff's case-in-chief but was willing to appear during the defendant's case); *In re Gulf Oil/Cities Services Tender Offer Litig.*, 776 F. Supp. 838, 839 (S.D.N.Y. 1991) (excluding defendant from testifying when called by a co-defendant because he refused to testify during plaintiff's case; holding that co-defendant's lack of control over the witness not relevant).

Point2 may choose whether it will participate in these proceedings, but once it decides to volunteer trial testimony, it must also produce the evidence that the United States needs to test that testimony on cross examination. A contrary result would compromise the Court's ability to ascertain the truth. Accordingly, the Court should rule that NAR may call Point2's representative

General Motors Corp., 150 F.3d 735, 742 (7th Cir. 1998) (same), *cited by* MOORE'S FEDERAL PRACTICE § 37.60[2][b] at 37-130 (Dec. 2007) (noting absence of bad faith or willfulness requirement in Seventh Circuit case law).

to testify at trial only if the company makes a complete production of relevant documents to allow a timely and effective deposition.

III. The Court Should Issue a Request for International Judicial Assistance

In the alternative, the United States moves for the issuance of a Request for International Judicial Assistance. The United States needs documents from Point2 to ensure an opportunity to effectively depose and cross-examine Mr. Tufts at deposition and trial. The evidence sought will bear directly on the validity of NAR's anticipated claim that Point2's alleged "MLS-like systems" could be a timely, likely, and sufficient alternative to MLSs for American real estate brokers. For example, Mr. King reportedly left Point2 based on his "fundamental disagreement with the company's future plans,"⁶ which highlights the importance of obtaining Point2's strategic and business plans (request no. 1) to gain perspective on and test Mr. Tufts's testimony.

When entities or persons who possess relevant evidence are outside the United States, this Court is authorized pursuant to 28 U.S.C. § 1781 and its inherent authority to issue international Letters of Request for testimony and production of documents. *See United States v. Reagan*, 453 F.2d 165, 171-73 (6th Cir. 1971). Point2 is based in Canada, and the documentary evidence relating to its technology, scale, penetration into the United States, and business plans are located at its headquarters in Saskatchewan. Point2 is unwilling to produce the needed documents voluntarily. A request for international judicial assistance is the only available avenue to compel production of these documents, and NAR does not object to the issuance of such a request.

⁶*Point2 Technologies Confirms Group of Resignations*, Inman News (Dec. 11, 2007), Ex. 9.

Accordingly, the United States respectfully requests, in the alternative, that the Court sign its proposed request.⁷

Although the United States is pursuing this course to protect its rights, the international process for seeking these documents can be burdensome and time-consuming, and there is substantial risk that the United States will not obtain the documents in time for trial, if at all. If this Court issues the international request, the United States will then apply for production of the documents from Point2 in Saskatchewan. Once service of the application is made in Canada, Point2 will have the opportunity to cross-examine the United States representative who will sign the affidavit accompanying the application for process. *See* ABA SECTION OF ANTITRUST LAW, OBTAINING DISCOVERY ABROAD 92-94 (2005). There may be a six to eight-week interval between the time the application is served and the hearing before the appropriate Canadian Court on the Letter of Request. *Id.* at 94-95. Thereafter, Point2 may appeal the decision as of right, which may add two to twelve months to the process. *Id.*

If and when the United States receives the necessary responsive documents, it will confer with Point2's counsel regarding a date that will permit enough time for the United States to obtain permission from Canada's Department of Foreign Affairs and International Trade to take the voluntary deposition of Mr. Tufts. The Department of State application advises that applications be made no less than fifteen business days in advance of the deposition date, but may not be made until a deposition date has been set. This lengthy process is inconsistent with the current schedule, pursuant to which discovery closed over two months ago and trial is set for July 7, and with the Court's admonition to the parties about continuing discovery by stipulation in any prolonged time

⁷The United States will email its proposed request to the Court in accordance with the instructions relating to proposed orders set forth on the Court's website.

frame.

IV. Conclusion

For the foregoing reasons, the Court should exclude Mr. Tufts, or any other representative from Point2, from testifying. Alternatively, the Court should (i) order that Mr. Tufts's testimony will be barred unless Point2 promptly and substantially complies with the government's document requests; or (ii) issue a Request for International Judicial Assistance to Saskatchewan, Canada.

Respectfully submitted,

s/Steven Kramer

Craig W. Conrath
Steven Kramer
Timothy T. Finley
Owen M. Kendler
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Antitrust Division
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530
Tel: (202) 307-0997
Fax: (202) 307-9952

Dated: February 8, 2008

CERTIFICATE OF SERVICE

I, Steven Kramer, hereby certify that on this 8th day of February, 2008, I caused a copy of the foregoing to be served on the person listed below by ECF.

Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
jbierig@sidley.com

s/ Steven Kramer

Steven Kramer

INDEX OF EXHIBITS

EXHIBIT 1

Correspondence between counsel for the United States and defense counsel regarding Point2 Technologies

EXHIBIT 2

Selections from the 5/1/07 expert report of Stephen Murray

EXHIBIT 3

Selections from the 8/1/07 expert report of Frederick A. Flyer

EXHIBIT 4

Selections from the 10/17/07 deposition of Frederick Flyer

EXHIBIT 5

Selections from the 9/20/07 deposition of Stephen Murray

EXHIBIT 6

Notice of deposition of Brendan King, dated 10/1/07

EXHIBIT 7

Email exchange between Scott Stein and Brendan King discussing preparations for Chicago meeting

EXHIBIT 8

Email exchange between counsel for the United States and Jason Golding, counsel for Point2

EXHIBIT 9

Article from Inman News dated 12/11/07 entitled "Point2 Technologies confirms group of resignations"

EXHIBIT 1

Kendler, Owen

From: Kully, David
Sent: Friday, November 16, 2007 8:34 AM
To: 'Stein, Scott D.'
Cc: 'Biro, Charles'; 'Bierig, Jack R.'; Finley, Timothy; Conrath, Craig; Kendler, Owen
Subject: RE: Point2 Deposition

Scott -- Your understanding is correct.

-----Original Message-----

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: Friday, November 16, 2007 8:32 AM
To: Kendler, Owen
Cc: Kully, David; Biro, Charles; Bierig, Jack R.
Subject: Point2 Deposition

Owen -- I'm just writing to confirm what you told me yesterday, i.e., that DOJ has decided not to go forward with the deposition of Brendan King on Monday. If I misunderstood, please let me know.

Scott D. Stein
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7520
(312) 853-7036 (fax)

Sidley Austin LLP mail server made the following annotations on 11/16/07, 07:32:32:

IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify the sender immediately.

Kendler, Owen

From: Kendler, Owen
Sent: Friday, December 07, 2007 9:57 AM
To: 'Stein, Scott D.'; Kully, David
Cc: 'Bierig, Jack R.'; Conrath, Craig
Subject: RE: Point2

Scott,

Thank you for providing a more detailed disclosure for Mr. King. NAR's decision to do so makes it unnecessary to engage in a prolonged debate about witnesses disclosed by the government. We do note for the sake of accuracy that each of the witnesses you complain about was disclosed well before the eve of the discovery cutoff.

We are not refusing to share with you the document discovery we seek. We will disclose to you exactly what documents we are seeking as soon as we prepare our requests, which will be shortly. Finally, we disagree with NAR's suggestion that our decision not to seek any discovery from Mr. King *before* NAR disclosed him as a trial witness somehow estops us from seeking discovery *after* NAR's belated disclosure. The purpose of a witness list is to disclose persons who will testify at trial in order to allow discovery to be taken from such persons.

Thank you,
Owen

-----Original Message-----

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: Wednesday, December 05, 2007 8:53 AM
To: Kully, David
Cc: Bierig, Jack R.; Kendler, Owen; Conrath, Craig
Subject: RE: Point2

Dave --

To repeat, the subject matter will be the very same as the subject matter of the deposition that DOJ was preparing to take; namely, Point 2's NLS technology, including how that technology is used by agents and MLs, and the various features of that technology, including the handshake and syndication features. I'm not sure what additional information you contend you require. Nor do we believe that the disclosure we have provided is insufficiently detailed -- particularly when one considers the level of detail DOJ believes is appropriate for its own disclosures. In that regard, I would refer you to DOJ's disclosures concerning the myriad new witnesses identified on the eve of the close of discovery: Robert Sutton, Kevin Cottrell, and Luke Steele ("business dealings with HBM II"), Jack Johnson and Lennox Scott ("NWMLS's structure and its IDX/VOW rules and topics related to the reports and deposition testimony of NAR's experts"); Craig Davis ("the history of his business, his business model and its benefits"), etc.

