

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

SECOND WITNESS STATEMENT OF SAM PROCHAZKA

I, Sam Prochazka, of the City of Edmonton, in the Province of Alberta, state as follows:

1. I am the Founder and Chief Executive Officer of Sam & Andy Inc. ("Sam & Andy"), a real estate software company that builds websites for real estate professionals. I gave evidence at the hearing in this matter held in September and October 2012 (the "Initial Hearing"). This witness statement updates the evidence I gave at the Initial Hearing with events that have happened since that time.

Business Developments since the Initial Hearing

2. Sam & Andy still offers Clicksold websites to real estate agents in the Greater Toronto Area ("GTA"). Our packages and pricing remain as I testified at the Initial Hearing. As the date of this statement, we had approximately 160 bronze customers, 1 silver customer, no gold customers, and 90 platinum customers in the GTA. The platinum package is the only package that offers VOW/IDX capability. Platinum and bronze have emerged as our most popular Clicksold packages because agents either want VOW/IDX capability or not. Those that do not want VOW/IDX capability are satisfied with the free bronze package.

3. TREB's requirement that Sam & Andy obtain authorization from both the agent and broker for every VOW-enabled website we create has arrested our customer growth in the GTA. We lose a prospective customer on a weekly basis when a broker refuses to authorize his agent to purchase our platinum package and operate a VOW/IDX capable website. In contrast, the local boards that we deal with in Calgary, Edmonton, Vancouver, and the US do not require individual broker authorization for each website we create. Instead, Sam & Andy has a standing license agreement with each local board which permits us to obtain the MLS data and use it to create a website for board members. Broker authorization is not required for each agent's website, making it easier for agents in Western Canada and the US to purchase our services.

4. Sam & Andy's primary market remains Western Canada. Since the Initial Hearing, growth has been relatively flat: we are not shrinking in Western Canada, but we are not growing either. In my view, the Western Canadian market is saturated. Most agents have websites. Sam & Andy and our competitors have operated in the market for a decade. Our new customers tend to be past customers of our competitors looking for a different service provider rather than agents

adopting a website for the first time. Similarly, we lose existing customers to our competitors from time to time.

5. In the United States, Sam & Andy withdrew from the Los Angeles area. We had a datafeed from the largest local MLS in the LA area, but to compete effectively we needed feeds from the other five major local MLSs. This was not worth the cost and complexity. We continue to operate in other US markets providing websites to US agents.

Sold Information in Edmonton

6. Since the Initial Hearing, no Canadian real estate board from which Sam & Andy obtains a datafeed has made available sold or other historical MLS information, such as WEST listings, in that datafeed.

7. I understand that the REALTORS® Association of Edmonton ("RAE"), which operates the local Edmonton MLS, intended to launch a customer-facing comparative market analysis ("CMA") tool in July 2014 but still has yet to. Agents would be able to offer the CMA tool on their website to registered users. Those users may enter criteria (e.g., lot size, home type, number of rooms/bathrooms etc.) and run a one-time query against the Edmonton MLS database. In response to the query, the CMA tool would return a limited number of recently sold listings which match the inputted search criteria. The sold prices would be visible to the buyer or seller conducting the search and the user could save the search results.

8. As I understand the proposed CMA tool, the historical MLS listing information to enable it would not be made available in a datafeed. It would remain in the RAE's database and only be made available in the way described in response to specific queries from home buyers and

sellers. Thus, the CMA tool would not enable agents, brokerages, or service providers like Sam & Andy to construct their own CMA tool using MLS data.

9. If RAE provided the historical MLS listing information in a datafeed as active MLS listing information is, agents, brokerages, and service providers, like Sam & Andy could, for example,:

- (a) create their own CMA tools by supplementing MLS data with non-MLS data (like school or neighbourhood information),
- (b) create other tools for use by agents or VOW users, and
- (c) analyze the data to offer additional information such as price trend information.

10. Not only would such tools improve service to home buyers and sellers, but agents, brokerages, and service providers could develop unique tools to differentiate themselves from their competitors. For example, Sam & Andy could invest in and develop tools which our competitors did not offer to attract more agents to our website services.

11. In contrast, the CMA tool that RAE proposed is a one-size-fits-all solution. It would not help Edmonton agents or brokerages distinguish themselves from their competitors since every RAE member will be able to offer the exact same CMA tool.

12. As of the date of this witness statement, RAE has not launched this CMA tool. As far as I can tell the initiative to do so has disappeared and I do not expect this tool to be available in the next twelve months, if at all.

Growth Opportunities as a Brokerage

13. As an entrepreneur, I frequently consider and test new business opportunities, primarily in the technology/ecommerce space (such as my online memory foam mattress business, Novosbed, or the online designer furniture business, Bryght, in which I am an investor).

14. [REDACTED]

15. [REDACTED]

16. Although my investors and I evaluated the web-based brokerage model, we rejected it for two reasons.

17. First, without sold data we did not have the ability to strongly differentiate and disrupt the existing market. Without offering home buyers and sellers different tools and a different home buying and selling experience, we did not expect to attract sufficient customers to our business without spending uneconomic amounts on marketing.

18. Knowing that the local real estate boards would not likely make MLS® sold data available, we considered whether sold prices from Alberta's public land registry system could be an alternative. On the one hand, the public land registry is a more comprehensive source of sold prices than the MLS® because it has information on prices for every property, not just those properties sold through the MLS®. However, information from the public registry has several disadvantages over information from the MLS®. It is less timely as I understand there is some lag between when a sale is agreed to, when the property is sold, and when the transaction price becomes available on the public registry. It also lacks details about the property, whereas a historical MLS® listing will include the sold price alongside the property's features (e.g., number of bedrooms/bathrooms, room sizes, amenities, pictures, descriptions etc.) which provide helpful context about the property. Finally, information from the public registry is much more expensive. We estimated that it would cost at least \$250,000 to obtain 10 years worth of records to properly seed the database to support the tools we wanted to develop. We would also have to pay to keep the database current. The cost of obtaining information from the public registry proved a stumbling block as we evaluated whether to proceed with our brokerage model.

19. Second, the business model depended on recruiting high quality agents willing to work full-time on a salary. In an industry dominated by commissions, part-time agents, and varying service quality, my investors and I were not convinced that we could find enough agents able to meet our standards and willing to work on a full-time salaried basis.

20. These two factors, the inability to obtain sold data without significant upfront investment and our doubt about attracting suitable agents, significantly increased the investment risk associated with the web-based brokerage proposal. We and our investors rejected it in favour of another business idea which promised similar returns at a lower risk. Thus, the investor money that would have funded the brokerage has instead been invested in a non-real estate business.

21. Had sold data been available at a much lower cost, such as if the local boards made historical MLS® listings available in a datafeed, the upfront investment associated with our web-based brokerage proposal would have decreased significantly reducing the overall investment risk associated with the proposal. In those circumstances, we may have decided to pursue this model rather than investing in a non-real estate business.

22. Were historical MLS® listings made available in a datafeed in Alberta or elsewhere, like Toronto, we would reconsider whether our proposed brokerage model was worth the investment.

Sold Data in Ontario

23. Sam & Andy contacted Teranet, which I understand manages Ontario's land registry data, about purchasing Ontario land registry data as we considered doing in Alberta. Teranet did not return our call.

SIGNED THIS 03 DAY OF February, 2015.



SAM PROCHAZKA

EXHIBIT "A"

TO THE SECOND WITNESS STATEMENT OF SAM PROCHAZKA

File No. CT-2011-003

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**SECOND WITNESS STATEMENT OF
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