

Jill Gibson, OSB No. 973581

jgibson@lynchconger.com

LYNCH CONGER LLP

1000 SW Disk Drive

Bend, Oregon 97702

Telephone: 541.383.5857

Facsimile: 541.383.3968

*Attorneys for Consumer Federation
of America and Oregon State Public
Interest Research Group*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

REX – Real Estate Exchange, Inc.,

Plaintiff,

3:20-CV-02075

v.

KATE BROWN, et al.,

Defendants.

CONSUMER FEDERATION OF
AMERICA AND OREGON STATE
PUBLIC INTEREST RESEARCH
GROUP’S *AMICI CURIAE* BRIEF

Consumer Federation of America (“CFA”) and Oregon State Public Interest Research Group (“OSPIRG”) submit this brief comment to the U.S. District Court, District of Oregon, to assist the court in resolving the lawsuit filed against the State of Oregon for prohibiting residential real estate brokers from offering rebates to home buyers.¹ CFA and OSPIRG believe that this prohibition harms Oregon home purchasers and restricts price competition in a brokerage marketplace where this competition is already severely limited.

¹ This comment was prepared by Stephen Brobeck, a senior fellow at the Consumer Federation of America. Mr. Brobeck, who holds a Ph.D. in American Studies from the University of Pennsylvania, has researched, and commented on real estate brokerage issues since the early 1990s.

This comment will describe the unique pricing system of residential real estate brokers in all states, explain how it harms consumers and greatly restricts price competition, show the role of anti-rebate statutes in limiting this competition, and suggest how eliminating this prohibition would benefit Oregon consumers.

Residential real estate commission levels are relatively high and nearly uniform. During the 1990s they declined, from a 6-7 percent range to a 5-6 percent range, but since then have remained unchanged. In fact, one research firm has reported that the average commission rate was higher in 2019 (5.7%) than in 2005 (5.0%).² In Oregon, all rates quoted by agents to a potential client in one study ranged between five and six percent.³ To many outside the industry, the \$25,000-\$30,000 commission on a \$500,000 home, which could purchase a new car or an expensive medical procedure, seems unwarranted in terms of the service provided.⁴

This commission level is considerably above that in most other countries. In England, for example, the average rate is well below two percent.⁵ Furthermore, the U.S. levels are fairly uniform within regional markets.⁶

The high and near-uniform commission levels primarily reflect a pricing system that is unique in consumer markets. In this system, half of those consumers involved in home purchases (buyers) are not charged a fee by brokers for their services. Instead, the other half (sellers) are required to compensate both their listing broker and the buyer broker (“coupled commissions”).

² Statista Research Department, Average Commission Rate in the U.S. between 1992 and 2019 (November 6, 2020). Another source, Real Trends, estimates that the average commission rate fell slightly during the past two decades.

³ Hidden Real Estate Commissions, loc. cit., p. 11.

⁴ For just one example see: “The Cost of Buying and Selling Homes Is Too High: Ending America’s Real-Estate Racket,” The Economist (February 15, 2020).

⁵ Panle Jia Barwick, Maisy Wong, Competition in the Real Estate Brokerage Industry: A Critical Review (Economic Studies at Brookings, December 2019), p. 8. In countries with rates under two percent, there is usually just one estate agent facilitating the sale.

⁶ An industry-funded study found, for example, that well over 50 percent of commission rates were identical in six of the seven areas studied. Ann B. Schnare, Robert Kulick, “Do Real Estate Agents Compete on Price? Evidence from Seven Metropolitan Areas,” in Edward Glaeser, John M. Quigley, Housing Markets and the Economy: Risk, Regulation, and Policy (Lincoln Institute of Land Policy, 2009).