As for document discovery, we do not understand the basis for your refusal (or inability) to specify what additional discovery you contend is required. DOJ was aware of Mr. King and Point 2 well before the discovery cutoff. Indeed, DOJ was preparing to depose Mr. King on precisely the same subject matter described above, and to do so having made a deliberate, strategic decision not to seek documents from Point2. We identified Mr. King as a potential trial witness promptly upon learning, on the eve of the deposition, that DOJ was canceling it. Given these facts, we do not think the hardly think it unreasonable to DOJ to explain what document discovery it claims to now need, and why it did not seek such discovery from Point2 in connection with the deposition it noticed.

-- Scott

From: Kully, David [mailto:David.Kully@usdoj.gov]
Sent: Tuesday, December 04, 2007 11:28 AM
To: Stein, Scott D.
Cc: Bierig, Jack R.; Kendler, Owen; Conrath, Craig

Subject: RE: Point2

Scott -- I'm responding on behalf of Owen, who is on his way to Seattle.

Please provide us with a more detailed description of Mr. King's testimony to guide our documentary and deposition discovery. Your September 7th letter to us describing the anticipated subject matter NAR's trial witnesses provided greater detail than what you have provided regarding Mr. King.

In response to your questions, the documentary discovery we believe is warranted will be reflected on the requests themselves, and the discovery is prompted by NAR's untimely disclosure and will be guided by its more detailed disclosure. NAR cannot disclose a trial witness on the eve of the cutoff and then suggest that we are not entitled to relevant discovery from that trial witness.

-----Original Message-----

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: Monday, December 03, 2007 8:24 AM
To: Kendler, Owen; Conrath, Craig; Kully, David
Cc: Bierig, Jack R.
Subject: RE: Point2

Owen --

The subject matter of Mr. King's anticipated testimony is, as described in my previous e-mail, the same subject matter that was to be the subject of DOJ's deposition -- Point 2's NLS technology.

Given that we expect Mr. King to provide testimony on the same subjects that DOJ was prepared to depose him about without the benefit of any documents, what additional document discovery does DOJ contend is warranted?

-- Scott

From: Kendler, Owen [mailto:Owen.Kendler@usdoj.gov]
Sent: Tuesday, November 27, 2007 1:13 PM
To: Stein, Scott D.; Conrath, Craig; Kully, David
Cc: Bierig, Jack R.; Biro, Charles
Subject: RE: Point2

Scott,

In your email below, you state that NAR "may" call Mr. King to testify. Because NAR disclosed the possible addition of Mr. King as a witness the day before discovery closed, because of the time and paperwork involved in traveling to Canada for a deposition, and because of the absence of any document discovery from Point2, we do not wish to consider setting up a deposition unless NAR is actually adding Mr. King to its witness list. If you are adding him, please provide a brief description of his anticipated testimony as you did with the witness disclosed in your September 7th letter. In the event that NAR adds Mr. King to its witness list, we will begin the process of seeking documents from Point2.

Thank you,
Owen

-----Original Message-----

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: Monday, November 19, 2007 3:44 PM
To: Conrath, Craig; Kully, David; Kendler, Owen
Cc: Bierig, Jack R.; Biro, Charles

Subject: Point2

NAR may seek to call Brendan King as a witness at trial to testify about Point 2's technology. We will not object if DOJ wishes to reschedule his deposition for some time after Thanksgiving.

-- Scott

Scott D. Stein
Sidley Austin LLP
One South Dearborn St.
Chicago, Illinois 60603
(312) 853-7520 (phone)
(312) 853-7036 (fax)
Assistant: Marcia Cummins (312-853-7252)

Sidley Austin LLP mail server made the following annotations on 11/19/0

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Sidley Austin LLP mail server made the following annotations on 12/03/07, 07:23:4

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Sidley Austin LLP mail server made the following annotations on 12/05/07, 07:52:40:

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to by other parties in promoting, marketing or recommending any partnership or other entity investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

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Kully, David

From: Stein, Scott D. [sstein@Sidley.com]
Sent: Monday, January 07, 2008 11:14 AM
To: Conrath, Craig; Kully, David
Cc: Bierig, Jack R.
Subject: Point2

Craig and David --

Welcome back from what I hope were vacations for you two over the holidays.

Point2 has identified Carey Tufts, Point2's Director of Marketing, as a person knowledgeable about the same issues that we anticipated being the subject of Mr. King's testimony. Given that Brendan King is no longer affiliated with Point2, Mr. Tufts will replace Mr. King on NAR's witness list. We would ask that you keep us in the loop on scheduling a date for his deposition.

Thanks.

-- Scott

Scott D. Stein
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7520
(312) 853-7036 (fax)

Sidley Austin LLP mail server made the following annotations on 01/07/08, 10:10:46:

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This e-mail is sent by a law firm and may contain information that is privileged or If you are not the intended recipient, please delete the e-mail and any attachments immediately.

Finley, Timothy

From: Finley, Timothy
Sent: Thursday, January 24, 2008 5:38 PM
To: 'Stein, Scott D.'
Cc: Conrath, Craig; Kully, David; Bierig, Jack R.
Subject: RE: Point2

Scott,

This summarizes the main points from the phone call that you, Dave and I had today regarding Point2.

- NAR will not ask Point2 to produce documents responsive to our request nos. 1 and 2.
- NAR is unwilling to stipulate that it will not make any arguments relating to Point2's future or potential plans for its NLS technology.

As a result, we will be moving the Court to exclude the testimony of Point2's representative for the reasons set forth in my January 16th email (below).

In response to your January 22nd email, we note first that Point2 has not agreed to produce "virtually all" the documents we requested. Rather, Point2 has refused to produce any documents relating to its business and strategic plans (request no. 1) or the members of its national listing service (request no. 2). I spoke to Point2's in-house counsel again late last week, and he confirmed that Point2 remains unwilling to produce these documents. We also do not know whether Point2 has produced or will produce all documents responsive to our remaining requests.

Second, as Dave and I mentioned during the call today, we plan to file a motion to initiate the formal process for the United States to obtain documents from a Canadian company. As we discussed, this process is burdensome, expensive and slow - often taking months or even years to complete. Resorting to this process puts us at risk of being unable to obtain the documents in time to take Mr. Tufts's deposition before trial.

Finally, there was no directive from Judge Kennelly to take Mr. Tufts's deposition before the end of February, nor did he say anything about this subject. While it might benefit NAR if we took this deposition without the relevant documents, Judge Kennelly did not remotely suggest that we should proceed in this fashion.

Tim

-----Original Message-----

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: Tuesday, January 22, 2008 6:30 PM
To: Finley, Timothy
Cc: Conrath, Craig; Kully, David; Bierig, Jack R.
Subject: Point2

Tim --

NAR has not had any communication with Point2 regarding its response to DOJ's request, NAR has no control whatsoever over Point 2, and NAR declines your invitation to get involved in any dispute between DOJ and Point2. And while we fail to see the relevance, the fact is that Point 2 representatives did not travel to Chicago to meet with us.

It appears from Mr. Golding's e-mail that Point2 has agreed to produce virtually all of what DOJ has requested. And, as you acknowledge, you have not even spoken with Mr. Golding about the nature and extent of their objections. Even assuming that the additional information DOJ is seeking is relevant, and without knowing what Point2's objections are or the bases therefor, we note that DOJ has avenues for obtaining that discovery through formal process, as DOJ alluded to in its filing with the Court following our first status hearing before Judge Kennelly. Moreover, as we have previously noted,

DOJ was prepared to go forward with a deposition of a Point 2 executive without obtaining any document discovery from Point 2 at all.

With respect to the threat to move to exclude Carey Tufts from testifying at trial (we are not calling "Point 2" as a witness), DOJ is of course free to file whatever motions you choose. Presumably, before filing a motion you will apprise us of the legal and factual basis for the motion. Suffice it to say, at this point we do not believe that such a basis exists.

Finally, please note that consistent with Judge Kennelly's directive at the last status conference, we would expect DOJ to move forward promptly to take the deposition of Mr. Tufts before the end of February.

-- Scott

-----Original Message-----

From: Finley, Timothy [mailto:Timothy.Finley@usdoj.gov]
Sent: Wednesday, January 16, 2008 4:42 PM
To: Stein, Scott D.
Subject: FW: U.S. v. National Association of Realtors

Scott,

I am forwarding an email from Jason Golding of Point2, in which Point2 refuses to produce any documents relating to its business plans and the members of its listing service. We called Mr. Golding today in an effort to address his concerns but were unable to reach him.

If NAR still intends to call Point2's representative as a trial witness, we ask that you join us in encouraging Point2 to provide these documents voluntarily. As a Canadian company, Point2 has no obligation to testify at trial in Chicago, yet has agreed to do so at NAR's request. Based on the recently produced Sidley documents, we observe that Point2's representatives also agreed to travel to Chicago to meet with NAR's attorneys to discuss anticipated testimony (we do not know whether this meeting actually took place). In fairness, under the circumstances, NAR should prevail upon Point2 to provide the requested documents voluntarily, without the need for expensive and time-consuming formal process to a Canadian company.

We hope that Point2 will readily agree to produce the documents once its concerns about confidentiality have been addressed. Failing that, however, Point2 cannot participate in this case as a trial witness on a selective basis while at the same time withholding relevant evidence. Accordingly, if we are unable to obtain the documents without undue cost and delay, and if NAR still seeks to call a Point2 witness at trial, then the United States will move to preclude any testimony from Point2.

Tim

-----Original Message-----

From: Jason Golding [mailto:jgolding@point2.com]
Sent: Tuesday, January 15, 2008 5:38 PM
To: Finley, Timothy
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Hi Tim,

Thanks for the call today. I have reviewed the PDF requesting documents.

The following are the applicable documents requested and Point2's intention to provide or not to provide. I will attempt to provide them before I leave

on holidays as of January 24th, 2008.

1. Business and strategic plans - Will not provide
2. Members - Will not provide
3. Board, Association and MLS members - N/A at present
4. Agreements - Will provide
5. Listing Data Fields - will provide screenshots of listing entry system and detailed listings that can be viewed publicly
6. Listing Information - Will provide where available
7. Listings Share - Will provide as available
8. Rules - Will provide as available
9. User Manual - Will provide
10. Compliance - Will provide
11. MLS Membership - N/A at present
12. Listings data - Will provide in aggregate where available
13. DOJ investigation and suit - Will provide as available

My understanding all along that any production of documents by Point2 was voluntary due to our jurisdiction. This is the basis of us withholding documents as above. If this is not the case, then I will provide additional reasons.

Jason Golding
CFO/General Counsel
Point2 Technologies Inc.
Phone: (306) 955-9736 ext. 215
Fax: (306) 955-0471
www.point2.com

-----Original Message-----
From: Finley, Timothy [mailto:Timothy.Finley@usdoj.gov]
Sent: Tuesday, January 15, 2008 3:11 PM
To: Jason Golding
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Jason, as discussed during our call today, please let us know when you expect to send us the documents. You also mentioned that you may have some objections to our requests - please let us know what they are and we will try to work with you on that. Once we agree on a date by which the documents will be produced, we can then schedule the deposition.
Thanks.

Tim

> -----Original Message-----
> From: Kendler, Owen
> Sent: Tuesday, January 15, 2008 4:04 PM
> To: 'jgolding@point2.com'
> Cc: Finley, Timothy
> Subject: FW: U.S. v. National Association of Realtors
>
> Jason,
>
> Below is the email with the document request attached.
>
> --Owen
> -----Original Message-----

> From: Kendler, Owen
 > Sent: Wednesday, December 12, 2007 1:51 PM
 > To: 'jgolding@point2.com'
 > Subject: U.S. v. National Association of Realtors
 >
 > Mr. Golding,
 >
 > Thank you for talking with us about Point2's willingness to voluntarily
 produce documents to the Division and the status of Mr. King with the
 company. As we discussed, I have attached for your review a schedule of
 the
 documents to be voluntarily submitted. Let me know if you have any
 difficulty opening the pdf. We look forward to discussing our requests
 with
 you once you have had the opportunity to look them over.
 >
 > Please let us know at your earliest convenience if Mr. King or an
 another
 Point2 representative will be appearing as a trial witness for the NAR
 and
 whether Point2 will agree to voluntarily comply with our requests.
 >
 > Thank you,
 > Owen
 >
 > << File: 54704_1.pdf >>
 > Owen Kendler
 > Trial Attorney
 > Antitrust Division, Litigation III
 > United States Department of Justice Tel: (202)
 305-8376
 > 325 Seventh St., N.W. Fax: (202) 514-7308
 > Suite 300, LPB
 > Washington D.C. 20530 (FedEx Zip: 20004)
 >
 >

Sidley Austin LLP mail server made the following annotations on 01/22/08, 17:26:08:

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 to by other parties in promoting, marketing or recommending any partnership or other
 entity,
 investment plan or arrangement, then (i) the advice should be construed as written in
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 with the promotion or marketing by others of the transaction(s) or matter(s) addressed in
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 communication and (ii) the taxpayer should seek advice based on the taxpayer's particular
 circumstances from an independent tax advisor.

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 immediately.

EXHIBIT 2

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 05 C 5140
)	
vs.)	Judge Filip
)	
NATIONAL ASSOCIATION OF REALTORS®)	Magistrate Judge Denlow
)	
Defendant.)	

REPORT OF STEPHEN H. MURRAY

I have been retained to serve as an expert witness for the National Association of Realtors® (“NAR”) in this case concerning several issues relating to the Virtual Office Website (“VOW”) Policy that was adopted by NAR in 2003, the Internet Listing Display (“ILD”) Policy adopted by NAR in 2005, and the revised 2005 definition of who may be a “participant” in the multiple listing service (MLS). For purposes of my report, I will divide the issues on which I have been asked to provide expert testimony into two areas:

1. The procompetitive justifications for the selective opt-out and the blanket opt-out provisions of the VOW Policy¹, and the blanket opt-out provision

¹ The opt-out provisions of the 2003 VOW Policy (attached as Exhibit 3) can be found in Section I(3). That section states: “Use of MLS active listing data on a VOW is subject to the permission of the listing brokers whose listings may be available to consumers via a VOW. Unless prohibited by state law or regulation, such permission is presumed unless a listing broker ‘opts out’ by directing that its or her listings not be available for search or display on the VOWs of other participants. A listing broker may independently elect to opt-out of (i) the VOWs of all other participants in the MLS (‘Blanket opt-out’), or (ii) the VOWs of selected other participants determined independently by the listing broker (‘Selective opt-out.’)”

available. In addition to existing MLS software solutions, the Internet could easily serve as the backbone of an alternative to the MLS. Firms like Trulia, Google, Yahoo, MSN, Zillow, and others could replicate the technologies needed to run an MLS or MLS-like facility for sharing of listings and cooperation among brokers almost seamlessly. Likewise, firms like RE/MAX, Prudential, all five Realogy brands (Century 21, Coldwell Banker, Corcoran, ERA and Sotheby's), Keller Williams, Realty Executives and Help-U-Sell already have the technologies to aggregate listing information from their affiliates, and indeed many have already implemented that technology. It would not be terribly difficult for these networks to make that aggregated listing inventory available to their affiliates and those from other nationally-branded real estate organizations. The listing inventory of firms associated with the national franchise brands, together with that of leading independent non-branded firms, would in many or perhaps even most markets approach or exceed 60-65% of all listed properties.

The technology has further evolved to enable even small firms or groups of brokers to share listings or offer cooperation to one another. Brokers could enter into data sharing agreements, often referred to as "peer-to-peer arrangements," with other brokers. Such data sharing agreements would give the participating brokers access to a large percentage of available properties. Moreover, the technology to facilitate peer-to-peer data sharing arrangements is available and inexpensive. As far back as 1997, IKON Office Solutions had developed a Java application that would have created an easy to manage peer-to-peer network capability.

Today, other companies like Point2 Technologies provide accessible and convenient capability to create MLS-like systems through their custom "handshake" system, where sales professionals can agree to share listings on each others sites with but one mouse

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

click, including an offer of compensation to one another.¹³ According to its website, as of April 2007, Point2NLS (which stands for “national listing service”) had almost 123,000 members sharing well over half a million listings directly with each other, and is adding over 200 new members each day.¹⁴ Without doubt there are others who either have this technology available or could quickly develop it.

For these reasons, I conclude that the threat that brokers would withdraw from MLSs in 2003 over concerns about the VOW Policy was credible, and that it was therefore reasonable and procompetitive for NAR to include the opt-out safety valve as part of the VOW Policy in order to deter such withdrawals.

c. NAR Was Correct To Conclude That Opt-Outs, While Important To Provide For, Would Rarely Be Exercised

I also conclude that NAR was correct in its assessment that the opt-out provisions were safety valves that would rarely be exercised. My conclusion is based on a number of considerations.

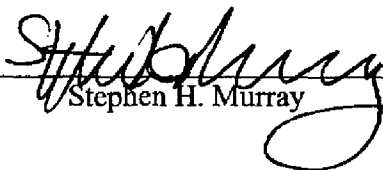
First, my conclusion is based on my personal interactions with senior executives of dozens of leading real estate brokerage firms from across the nation. Discussions with these executives in the spring of 2003 revealed a common belief that there should be both blanket and selective opt-out provisions in the VOW Policy. However, none of the executives with whom I spoke ever indicated that they planned to exercise any opt-out right, or indicated a desire to exercise the opt-out right. Rather, they emphasized the importance of the opt-out as a safety valve if a broker engaged in practices that undermined their ability to serve their clients.

¹³ <http://nls.point2.com/Content/Documents/NLS-principles-practices.pdf>.

¹⁴ <http://www.point2nls.com/Content/Statistics.asp>

Significantly, the referral rule addressed only one form of misuse or “free riding” on the MLS. As noted above, free-riding occurs whenever the MLS is used for purposes other than brokering the sale of the residential real property. Because the referral rule was under inclusive, it made sense to create a broad based rule. The NAR was also challenged in trying to draft the policy to create language that identified what behaviors they were trying to identify. The revised definition of “participant” more clearly defines and captures the fundamental purpose of the MLS. It guards against use of the MLS by those who may have a real estate license but who would use the MLS for reasons other than real estate brokering, in a straightforward effort to prevent free-riding generally.

Date: May 1, 2007


Stephen H. Murray

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

EXHIBIT 3

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA

Plaintiff,

v.

**NATIONAL ASSOCIATION OF
REALTORS®**

Defendant.

)
)
) Civil Action No. 05 C 5140

)
) Judge Filip

)
) Magistrate Judge Denlow

Expert Report of Fredrick A. Flyer

August 1, 2007

CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER

allows agents and brokers to post their listings at no charge.⁵⁵ Zillow allows sellers (e.g., FSBOs) as well as brokers and agents to post listings on their site, also at no charge.⁵⁶ Zillow and Trulia were recently reported to be among the most frequently trafficked real estate related websites on the Internet.⁵⁷

53. Notably, many brokers have embraced the concept of providing consumers with direct access to information about listings through these third-party Internet websites. For example, Realogy, which owns major franchises such as Coldwell Banker, Century 21, and ERA, as well as the largest brokerage in the U.S. (NRT), recently announced plans to submit its listings, which number over 500,000, to Google Base and Trulia.⁵⁸ Similarly, the Houston Association of Realtors[®] submits all of its listings to Google Base.⁵⁹ Other significant brokers in large markets have likewise embraced this form of direct dissemination of listing information to consumers.⁶⁰

54. Furthermore, new technologies are making it less cumbersome for listing brokers to place their listings on various websites. For example, Point2 is a company that allows brokers to automatically “syndicate” their listings to several websites, including Trulia, Google Base, and Yahoo! Classifieds, at little cost to the broker.⁶¹ Point2 also has developed

⁵⁵ See <http://www.trulia.com/> (last visited on August 1, 2007) and Trulia Real Estate Search – FAQ <http://www.trulia.com/faq/> (last visited on August 1, 2007)

⁵⁶ See <http://www.zillow.com/> (last visited August 1, 2007) and Zillow – About Zillow – Home Real Estate Valuation, Services, The Big Question, <http://www.zillow.com/corp/HowZillowMakesMoney.htm> (last visited on August 1, 2007)

⁵⁷ See “Monthly Internet Traffic Reports” for January, February, and March available on at: NAR Website Traffic Statistics: 2007, <http://www.realtor.org/realtororg.nsf/pages/sitetraffic?OpenDocument> (last visited August 1, 2007)

⁵⁸ “Realogy Announces Comprehensive Online Listings Distribution Strategy,” Realogy Press Release, March 2, 2007, http://www.realogy.com/media/pr/show_release.cfm?id=329 (last visited on August 1, 2007)

⁵⁹ Deposition of Curtis Robert Hale, III, March 16, 2007, p. 141.

⁶⁰ <http://www.trulia.com/testimonials/> (last visited August 1, 2007)

⁶¹ Point2 NLS, Listing Syndication, <http://nls.point2.com/Content/FeaturesServices/SyndicationAdvertising.asp> (last visited August 1, 2007). The websites to which brokers can “syndicate” their listings through Point2 include Google

peer-to-peer technology (referred to as “handshake”) that allows brokers to directly share listings with one another, rather than through the MLS.⁶²

55. The abundance of websites that provide consumers access to MLS and non-MLS listings illustrate that Internet access to listings is not dependent on VOWs. Further, as I explain in Section IV, these sites provide a range of information that appears to be valued by consumers. Also, as I discuss in that section, the comprehensiveness or completeness of VOW listings does not appear to distinguish VOWs from IDX or other sites. Ultimately, the fact that these many alternative sites are not only common but popular suggests that the information on these sites provides a good substitute for Web-based access to property listings available via VOWs.

C. VOWs Are Not Distinguished by Increased Productivity, Unique Non-Price Benefits, or Broker Discounting

56. Dr. Vistnes asserts that consumers benefit from VOWs because brokers operating VOWs are more productive.⁶³ He states that this productivity advantage derives from the fact that VOWs allow brokers to offload much of their work to the client and, hence, saves broker resources. Dr. Vistnes further claims that due to these productivity advantages, consumers not only receive better service from VOWs, but also pay lower fees because of significant rebates.⁶⁴ These alleged better services include lower-cost, expedited transactions, as well as non-pecuniary benefits such as automated search processes, property

Base, Yahoo! Classifieds, NYTimes.com, Point2 Homes, Trulia, Oodle, PropSmart, Edgeio, RealEstateAdvisor.com, US Condo Exchange, LiveDeal.com, LiveDeal.ca, Craigslist, HotPads.com, Vast.com, CityCribes.com, Propbot.com, House.com, VideoHomes.com, TheHousingPages.com, Backpage.com, and eBay. Realtown: Point2 NLS Expands Real Estate Listing Syndication Network, <http://www.realtown.com/articles/technology/point2-nls-expands-real-estate-listing-syndication-network> (last visited August 1, 2007)

⁶² Point2 NLS, Listing Syndication, <http://nls.point2.com/Content/FeaturesServices/SyndicationAdvertising.asp> (last visited August 1, 2007)

⁶³ Expert Report of Dr. Vistnes, pp. 24-34.

⁶⁴ Expert Report of Dr. Vistnes, p. 16.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1 day of August, 2007

A handwritten signature in cursive script, appearing to read "Fredrick A. Flyer", written in black ink. The signature is fluid and extends to the right with a long horizontal stroke.

Fredrick A. Flyer, Ph.D.

EXHIBIT 4

DR. FREDRICK FLYER, OCTOBER 17, 2007

Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) Civil Action
NATIONAL ASSOCIATION OF) No. 05 C 5140
REALTORS,)
Defendant.)

The videotaped deposition of
DR. FREDRICK FLYER, called as a witness for
examination, taken pursuant to the Federal Rules of
Civil Procedure of the United States District
Courts pertaining to the taking of depositions,
taken before VICTORIA C. CHRISTIANSEN, a Notary
Public within and for the County of DuPage, State
of Illinois, and a Certified Shorthand Reporter of
said state, CSR No. 84-3192, at Suite 3800, One
South Dearborn Street, Chicago, Illinois, on the
17th day of October, A.D. 2007, at 9:10 a.m.

DR. FREDRICK FLYER, OCTOBER 17, 2007

Page 47

1 A. He may have.

2 Q. Okay. Has he used those in his
3 discussions with you?

4 A. He may have.

10:06 5 Q. Have you relied on those discussions
6 in -- in preparing your report?

7 MR. STEIN: Object to form.

8 BY THE WITNESS:

9 A. I don't recall relying on any particular
10:06 10 fact in preparing my report.

11 BY MR. KRAMER:

12 Q. Do -- do you recall --

13 A. Did it help my general understanding of
14 what these different -- for example, Point2,
10:07 15 exactly -- my understanding of what their business
16 model is comes from my discussions with Josh Nixt.
17 I don't know that it's pertinent to any of the
18 opinions draw in the report or any of the analysis
19 I undertake.

10:07 20 Q. But -- but it helped you in
21 understanding the -- the industry?

22 A. It helped me understand a different type
23 of website that was out there, and it was partly --
24 you know, not just related to the case. I find

DR. FREDRICK FLYER, OCTOBER 17, 2007

Page 48

1 the -- the development of Inter- -- the Internet
2 and Internet websites interesting, so I found it
3 intellectually interesting.

4 Q. Are there any other industry
10:07 5 participants other than Ms. Janik and Mr. Holmen
6 and Point2 that you're recollecting Dr. Nixt
7 related information to you about a discussion he
8 had?

9 A. Well, also Steve Murray.

10:07 10 Q. Besides him.

11 A. Based on his discussions?

12 Q. Yes, sir.

13 A. Not that I recollect.

14 Q. Okay. Did your August 1 expert report
10:08 15 contain a complete statement of all opinions to be
16 expressed in your testimony at the trial of this
17 case?

18 A. It contained my understanding of what my
19 opinions would be at the time the report was
10:08 20 provided.

21 Q. Approximately when did you form the
22 opinions to be expressed in your testimony at trial
23 of this case that are contained in your report?

24 A. When did I form the understanding of my

EXHIBIT 5

STEPHEN H. MURRAY, SEPTEMBER 20, 2007

Page 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,) Civil Action
vs.) No. 05 C 5140
NATIONAL ASSOCIATION OF)
REALTORS,)
Defendant.)

The videotaped deposition of
STEPHEN H. MURRAY, called as a witness for
examination, taken pursuant to the Federal Rules
of Civil Procedure of the United States District
Courts pertaining to the taking of depositions,
taken before PAULINE M. VARGO, a Notary Public
within and for the County of DuPage, State of
Illinois, and a Certified Shorthand Reporter of
said state, C.S.R. No. 84-1573, at Suite 3700,
One South Dearborn Street, Chicago, Illinois, on
the 20th day of September, A.D. 2007, at 9:06 a.m.

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14:27:57 1 given to me in my work when we were trying to do
14:28:00 2 this. That wasn't a complete list, but it was a
14:28:03 3 sample of rules.

14:28:06 4 If these brokers, this group that was
14:28:08 5 withdrawing to form something else complied with
14:28:13 6 the rules about membership and admittance and
14:28:17 7 various other things, it would not be
14:28:21 8 anticompetitive necessarily at all.

14:28:23 9 BY MR. KRAMER:

14:28:23 10 Q. Let's go back to your opinion that
14:28:24 11 threats of withdrawal from an MLS as a result
14:28:26 12 of the VOW policy were reasonable and any such
14:28:30 13 withdrawal would have been harmful to competition.
14:28:33 14 What did you mean there by "harmful to
14:28:35 15 competition," please?

14:28:38 16 A. Most, if not all, of the new
14:28:41 17 technologies and the platforms that provide
14:28:47 18 MLS-type features, Google, Yahoo, Point 2, AOL,
14:28:56 19 MSN, Trulia -- I could go on -- they have because
14:29:01 20 of their business models larger firms with more
14:29:04 21 listings and more advertising dollars, can purchase
14:29:07 22 and hold the top search positions in those search
14:29:11 23 engines; and therefore, what would end up happening
14:29:13 24 is that the largest firms with the largest budgets

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14:29:15 1 and the largest number of listings and the most
14:29:18 2 traffic and the most references, and there is all
14:29:21 3 kinds of measurements on these sites -- Yahoo is
14:29:24 4 another one -- that the firms that are largest with
14:29:27 5 the most listings would be found first by any
14:29:31 6 consumer doing a search. That's what I was
14:29:33 7 referring to in that regard.

14:29:38 8 Q. I am sorry to skip back, but I
14:29:40 9 overlooked a question I meant to ask a little while
14:29:42 10 ago, and when you were talking about groups of
14:29:50 11 brokers threatening to withdraw from an MLS in
14:29:52 12 connection with the VOW opt-out policy, what was
14:29:57 13 your expectation of what the withdrawing brokers
14:30:02 14 that threatened withdrawal would do as a substitute
14:30:06 15 to the original MLS?

14:30:06 16 A. I just mentioned a number of technology
14:30:09 17 companies and I will mention them again for this
14:30:11 18 particular question. Google, Yahoo, Trulia, Point
14:30:15 19 2 -- that's with the number "2" after the word
14:30:19 20 "point" -- Reply, Homescape. I can go on and list
14:30:26 21 numerous companies that have search and retrieval
14:30:30 22 capabilities on a real estate, residential real
14:30:33 23 estate website which would provide most, if not
14:30:38 24 all, of the MLS search and retrieval that's

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14:30:40 1 required by consumers, agents and brokers.

14:30:47 2 Q. Mr. Murray, what information did you
14:30:50 3 consider in reaching your opinion that threats of
14:30:53 4 withdrawal from the MLS as a result of the VOW
14:30:55 5 policy were reasonable and any such withdrawal
14:30:59 6 would have been harmful to competition?

14:31:01 7 A. As I have just said, most, if not all,
14:31:05 8 of the current technology providers that we are
14:31:08 9 aware of that could replace the technologies
14:31:10 10 provided by MLS provide for a bias in the search
14:31:15 11 for property, and the bias can favor and does often
14:31:21 12 favor the largest, the ones who spend the most, the
14:31:24 13 ones who have the most listings and so on and so
14:31:27 14 forth, which is contrary to the way MLSs operate
14:31:31 15 today.

14:31:32 16 Q. And do the technology companies that you
14:31:33 17 just referenced permit the exchange of offers of
14:31:37 18 cooperation and compensation?

14:31:38 19 A. Not today, not to my knowledge.

14:31:40 20 Q. Do you have any knowledge of them
14:31:45 21 offering that in the near future?

14:31:46 22 A. I know of at least one company that is
14:31:48 23 building that into their capabilities already.

14:31:51 24 Q. What company is that?

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14:31:51 1 A. Point 2 Technologies.

14:31:54 2 Q. And would you elaborate on what you know
14:31:56 3 about that, please?

14:31:56 4 A. I know that they are building in fields
14:32:00 5 into their data that has to do with the offer of
14:32:05 6 compensation and the offer to cooperate with
14:32:10 7 agents. They also are one of the few that operate
14:32:14 8 within the Point 2 system what we would refer to
14:32:16 9 as a peer-to-peer networking system where agents
14:32:21 10 and/or brokers now can execute what's called a
14:32:26 11 handshake. That is, if I am an agent and put my 20
14:32:29 12 listings on my personal site and you are an agent
14:32:31 13 in the same market with your 20 listings, if we
14:32:34 14 both agree to a handshake, then my listings are on
14:32:37 15 your page and your listings are on my page, which
14:32:40 16 now broadens the number of potential visitors to
14:32:43 17 our mutual site.

14:32:44 18 Q. So that handshake requires a
14:32:49 19 coordination between individual brokers?

14:32:50 20 A. Literally it's, you know, do you agree
14:32:54 21 this guy offers you a handshake, and you look at it
14:32:57 22 and you go "I agree," click. It's automatic.

14:32:59 23 Q. I take it, though, there are some
14:33:02 24 underlying considerations before agreeing to a

STEPHEN H. MURRAY, SEPTEMBER 20, 2007

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14:33:03 1 handshake?

14:33:04 2 A. You know, I don't know the level of
14:33:06 3 detail, but as far as I know, the actual if you and
14:33:10 4 I knew each other and respect each other and both
14:33:13 5 wanted to exchange listings, it would be a matter
14:33:17 6 of those two mouse clicks.

14:33:18 7 Q. Let's go back to the opinion we were
14:33:21 8 discussing about, and let's go to the other facet,
14:33:24 9 the threats of withdrawal from the MLS as a result
14:33:28 10 of the VOW policy were reasonable. What
14:33:30 11 information did you consider in reaching that facet
14:33:34 12 of the opinion?

14:33:35 13 A. Discussions with numerous brokers and
14:33:37 14 reading of some documents that they had written.

14:33:47 15 Q. Anything else, sir?

14:33:49 16 A. No.

14:33:52 17 Q. And are the discussions that you are
14:33:53 18 talking about with numerous brokers the ones that
14:33:57 19 we were discussing before the last break?

14:33:59 20 A. Some of them were in those discussions,
14:34:01 21 yes.

14:34:04 22 Q. Which brokers do you remember
14:34:08 23 specifically then in connection with those
14:34:16 24 discussions that we are talking about now as

EXHIBIT 6

CERTIFICATE OF SERVICE

I, Owen M. Kendler, certify that on this 1st day of October, 2007, I caused a copy of the DEPOSITION NOTICE OF BRENDAN KING to be served on the person listed below by electronic mail.

Jack Bierig, Esq.
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603
phone: 312-853-7614
fax: 312-853-7036
e-mail: jbierig@sidley.com

Counsel for Defendant NAR



Owen M. Kendler

EXHIBIT 7

From: Brendan King <bking@point2agent.com>
Sent: Monday, October 1, 2007 4:10 PM
To: Stein, Scott D. <sstein@Sidley.com>; Jason Golding <jgolding@point2.com>
Subject: RE: exchange of emails

Thanks for the invite I will get back to you with our flights and hotel. It would be great if you could put together a concise agenda covering the topics you would like to cover. It may be that there is no specific agenda and so alternatively the people that will attend may best serve as a preparation tool.

See you on the 29th

Brendan King
COO Point2
BKing@Point2.com
www.Point2.com
www.Point2homes.com
<http://point2agent.wordpress.com>
ph 306.955.9736 ext 212
Cell 306.717.380

From: Stein, Scott D. [mailto:sstein@Sidley.com]
Sent: October 1, 2007 2:43 PM
To: Jason Golding; Brendan King
Subject: RE: exchange of emails

Brendan and Jason --

We look forward to meeting with you on October 29. The meeting will be at our office, the law firm of Sidley Austin LLP, One South Dearborn St., Chicago, IL, 60603. When you arrive, you will be directed to the 37th floor.

I recommend that you fly into O'Hare Airport. The closest hotel is called Hotel Burnham (a Kimpton hotel), and is two blocks away. The Palmer House Hilton is also a couple of blocks away, though it's a little older. Let's plan on meeting at 9:30.

-- Scott

From: Jason Golding [mailto:jgolding@point2.com]
Sent: Monday, October 01, 2007 3:18 PM
To: Brendan King; Stein, Scott D.
Subject: RE: exchange of emails

Hi Scott,

See my contact info below.

Jason Golding
CFO/General Counsel
Point2 Technologies Inc.
Phone: (306) 955-9736 ext. 215
Fax: (306) 955-0471
www.point2.com

From: Brendan King
Sent: Monday, October 01, 2007 2:11 PM
To: Jason Golding; Stein, Scott D.
Subject: exchange of emails

Here they are.

Brendan King

COO Point2

BKing@Point2.com

www.Point2.com

www.Point2homes.com

<http://point2agent.wordpress.com>

ph 306.955.9736 ext 212

Cell 306.717.380

Sidley Austin LLP mail server made the following annotations on 10/01/07, 15:40:03:

IRS Circular 230 Disclosure: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this communication, including attachments, was not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding any penalties that may be imposed on such taxpayer by the Internal Revenue Service. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addressed in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

This e-mail is sent by a law firm and may contain information that is privileged or confidential. If you are not the intended recipient, please delete the e-mail and any attachments and notify us immediately.

EXHIBIT 8

Kendler, Owen

From: Kendler, Owen
Sent: Wednesday, December 12, 2007 1:51 PM
To: 'jgolding@point2.com'
Subject: U.S. v. National Association of Realtors

Mr. Golding,

Thank you for talking with us about Point2's willingness to voluntarily produce documents to the Division and the status of Mr. King with the company. As we discussed, I have attached for your review a schedule of the documents to be voluntarily submitted. Let me know if you have any difficulty opening the pdf. We look forward to discussing our requests with you once you have had the opportunity to look them over.

Please let us know at your earliest convenience if Mr. King or another Point2 representative will be appearing as a trial witness for the NAR and whether Point2 will agree to voluntarily comply with our requests.

Thank you,
Owen



54704_1.pdf

Owen Kendler
Trial Attorney
Antitrust Division, Litigation III
United States Department of Justice
325 Seventh St., N.W.
Suite 300, LPB
Washington D.C. 20530 (FedEx Zip: 20004)

Tel: (202) 305-8376
Fax: (202) 514-7308

**SCHEDULE OF DOCUMENT REQUESTS FOR
POINT2 TECHNOLOGIES, INC.**

I. INSTRUCTIONS

1. Unless otherwise specified, the documents requested in this schedule are only those documents in the possession, or custody of Point2 Technologies, Inc. ("Point2") that were applicable, prepared, dated or received at any time from January 1, 2004, to the present. Please refer to the appendix below for definitions of many of the terms used in this schedule.

2. Please produce documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in this schedule. In either event, please identify the persons from whose files the documents have been taken for production. When documents that in their original condition were stapled, clipped, or otherwise fastened together please produce them in such form.

3. Please produce documents or data maintained by Point2 in electronic form in a reasonably accessible electronic form. Contact the attorneys for the United States to determine, with the assistance of the appropriate government technical officials, how to produce the information in data formats and choices of media that will be accessible to the government's equipment and resources. When Point2 provides documents or data in electronic form, it should also provide documents sufficient to show what information is contained in the data and how it is obtained, such as a data manual or data entry instructions.

4. To the extent Point2 objects to the production of any document or portion of a document based on a claim of privilege, please identify the nature of the privilege (including work product) that is being claimed and provide (a) the type of document, *e.g.*, letter or memorandum; (b) the general subject matter of the document; (c) the date of the document; and (d) such other

information as is sufficient to identify the document, including, the author of the document, the addressees of the document, and any other recipients shown in the document.

II. DOCUMENT REQUESTS

1. **Business and Strategic Plans.** Excluding documents related solely to Point2's heavy equipment business, please submit: (a) one example of each document that Point2 provided its investors or creditors, or to potential investors or creditors; (b) all strategic plans, business plans, and forecasts prepared by, reviewed by, or disseminated to Point2's senior management; and (c) all documents prepared by, reviewed by, or disseminated to Point2's senior management relating to entities that Point2 considers to be its competitors in any market for any product or service that Point2 provides or has considered providing.

Attached to this Schedule of Document Requests is a December 11, 2007 article from *Inman News* about recent executive resignations at Point2. Please provide all documents regarding Point2's "new directions" and "strategy and direction going forward" as discussed in the *Inman News* article.

2. **Members.** Please submit documents sufficient to show: (a) each real estate broker who is or, since January 1, 2004, has been, a member of or subscriber to Point2's NLS; (b) the name, address, and telephone number of the brokerage company with which each such broker is or was affiliated; (c) any identifying code or number that Point2 uses or used to refer to each such broker; and (d) the multiple listing service(s) to which the broker belongs.

3. **Board, Association, and Multiple Listing Service Members.** Please submit documents sufficient to identify each board or association of realtors, or multiple listing service who is or, since January 1, 2004, has been, a customer of Point2; and any identifying code or number that Point2 uses or used to refer to each such customer.

4. **Agreements.** One example of each agreement that Point2 establishes with agents or brokers (*e.g.*, the standard, professional, and premium agreements); and one example of each agreement that Point2 establishes with multiple listing services, boards, or associations.

5. **Listing Data Fields.** Documents (such as forms for submitting listings and the instructions for such forms) sufficient to show the fields or categories of real estate listing information that: (a) brokers are required to provide when submitting a listing to Point2; (b) brokers are permitted to provide when submitting a listing to Point2; (c) Point2 displays on its website with each property listing; (d) Point2 makes available to brokers for display to display on their public websites with each property listing; and (e) members or participants in Point2's NLS are able to access or view about listings submitted to Point2's NLS by other members or participants.

6. **Listing Information:** Documents sufficient to show the number and percentage of active listings maintained by Point2 that include: (a) a cooperative compensation offer; (b) the listing's street address; (c) the listing's multiple listing service number (*i.e.* the number assigned to the listing by the broker's local or regional MLS); (d) past price changes for the listing; (e) showing instructions; and (f) days on market.

7. **Listings Share:** Documents discussing the share or percentage of active listings in any area within the United States displayed by Point2 or represented in Point2's NLS.

8. **Rules.** One copy of each set of current or past rules, regulations, policies, or principles relating to Point2's NLS, listings, arbitration, or ethics.

9. **User Manuals.** One copy of each set of user manuals or instructions relating to the use of Point2 by multiple listing services, boards or associations of realtors, brokers, or other real estate professionals.

10. **Compliance.** Documents sufficient to show how Point2: (1) enforces its rules, regulations, policies, or procedures; and (2) ensures the accuracy and timeliness of listings, data fields concerning the listings, and the status of the listings (*e.g.* active, pending, withdrawn, under contract, sold).

11. **MLS Membership.** Each document discussing the withdrawal from any multiple listing service by any Point2 member or participant, or the participation or non-participation of any Point2 member or participant in any multiple listing service.

12. **Listings data.** All listings data, including all data relating to any active listings, expired listings, withdrawn listings, or listings of properties that were sold for the following metropolitan areas and regions:

Atlanta and Dekalb County, GA	Ithaca, NY
Austin, TX	Jackson, WY
Bakersfield, CA	Las Vegas, NV
Boston and Central Massachusetts	Maine
Charlotte, NC	Monroe County, FL
Chicago, IL	Orlando, FL
Cleveland, OH	Philadelphia, PA
Columbia, NY	Phoenix, AZ

Dallas/Fort Worth Region	Portland, OR
Denver, CO	San Diego, CA
Detroit, MI	Tampa, FL
Emporia, KS	Tulsa, OK
Fargo, ND	Washington/Baltimore Region
Hays KS	York, PA

The United States is prepared to discuss the contours of the above areas with Point2 and to provide Point2 metrics (*e.g.* county names or zip codes) that would give greater definition to the this request. In the alternative, if it is easier for Point2 to produce the all listings in the United States rather than for the select market areas, the United States would be willing to take receipt of the larger database.

13. **DOJ investigation and suit.** Each document discussing the lawsuit in which this document request was issued (*United States v. National Association of Realtors*, Civil Action No. 05 C 5140 (N.D. Ill.)), or the Department of Justice investigation that preceded the filing of this lawsuit, including all communications with the National Association of Realtors and its representatives (*e.g.* attorneys and experts).

IV. APPENDIX

The United States sets forth the following definitions applicable to this schedule:

A. “Point2” means Point2 Technologies, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

B. “And” and “or” are terms of inclusion and not of exclusion, and shall be construed either disjunctively or conjunctively as necessary to bring within the scope of this Schedule any document or response that might otherwise be construed to be outside its scope.

C. “Broker” means a person licensed by a state to provide services to a buyer or seller in connection with a real estate transaction. The term includes any person who lawfully possesses a broker’s license, any Realtor, and any agent or sales associate who is affiliated with a broker.

D. “Cooperative compensation offer” means the compensation offered by an agent or broker to other agents or brokers for their services in the sale of the agent or broker’s listing, or how the term is otherwise defined by the National Association of Realtors in its *Handbook on Multiple Listing Policy* (2007).

E. “Discussing” means analyzing, constituting, summarizing, reporting on, commenting on, considering, recommending, setting forth, or describing a subject, regardless of the length of the discussion. Documents that merely mention or refer to a subject without further elaboration do not discuss that subject. Documents discussing a particular subject include all documents that contain reports, studies, forecasts, analyses, calculations, plans, proposals, evaluations, recommendations, directives, procedures, policies, guidelines, or any other comments that address or concern the subject.

F. “Document” means all written, recorded, and graphic materials and all electronic data of every kind in the possession, custody, or control of the company. The term “documents” includes spreadsheets, as well as underlying cell formulae and other codes. The term “documents” also includes electronic mail messages and other documents and data stored in, or accessible through, computer or other information retrieval systems, such as personal computers, portable computers, workstations, portable or removable storage media, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of online or offline storage, whether on or off company premises.

G. “Each” includes “every” and vice versa.

H. “Including” means including, but not limited to.

I. “Listing” means a record of a residential property for sale and any information relating to that property stored or maintained by Point2’s MLS.

J. “MLS” means a multiple listing.

K. “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office or other business or legal entity, whether private or governmental.

L. “Plans” means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

M. “Point2’s NLS” refers to Point2’s national listing and advertising service for real estate professionals, or how the term is otherwise defined in Point2’s *Principles & Practices* (2007) or on its website at <http://nls.point2.com/Content/FAQ.asp> as of December 11, 2007.

N. “Relating to” means, in whole or in part, discussing, describing, pertaining to, referring or alluding to, reflecting, containing, analyzing, reporting on, commenting on, evidencing, constituting, setting forth, considering, recommending, or concerning.

O. “Rule” means any bylaw, policy, guideline, operating procedure, operating rule, or other agreed upon practice, whether formal or informal.

Finley, Timothy

From: Jason Golding [jgolding@point2.com]
Sent: Monday, February 04, 2008 3:01 PM
To: Finley, Timothy
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors
Signed By: jgolding@point2.com
Security Label: Signed

Hi Tim,

In response to your last email below, I shall note the following:

1. I am unfamiliar with any correspondence between our employees and Joshua Nixt. I have personally never heard the name. We had a number of senior employees resign on December 3, 2007. I can not say for certain that one or more of them did not have correspondence with Mr. Nixt but his name was never mentioned in any executive or manager meetings to my knowledge. If you have knowledge of correspondence between any of said employees and Mr. Nixt, please indicate the applicable employees and we will search their records and/or attempt to contact them to derive the applicable documentation.
2. As per your questions:

"First, could you explain what you mean when you write that Point2 has "provided the documents that we have identified as relevant." Does this mean that you have provided all documents responsive to the requests, or is it possible that certain responsive documents were not produced because Point2 determined they were not relevant?"

The answer is that we have provided all documents responsive to the requests.

"Second, were the documents produced by Point2 prepared or used during the ordinary course of its business, or were some of them created for the purpose of responding to our request for documents?"

These documents were used in the ordinary course of our business.

"Third, we did not see any documents that appear to come from Carey Tufts' files. If it has not done so already, would Point2 be willing to search his files as well?"

Mr. Tuft's stepped into a senior position after the aforementioned resignations and as such has had no contact before or subsequent to NAR employees. While he may have prepared documents in his own files, Point2 employees a "wiki" document sharing concept so they are available to other employees. Mr. Tufts has posted on www.reliberation.com extensively as the editor of said blog. His posts are catalogued fully for the public at such site. I doubt that many of said documents and/or posts are relevant, but I will let you and your staff be the judge of that by reviewing said site as you desire.

Regards,

2/6/2008

Jason Golding
CFO/General Counsel
Point2 Technologies Inc.
Phone: (306) 955-9736 ext. 215
Fax: (306) 955-0471
www.point2.com

-----Original Message-----

From: Finley, Timothy [mailto:Timothy.Finley@usdoj.gov]
Sent: Tuesday, January 29, 2008 2:07 PM
To: Jason Golding
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Jason,

To answer the first of your questions, our request does include documents or internal notes or e-mails relating to communications between Point2 and NAR's outside legal counsel. As to your second question, we believe that Point2 communicated on one or more occasions with Joshua Nixt, a consultant retained by NAR in this case, and possibly others in the same communication(s). We ask that Point2 produce any documents, internal notes or e-mails embodying or relating to these communications. We do not know if there are other documents embodying or relating to communications between Point2 and any other NAR employees or representatives, so we are asking that those be produced if they exist.

With respect to our document request no. 1, we have already sought to make this request as narrow as possible. We are unable to narrow it further without possibly excluding relevant documents, especially since we do not know what responsive documents Point2 has. If there is a specific type of document that you believe can be excluded from your response without compromising our need to obtain relevant documents, we can discuss this with you.

As to request no. 2, we tried to reconstruct information about Point2's members using publicly available information from its website, but were unable to do so in a systematic or reliable way. If this information is publicly available, we believe Point2 should be willing to provide it to us in a readily accessible form.

As I mentioned earlier, there is a protective order in this case which protects confidential third party information from unnecessary disclosure. Like other third parties who have produced evidence in this case, Point2 can make any production of confidential information subject to the provisions of this order, a copy of which is enclosed.

Finally, we would appreciate a few clarifications regarding your responses to the remaining requests. First, could you explain what you mean when you write that Point2 has "provided the documents that we have identified as relevant." Does this mean that you have provided all documents responsive to the requests, or is it possible that certain responsive documents were not produced because Point2 determined they were not relevant? Second, were the documents produced by Point2 prepared or used during the ordinary course of its business, or were some of them created for the purpose of responding to our request for documents? Third, we did not see any documents that appear to come from Carey Tufts's files. If it has not done so already, would Point2 be

2/6/2008

willing to search his files as well?

Thanks and hope you enjoy your holidays.

Tim

-----Original Message-----

From: Jason Golding [mailto:jgolding@point2.com]
Sent: Thursday, January 24, 2008 4:24 PM
To: Finley, Timothy
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Hi Tim,

As discussed with Owen, I am leaving for holidays today until February 4th.

I have attempted to reply to your queries. Any further inquiries will have to wait until after I return from holidays.

I can say that if there is any correspondence between Point and NAR on the matter, we have no problem providing such. Does this include NAR's external legal counsel as that is, to my recollection, the extent of my contact with them?

If you are referring to other correspondence you believe occurred, can you please narrow down the individuals in Point2 who you believe has had such correspondence so I can derive such from them?

I can confirm that, based on the request made, I have provided the documents that we have identified as relevant except for the requests in 1. and 2. As discussed, we do not wish to provide the documents in 1. and less the DOJ is more specific in said requests. As for question 2., I provided you with knowledge of where such information can be acquired as public information and will not voluntarily turn over customer records.

