IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JAY REIFERT,

Plaintiff,

v.

MEMORANDUM AND ORDER

04-C-969-S

SOUTH CENTRAL WISCONSIN MLS CORPORATION, REALTORS ASSOCIATION OF SOUTH CENTRAL WISCONSIN, INC., ROBERT L. COURTER, SUSAN MATHEWS, DAVID STARK, ROBERT WEBER, THOMAS BUNBURY, MAURICE W. HILL, PETER SVEUM, MARSHALL ZWYGART and DAVID MCGRATH,

Defendants.

Plaintiff Jay Reifert commenced this anti-trust action alleging that defendant South Central Wisconsin MLS Corp. ("SCWMLS") unlawfully ties the sale of its services to the purchase of services from its corporate parent, defendant Realtors Association of South Central Wisconsin, Inc. ("Realtors"). Plaintiff also alleges that conditioning access to MLS services on membership in Realtors is an unlawful group boycott. Plaintiff named as defendants the individual directors of SCWMLS (collectively, "individual defendants"). Jurisdiction is based on 28 U.S.C. § 1331. The matter is presently before the Court on cross motions for summary judgment. The following is a summary of relevant undisputed facts.

FACTS

Defendant Realtors is a real estate professionals trade association and the owner of 100% of SCWMLS' stock. It offers services to its members including arbitration and mediation, enforcement of a code of ethics, education courses, professional recognition, referral programs, contract forms, legal information, conventions, publications, lobbying, website, and social functions. As a condition of membership Realtors requires members to join the Wisconsin Association of Realtors ("WAR") and the National Association of Realtors ("NAR"). NAR offers additional services including use of the "Realtors" trademark, an annual conference, a magazine and membership discounts. Defendant Realtors generally accepts as a member any licensed real estate professional who agrees to abide by the NAR code of ethics and pays the fees.

In 2005, annual fees to join all three associations are $441. Realtor dues are established by members who are elected to the board of directors. Dues are set solely to cover anticipated cost of operations and there is no attempt to make a profit. On March 18, 2005 RASCW had 2419 members, including 2306 real estate licensees and 113 appraisers.

Defendant SCWMLS operates a multiple listing service which includes a computerized data base of homes and properties for sale in south cental Wisconsin. To participate in the multiple listing service members must pay $90 per quarter. Fees are set by members

elected to the board of directors. Fees are set solely to cover anticipated cost of operations and there is no attempt to make a profit. Licensed real estate brokers who are members of any local association of Realtors may participate in the SCWMLS multiple listing service. A high percentage of broker represented residential property sold in south central Wisconsin is listed in defendant's MLS. On March 18, 2005 only 84 of the 2306 real estate professionals who were Realtor members did not use SCWMLS. On March 18, 2005 SCWMLS gave access to 331 members of local Realtor associations other than defendant Realtors. SCWMLS operates the only multiple listing service primarily within Dane, Sauk and Columbia Counties.

Plaintiff is a licensed real estate broker in south central Wisconsin and the principal of Excel Exclusive Buyer Agency since 1997. He has been a member of Realtors and a participant in SCWMLS since 1988. He wants to continue his participation in SCWMLS but does not want to continue his membership in Realtors. He has continued his membership in Realtors solely to gain access to the multiple listing service.

According to a survey by plaintiff's expert Riddle, between 19 and 24% of Dane county SCWMLS users would not join Realtors if they were not required to join to gain access to the multiple listing service. In Massachusetts and Alaska where multiple listing service access does not require membership in a local Realtors

association more than 20% of MLS users do not belong to a Realtors association.

The National Association of Exclusive Buyer Agents ("NAEBA"), Colorado Exclusive Buyer Agents Association ("CEBAA"), and Massachusetts Association of Buyers Agents ("MABA") are associations of real estate professionals who are exclusive buyer agents. Plaintiff is a member of NAEBA, which offers services specific to representations of buyers. He knows of only one other exclusive buyer agent in Wisconsin eligible to join. CEBAA and MABA offer membership in Colorado and Massachusetts, respectively.

The Appraisal Institute ("AI"), National Association of Independent Fee Appraisers ("NAIFA"), and National Association of Real Estate Appraisers ("NAREA") are associations of professional real estate appraisers. They offer certifications, professional standards, education, appraisal databases, software, insurance, legislative monitoring, membership directories, conferences and commercial discounts. Annual membership fees for AI are $740. AI Membership requires payment of local chapter dues which are $110 in Wisconsin. NAIFA dues are $400 per year. NAREA dues are $215 per year.

The Asian Real Estate Agent Association ("AREAA"), Chinese Real Estate Association of America ("CREAA"), Chinese American Real Estate Professional Association ("CAREPA") and the National Association of Hispanic Real Estate Professionals ("NAHREP") are

associations of real estate professionals which promote the advancement and interests of ethnic communities. They offer networking, education, websites, lobbying, information resources and community service events. CREAA and CAREPA are headquartered and hold meetings in California. CAREPA is supported by the California Association of Realtors and NAR. Annual dues for these organizations are as follows: AREAA $100, CREAA $30, CAREPA $100, NAHREP $99.