The near uniformity of this practice reflects the Multiple Listing Service (MLS) requirement for all brokers who list properties to include a fixed, non-negotiable commission for the buyer broker. Sellers can ask their brokers to reduce this “commission split,” but they then risk the property not being shown by buyer brokers. Buyers cannot easily detect their broker steering them away from low commission properties because they do not have access to the full MLS listings which include the splits.⁷ Three major lawsuits are seeking to eliminate these coupled commissions, and the U.S. Department of Justice has also recently challenged them.⁸

Coupled commissions with hidden splits represents the most important factor influencing brokerage pricing, but it is not the only factor contributing to high and near-uniform commission levels. Other factors include:

- the glut of licensed real estate agents – nearly two million facilitate 5-6 million home sales annually – that provides a strong incentive to all agents to keep commission levels high,⁹
- the refusal of most listing brokers to negotiate their commissions,¹⁰ and
- the neglect of many states, strongly influenced by the industry, to support U.S. Department of Justice efforts to restrain anti-competitive practices within the industry.¹¹

⁷ Research by three economists using over 650,000 residential listings in Massachusetts found significant steering by agents away from low commission properties. Panle Jia Barwick, Paraka Pathak, Maisy Wong, “Conflicts of Interest and Steering in Residential Brokerage,” American Economic Journal: Applied Economics, v. 9, n. 3 (July 2017), pp. 191-222.

⁸ Sitzer v. NAR (2019); Moehrl v. NAR (2020); Bauman v. MLS Property Information Network, Inc. (2020); U.S. Department of Justice, Antitrust Division v. NAR (2020).

⁹ Despite 5-6 percent commissions, the typical real estate licensee grosses less than \$50,000 in income annually according to NAR surveys. NAR Member Profile (July 2020).

¹⁰ Phone conversations with a representative sample of 200 listing agents, in which CFA played the role of a potential home buyer, revealed that 73 percent said they would not negotiate their commission. Hidden Real Estate Commissions, loc. cit., p. 7.

¹¹ A large majority of states have delegated authority and responsibility for regulating the industry to the industry itself through state-created real estate commissions. Patrick Woodall, Stephen Brobeck, State Real Estate
Page 3 – CONSUMER FEDERATION OF AMERICA AND OREGON STATE PUBLIC
INTEREST RESEARCH GROUP’S *AMICI CURIAE* BRIEF

Despite widespread industry opposition to negotiation of commissions, sellers do have the opportunity to secure a rate below the prevailing one, either by finding a traditional listing agent who will reduce their commission or by employing a discount broker such as Redfin.¹² Buyers in Oregon, however, do not have this opportunity. As explained earlier, the buyer broker commission is relatively fixed and not negotiable. And since it is typically built into the sale price, the buyer ends up paying most or all of it.¹³ Rebates provide some relief to buyers unable to negotiate lower commissions, then having to pay for them through a higher sales price.

Accordingly, rebates not only benefit buyers financially but also are fair to them. At the same time, rebates provide an opportunity for enterprising agents to compete for buyer clients by offering these buyers a portion of their agent compensation. These rebates, permitted by 40 states and the District of Columbia, encourage some price competition in regional markets within these states.¹⁴

The plaintiff, REX Homes, suggests that the Oregon rebate prohibition denies Oregon consumers an average of \$12,600 per sale.¹⁵ Whether the average saving is this amount or only \$1,260, it is real to the large majority of renters who wish to but cannot afford to purchase a

Regulation: Industry Dominance and Consumer Costs (2006). In Oregon the real estate commissioner and seven of the nine members of the Oregon Real Estate Board must be active real estate licensees.

¹²Nevertheless, there is little evidence that many buyers take advantage of this opportunity, which makes sense since most sellers are preoccupied with the timing and price of the sale, since a large majority of listing agents will not negotiate commissions, and since discounters list a very small percentage of homes for sale. The largest, Redfin, lists fewer than one percent of these homes nationwide. Jeff Ostrowski, “In hot seller’s market, discount brokers gain appeal,” Bankrate (December 22, 2020).