Regards,

Jason Golding
CFO/General Counsel
Point2 Technologies Inc.
Phone: (306) 955-9736 ext. 215
Fax: (306) 955-0471
www.point2.com

-----Original Message-----

2/6/2008

From: Finley, Timothy [mailto:Timothy.Finley@usdoj.gov]
Sent: Thursday, January 24, 2008 12:56 PM
To: Jason Golding
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Jason,

Thanks for speaking to me on January 15th and again on the 18th concerning our requests that Point2 voluntarily provide us with documents in advance of the deposition of Point2's representative, Carey Tufts. While we are pleased that Point2 has voluntarily provided some of the documents we have requested, we need documents responsive to our first and second requests before we can question Mr. Tufts at deposition or trial. Accordingly, we wanted to let you know that we are moving forward with the letters rogatory process, which as I mentioned is the formal procedure for the United States to obtain documents from a Canadian company.

This is a burdensome, expensive and time-consuming process which typically takes months and sometimes years to complete. The Court in our case has ordered that trial begin on July 7, 2008 and has indicated that the parties should complete any remaining discovery promptly. For this reason, we continue to believe that the best course would be for Point2 to voluntarily provide all of the documents we are requesting. We note Point2 has agreed - on a voluntary basis and at NAR's request - to provide a witness at trial. Point2 should also be willing to voluntarily provide all documents that are relevant to the testimony of that witness, and we hope that Point2 will agree to do so.

With respect to our remaining requests, would you please confirm that all responsive documents have been produced? We note by way of example that we did not receive any emails between NAR and Point2 (request no. 13), though we believe such communications occurred.

Tim

-----Original Message-----

From: Jason Golding [mailto:jgolding@point2.com]
Sent: Tuesday, January 15, 2008 5:38 PM
To: Finley, Timothy
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Hi Tim,

Thanks for the call today. I have reviewed the PDF requesting documents.

The following are the applicable documents requested and Point2's intention to provide or not to provide. I will attempt to provide them before I leave on holidays as of January 24th, 2008.

1. Business and strategic plans - Will not provide
2. Members - Will not provide
3. Board, Association and MLS members - N/A at present
4. Agreements - Will provide
5. Listing Data Fields - will provide screenshots of listing entry

2/6/2008

system
and detailed listings that can be viewed publicly
6. Listing Information - Will provide where available
7. Listings Share - Will provide as available
8. Rules - Will provide as available
9. User Manual - Will provide
10. Compliance - Will provide
11. MLS Membership - N/A at present
12. Listings data - Will provide in aggregate where available
13. DOJ investigation and suit - Will provide as available

My understanding all along that any production of documents by Point2 was voluntary due to our jurisdiction. This is the basis of us withholding documents as above. If this is not the case, then I will provide additional reasons.

Jason Golding
CFO/General Counsel
Point2 Technologies Inc.
Phone: (306) 955-9736 ext. 215
Fax: (306) 955-0471
www.point2.com

-----Original Message-----
From: Finley, Timothy [mailto:Timothy.Finley@usdoj.gov]
Sent: Tuesday, January 15, 2008 3:11 PM
To: Jason Golding
Cc: Kendler, Owen
Subject: RE: U.S. v. National Association of Realtors

Jason, as discussed during our call today, please let us know when you expect to send us the documents. You also mentioned that you may have some objections to our requests - please let us know what they are and we will try to work with you on that. Once we agree on a date by which the documents will be produced, we can then schedule the deposition.
Thanks.

Tim

> -----Original Message-----
> From: Kendler, Owen
> Sent: Tuesday, January 15, 2008 4:04 PM
> To: 'jgolding@point2.com'
> Cc: Finley, Timothy
> Subject: FW: U.S. v. National Association of Realtors
>
> Jason,
>
> Below is the email with the document request attached.
>
> --Owen
> -----Original Message-----

2/6/2008

> From: Kendler, Owen
> Sent: Wednesday, December 12, 2007 1:51 PM
> To: 'jgolding@point2.com'
> Subject: U.S. v. National Association of Realtors
>
> Mr. Golding,
>
> Thank you for talking with us about Point2's willingness to voluntarily
produce documents to the Division and the status of Mr. King with the
company. As we discussed, I have attached for your review a schedule of
the
documents to be voluntarily submitted. Let me know if you have any
difficulty opening the pdf. We look forward to discussing our requests
with
you once you have had the opportunity to look them over.
>
> Please let us know at your earliest convenience if Mr. King or an
another
Point2 representative will be appearing as a trial witness for the NAR
and
whether Point2 will agree to voluntarily comply with our requests.
>
> Thank you,
> Owen
>
> << File: 54704_1.pdf >>
> Owen Kendler
> Trial Attorney
> Antitrust Division, Litigation III
> United States Department of Justice Tel: (202)
305-8376
> 325 Seventh St., N.W. Fax: (202) 514-7308
> Suite 300, LPB
> Washington D.C. 20530 (FedEx Zip: 20004)
>
>

EXHIBIT 9

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Point2 Technologies confirms group of resignations

Outgoing COO says departure relates to disagreement

Tuesday, December 11, 2007

[Inman News](#)

The chief operating officer, chief technology officer and five other leaders at real estate technology and marketing company Point2 Technologies announced their resignations last week, a Point2 spokesman and its former chief operating officer confirmed Monday.

A team of employees, including COO Brendan King, chief technology officer Jason Collins, and vice president of strategy and business development Jeff Tomlin were among the departing group. Jay Thompson, who authors the [Phoenix Real Estate Guy](#) blog, suggested in a [Friday blog post](#) that something was perhaps askew at Point2. And a related blog posting at the [RELiberation site](#) drew scores of comments.

King said he left for personal reasons including a fundamental disagreement with the company's future plans. "I disagreed with the strategy and direction going forward, so I decided to move onto different opportunities," King said. He did not reveal his career plans. He said that the group of employees at Point2 "was a dream team."

"I, as did everyone else, gave a very long resignation period," King said, adding, "I haven't been back to the office as of last Monday. I've been helping over the phone and via e-mail."

The group of departing employees included Jon Levesque, John Fothergill, Greg Miller, Allan Wolinski -- who all worked in the company's real estate division. Chester Hagen, chief operating officer for Point2's heavy equipment division, has also resigned, Noujeim said.

It has been a challenge to fill the roles of the departing employees, said Noujeim. "People are getting figured out -- who's going to assume what role." But he said there will be "no change whatsoever to our customer business or the systems."

The company announced today that company president Barry Willick has assumed the responsibilities of King and Hagen, and, "Recently promoted executives will work together with key departing officials during their respective notice periods to ensure a smooth tradition."

Willick said in a statement today, "It's always hard to see Point2 team members move on, and more so when it is a group of senior staff, even though the core of Point2 maintains a very solid bench of veteran and senior managers. "While many organizations at some point face such departures, this occurrence at Point2 is unfortunate for all our staff, as Point2 staff members are like family."

He added, "Our customers both in real estate and heavy equipment should expect the leadership and investment in technology innovation they are accustomed to seeing from Point2, to continue to forge ahead. All our business, technology systems and operational functions remain on course," and, "we intend to continue to invest in our growth and in new technologies."

Willick said that the executive-level departures "would present magnificent challenges to any organization, including ours," and the vacated positions will be filled internally when possible and also through recruitment efforts if necessary.

The company announced a series of new duties and titles for Point2 employees today in the wake of the resignations. Linda Jame, *manager of the broker division for Point2's real estate business*, has assumed additional responsibility as director enterprise solutions.

Carey Tufts will serve as marketing director, Adnan Fida has been named syndication director, Zach Scott has been promoted to director of systems development, James Townley has been promoted to director of product development, Jennifer Anderson now serves as customer service manager, and Joel Loewen assumes the lead position for Point2's systems department.

Point2 operates an international property advertising and marketing service, dubbed the Point2 National Listing Service or [Point 2 NLS](#), that allows members to forge marketing agreements with other real estate professionals. According to the [Point2 NLS Web site](#), that system has about 163,300 members in 85 countries.

King said Monday that customers of Point2's real estate services "shouldn't feel any visible change," though the company may go in "new directions now." He also said that the workers who resigned would probably "love to come back."

Noujeim said that the company's financial position "remains solid," and there are "no plans to reduce the size of the company. We continue on the same track of innovation. The overall direction where the company is headed remains the same."

He also said there were no plans to terminate the workers who resigned.

In September, the company announced that its CEO and co-founder, Wendell Willick, resigned his position. That same month, he entered a guilty plea in a criminal case that is not related to the company or his work at the company. Point2 announced at the time that Barry Willick, Wendell's brother, would continue to serve as company president and chief technology officer, as the company board determined that an interim CEO position was not necessary.

Point2, which has offices in Saskatoon and Vancouver, Canada, launched in 1996 offering services for heavy-equipment dealers. The company added estate operations in 2003.

What's your opinion? Send your Letter to the Editor to opinion@inman.com.

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