The National Association of Independent Real Estate Brokers ("NAIREB") is open exclusively to brokers who are not affiliated with a franchised real estate company. NAIREB offers referrals, education networking and a magazine. It encourages members to join Realtor associations. NAIREB annual dues are $79.

MEMORANDUM

A per se tying violation requires proof of four elements: (1) a tying arrangement between two distinct products or services, (2) sufficient market power in the tying market to restrain free competition in the tied product market, (3) a substantial effect on interstate commerce, (4) the tying company has an economic interest in the sales of the tied product. Carl Sandburg Village Ass'n No. 1 v. First Condominium Development Co., 758 F.2d 203, 207. (7th Cir. 1985). Plaintiff argues that each of the elements has been established as a matter of law. Defendants contend that plaintiff

has failed as a matter of law to adequately establish the third or fourth elements and that factual disputes preclude summary judgment on the other elements. Additionally, defendants seek summary judgment based on a statute of limitations defense and the absence of antitrust injury.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Viewing the facts and drawing inferences most favorable to plaintiff, there is insufficient evidence for a fact finder to find that a tie between the defendant's multiple listing service and Realtor membership has had an effect on interstate commerce as that

element has been defined by the Supreme Court. A tying arrangement is a violation of antitrust law only if a substantial volume of commerce is foreclosed by the tie. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 (1984). "Similarly, when a purchaser is "forced" to buy a product he would have otherwise bought even from another in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed." Id.

Two courts of appeal have considered this requirement in the context of a tie between MLS access and Realtor association membership. In Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 815 (1st Cir. 1988) the Court upheld a directed verdict dismissing the claim, reasoning as follows:

> However, Wells' action is indeed fatally affected by the excerpt from Hyde quoted above. Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board but for the power exerted by the lure of the defendants' MLS. There is no evidence that a substantial volume of "commerce" in board membership was foreclosed by the tie-in.

In contrast, the Eleventh Circuit found a substantial effect on commerce resulting from an MLS-Realtor board tie. Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991). One of the plaintiffs in Thompson, Empire Real Estate Board, provided

services similar to the defendant real estate board. Empire was established in 1939 to serve African American real estate professionals at a time when the local Realtor association excluded them. Both boards continue to exist and to provide a similar range of services to members. Evidence established that 400 members of Metropolitan would have been members of Empire but for the MLS-Realtor board tie. The Court found a substantial foreclosure of competition based on the facts.

The issue before this Court is whether plaintiff has brought forth sufficient evidence from which a fact finder could conclude that competition in the south central Wisconsin real estate services market has been foreclosed by the SCWMLS tie to defendant Realtors. In an effort to meet its burden plaintiff has presented survey evidence from Wisconsin and statistical analysis from other markets, that supports the finding fewer real estate professionals would join defendant Realtors in the absence of the tie. This evidence suggests that about 20% of Realtor members would not join if they could obtain MLS services without membership. The law is clear, however, that merely establishing that customers purchased an unwanted product does not establish foreclosure of competition. Jefferson Parish, 466 U.S. at 16. "When there are no rival sellers of the tied product, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not

foreclose anyone." 9 Phillip A. Areeda, et. al., Antitrust Law, ¶ 1723 (2d ed. 2004).

In an effort to demonstrate foreclosure plaintiff has produced a laundry list of entities that he asserts are competitors in the market for the services provided by defendant Realtors. However, examination of the undisputed facts about these entities and the related expert report does not suggest that they are in the same product market with defendant Realtors. While it is true that there is superficial overlap in the offerings of these associations – conventions, websites, education, publications, lobbying - these similarities do little to establish that any are competing in the same product market with Realtors. Virtually all professional organizations offer such services while undoubtedly serving different product markets.

Services are in the same market when they are good substitutes for one another. That is, when there is "interchangeability of use or the cross elasticity of demand between the product and the substitutes for it." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Furthermore, plaintiff bears the burden to prove by econometric evidence that the products are good substitutes. Menasha Corp. v. News America Marketing In-Store, Inc., 354 F.3d 661, 664 (7th Cir. 2004). "[O]bserving things that to the untutored eye seem to be substitutes need not mean they are good substitutes." Id. Not only has plaintiff failed to bring forth

econometric evidence, its proffered competitive associations do not appear to be good substitutes even to the "untutored eye."

Three of the associations, NAEBA, CEBAA and MABA, serve only exclusive buyer agents. The latter two serve agents in Colorado and Massachusetts and are therefore unlikely to be substitutes for services provided in Wisconsin even if the services offered were similar. Plaintiff, who is a member of NAEBA, has testified that the Realtors and NAEBA offer distinctly different services because NAEBA is directed specifically to the concerns of buyer agents. He testified that he joined NAEBA without regard to his membership in Realtors and that he knew of only one other real estate professional in Wisconsin eligible to join NAEBA.

Three other associations, AI, NAIFA and NAREA are devoted to providing services to real estate appraisers. An unlikely substitute for the far more general services offered to real estate professionals by Realtors.