¹³ There is much consensus within the industry that the commission is added to the sale price. See: “Who Pays the Buyer’s Agent Commission?” simplessharing on Surfield website (September 17, 2020). Audrey Ference, “Who Pays the Real Estate Agent When You Buy or Sell a Home,” Realtor.com (August 22, 2017). Elizabeth Weintraub, “Who Pays the Commission to the Real Estate Agent,” the balance (January 11, 2021). Tara Struyk, “Who Pays the Real Estate Commission?” Investopedia (December 31, 2020). Lydia DePillis, “The internet didn’t shrink 6% real estate commissions, but this lawsuit might,” CNN Business (May 15, 2019).

¹⁴ Council of Insurance Agents, 50-State Survey: Anti-Rebating Laws (2017).

¹⁵ REX v. State of Oregon Complaint (2020), p. 3.

home.¹⁶ But our concern is not primarily for the pricing restraints just on REX. Without the rebate prohibition, other discount brokers, and possibly even some traditional ones, would make available rebates to home buyers. In Washington State, next door, many agents offer rebates. Those working for just one company, Redfin, participated in an estimated five percent of all Seattle home sales in 2016. Recently, the company has offered buyers an average refund of \$3,500.¹⁷

The rebate prohibition stifles price competition and harms consumers. As a Federal government report states: “Rebates can be powerful tools for price competition among brokers....Rebate bans inhibit price discounting and thereby harm consumers.”¹⁸ We urge the court to find a way to make these rebates legal to foster price competition and benefit consumers.¹⁹ Other states with laws that prohibit commission-sharing to non-licensed parties, similar to Oregon’s, have made exceptions for customer rebates.²⁰ Insisting that Oregon make such an exception would serve the public interest.

Dated: March 10, 2021

Respectfully submitted,

/s/
Jill Gibson, OSB No. 973581
jgibson@lynchconger.com
LYNCH CONGER LLP
1000 SW Disk Drive
Bend, Oregon 97702

¹⁶ In its December 1, 2020 Economist’s Outlook, NAR estimated that 62 percent of renters could not afford to purchase a home.

¹⁷ Jeanne Lang Jones, “Is Redfin Really a Game Changer in the Real Estate Industry?” Seattle Business (February 2018).

¹⁸ Federal Trade Commission, U.S. Department of Justice, Competition in the Real Estate Brokerage Industry (April 2007), Section IV.A.1.

¹⁹ Another benefit of eliminating anti-rebate prohibitions in the ten states, according to one academic study, would be reducing total brokerage costs by nine percent. Competitive pressures could force brokers to share this efficiency with their clients by reducing fees. Lu Han, Seung-Hyun Hong, “Testing Cost Inefficiency Under Free Entry in the Real Estate Brokerage Industry,” Journal of Business & Statistics (2011), v. 29, n. 4, pp. 564-578.

²⁰ Maryland, for example, prohibits rebates to any individual who provides brokerage services but is not licensed, but allows home buyers and sellers to receive rebates because it does not regard them as having provided any services. See the joint communication from the State Attorney General and Real Estate Commission on “incentives and rebates” (December 14, 2010) on the Maryland Department of Labor’s website.

*Attorneys for Consumer Federation
of America and Oregon State Public
Interest Research Group*

Page 6 – CONSUMER FEDERATION OF AMERICA AND OREGON STATE PUBLIC
INTEREST RESEARCH GROUP’S *AMICI CURIAE* BRIEF

LYNCH CONGER LLP
ATTORNEYS AT LAW
T: (541) 383-5857 | F: (541) 383-3968
1000 SW DISK DRIVE
BEND, OREGON 97702

CERTIFICATE OF SERVICE

In accordance with Fed. R. Civ. P. 5(b)(2)(E) and LR5-1, I hereby certify that on March 10, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

Dated: March 10, 2021

/s/

Jill Gibson, OSB No. 973581
jgibson@lynchconger.com
LYNCH CONGER LLP
1000 SW Disk Drive
Bend, Oregon 97702

*Attorneys for Consumer Federation
of America and Oregon State Public
Interest Research Group*