Four additional associations which plaintiff suggests as substitutes, AREAA, CREAA, CAREPA and NAHREP, serve distinct ethnic communities and have as their purpose the advancement of those communities and real estate professionals within them. It seems unlikely that their services would be substitutes for Realtors. This inference is further supported by the fact that one of the organizations, CAREPA, is affiliated with the California Association of Realtors and NAR thereby dispelling any suggestion

that they are competitors. Similarly, NAIREB is devoted to the needs of independent brokers apparently providing services unique to their needs while encouraging membership in Realtor associations.

Not only do none of these associations appear to be good substitutes, plaintiff has not offered evidence of a single real estate professional who has joined one of these organizations instead of Realtors or who has declined to join because he or she is a member of Realtors. The lack of such evidence is in stark contrast to the evidence in Thompson that 400 brokers fell into those categories. Furthermore, the dramatic differences in membership costs between the organizations and Realtors belies the suggestion that they are substitutes in the same product market.

On June 30, 2005 plaintiff offered a supplemental expert testimony of Riddle in the form of an analysis of non-random markets throughout the United states which purports to demonstrate that some of the alleged substitutes have higher membership rates in areas where there is no MLS tie ("open MLS") than in areas where there is such a tie ("closed MLS"). Defendants have objected to this evidence as untimely and inadmissible under Rule 702.

The supplemental report is untimely. The existence of competing real estate service providers in the relevant product market whose sales were foreclosed is an essential element of plaintiff's claim. Yet the initial expert report, filed within the

time requirement of Rule 26(a)(2)(C), included nothing that would support this element. In fact, when he was deposed after issuing the report Riddle denied any opinion concerning whether other providers were in the same product market as Realtors. Riddle deposition of June 23, 2005 at 26-27. In light of the prevailing law it was apparent that this element would be critical to proving the claim. It is inappropriate to introduce expert testimony on this element under the guise of "rebuttal" simply because defendants subsequently denied the existence of the element. Under such circumstances exclusion is mandated by Rule 37(c)(1) unless the delay was harmless, an argument not made by plaintiff and unlikely to be sustained based on the prior deposition responses indicating that the expert would have no opinion on the topic.

Even if the belatedly disclosed expert testimony was admitted there appears to be little relevant, probative value in the analysis. It is likely that markets for professional real estate services are different in California, Georgia, Alaska and Massachusetts and Wisconsin. For example, the proffered competing organizations are directed at specific ethnic communities yet there is no apparent effort to control for the significant differences in populations between markets. Comparison of the data indicates great disparities in membership rates within the open and closed markets which suggest that other factors, far more than open or closed status, impact membership rates.

Whatever minimal value the survey might have it is certainly not evidence that the organizations included in the survey are in the same product market as Realtors. Riddle, who conducted the analysis and offered the evidence, expressly testified at his deposition that the comparison of membership rates between open MLS and closed MLS markets does not demonstrate that the associations are in the same product market as defendant Realtors and that he has not done any analysis that would support such a conclusion. Riddle deposition of June 23, at 31. He further testified that demonstrating that the associations competed in the same product market would require an analysis of comparative prices and price movements and an analysis of specific services offered by the compared providers. Id. at 30. No such analysis has been proffered even in the belated supplemental report.

Viewing the facts most favorable to plaintiff, he has failed to offer evidence sufficient to sustain a finding that there are competing providers of services in the tied product market whose sales have been foreclosed by the tie between MLS and Realtors. Accordingly, summary judgment must be granted in favor of defendants. The Court does not address the merits of the additional independent bases for judgment offered by defendants.

Plaintiff offers far less evidence or argument in support of his group boycott claim. To sustain such a claim plaintiff must demonstrate that the anti-competitive effects of the membership

requirement outweigh any anti-competitive effects of the membership rule. Initially, plaintiff must demonstrate that the membership requirement has an adverse impact on competition in the relevant market. Bi-Rite Oil Co., Inc. v. Indiana Farm Bureau Co-op. Ass'n, Inc., 908 F.2d 200, 203 (7th Cir. 1990). Plaintiff has not demonstrated that he or any other real estate professional was denied access to the MLS. His evidence in support of anti-competitive effect consists of referencing arguments made in support of the tying claim which have previously been rejected as establishing an anti-competitive effect.

In opposition to summary judgment plaintiff merely argues that defendants have failed to meet their burden to prove the absence of anti-competitive effects. This argument misapprehends the summary judgment process which permits a defendant to put the plaintiff to its proof merely by asserting the absence of evidence to support a particular element of plaintiff's claim. Outlaw v. Newkirk, 259 F.3d 833, 837 (7th Cir. 2001). For the reasons set forth in the analysis of the tying claim, plaintiff has failed to provide evidence sufficient to sustain a finding of anti-competitive effect from the membership requirement. Accordingly, there is no need to proceed to a balancing of pro-competitive effects of the rule. Defendants are entitled to summary judgment on the group boycott claim.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered against plaintiff in favor of defendants dismissing plaintiff's complaint with prejudice and costs.

Entered this 25th day of August, 2005.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge