

ANALYSIS OF AGREEMENTS CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Information and Real Estate Services, LLC, File No. 0610087
In the Matter of Northern New England Real Estate Network, Inc., File No. 0510065
In the Matter of Williamsburg Area Association of Realtors, Inc., File No. 0610268
In the Matter of Realtors Association of Northeast Wisconsin, Inc., File No. 0610267
In the Matter of Monmouth County Association of Realtors, Inc., File No. 0510217

The Federal Trade Commission has accepted for public comment a series of agreements containing consent orders with five respondent entities. Each of the proposed respondents operates a multiple listing service (“MLS”) that is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. The agreements settle charges that each respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent orders have been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreements and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed consent orders. This analysis does not constitute an official interpretation of the agreements and proposed orders, and does not modify their terms in any way. Further, the proposed consent orders have been entered into for settlement purposes only, and do not constitute an admission by any proposed respondent that it violated the law or that the facts alleged in the respective complaint against each respondent (other than jurisdictional facts) are true.

I. The Respondents

The agreements are with the following organizations:

- Information and Real Estate Services, LLC (“IRES”) is a limited liability company based in Loveland, Colorado, that is owned by five boards and associations of realtors in Boulder, Fort Collins, Greeley, Longmont, and Loveland/Berthoud, Colorado. IRES operates a regional MLS for Northern Colorado that is used by more than 5,000 real estate professionals.

- Northern New England Real Estate Network, Inc. (“NNEREN”) is a corporation based in Concord, New Hampshire, that functions as an association of realtors. NNEREN operates an MLS for New Hampshire and some surrounding areas that is used by several thousand real estate professionals.

- Williamsburg Area Association of Realtors, Inc. (“WAAR”), is a corporation based in Williamsburg, Virginia, that functions as an association of realtors. WAAR operates an MLS for the Williamsburg, Virginia, metropolitan area and surrounding counties that is used by approximately 650 real estate professionals.
- Realtors Association of Northeast Wisconsin, Inc. (“RANW”) is a non-profit corporation based in Appleton, Wisconsin, that functions as an association of realtors. RANW operates an MLS for the Northeast Wisconsin Area, which includes the cities of Green Bay, Appleton, Oshkosh, and Fond du Lac, Wisconsin, and the surrounding counties, that is used by more than 1,500 real estate professionals.
- Monmouth County Association of Realtors, Inc. (“MCAR”) is a corporation based in Tinton Falls, New Jersey, that functions as an association of realtors. MCAR operates an MLS for Monmouth County, Ocean County and the surrounding areas of New Jersey that is used by several thousand real estate professionals.

II. Industry Background

A Multiple Listing Service, or “MLS,” is a cooperative venture by which real estate brokers serving a common local market area submit their listings to a central service, which in turn distributes the information, for the purpose of fostering cooperation among brokers and agents in real estate transactions. The MLS facilitates transactions by putting together a home seller, who contracts with a broker who is a member of the MLS, with prospective buyers, who may be working with other brokers who are also members of the MLS. Membership in the MLS is largely limited to member brokers who generally must possess a license to engage in real estate brokerage services and meet other criteria set by MLS rules.

Prior to the late 1990s, the listings on an MLS were typically directly accessible only to real estate brokers who were members of a local MLS. The MLS listings typically were made available through books or dedicated computer terminals, and generally could only be accessed by the general public by physically visiting a broker’s office or by receiving a fax or hand delivery of selected listings from a broker.

Information from an MLS is now typically available to the general public not only through the offices of real estate brokers who are MLS members, but also through three principal categories of internet web sites. First, information concerning many MLS listings is available through Realtor.com, a national web site run by the National Association of Realtors (“NAR”). Realtor.com contains listing information from many local MLS systems around the country and is the largest and most-used internet real estate web site. Second, information concerning MLS listings is often made available through a local MLS-affiliated web site. Third, information

concerning MLS listings is often made available on the internet sites of various real estate brokers, who choose to provide these web sites as a way of promoting their brokerage services. Most of these various web sites receive information from an MLS pursuant to a procedure often known as Internet Data Exchange (“IDX”), which is typically governed by MLS policies. The IDX policies allow operators of approved web sites to display MLS active listing information to the public.

Today the internet plays a crucial role in real estate sales. According to a 2005 survey by the National Association of Realtors (“NAR”), 77 percent of home buyers used the internet to assist in their home search, with 57 percent reporting frequent internet searches. Twenty-four percent of respondents first learned about the home they selected from the internet, the second most common means behind learning about a home from a real estate agent (50 percent).¹ In all, 69 percent of home buyers found the internet to be a “very useful” source of information, and a total of 96 percent found the internet to be either “very useful” or “somewhat useful.”² Moreover, the NAR Survey makes clear that the overwhelming majority of web sites used nationally in searching for homes contain listing information that is provided by local MLS systems.³

A. Types of Real Estate Brokerage Professionals

A typical real estate transaction involves two real estate brokers. These are commonly known as a “listing broker” and a “selling broker.” The listing broker is hired by the seller of the property to locate an appropriate buyer. The seller and the listing broker agree upon compensation, which is determined by written agreement negotiated between the seller and the listing broker. In a common traditional listing agreement, the listing broker receives compensation in the form of a commission, which is typically a percentage of the sales price of the property, payable if and when the property is sold. In such a traditional listing agreement, the listing broker agrees to provide a package of real estate brokerage services, including promoting the listing through the MLS and on the internet, providing advice to the seller regarding pricing and presentation, fielding all calls and requests to show the property, supplying a lock-box so that potential buyers can see the house with their agents, running open houses to show the house to potential buyers, negotiating with buyers or their agents on offers, assisting with home inspections and other arrangements once a contract for sale is executed, and attending the closing of the transaction.

¹ *E.g.*, PAUL C. BISHOP, THOMAS BEERS AND SHONDA D. HIGHTOWER, THE 2005 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS (hereinafter, “NAR Study”) at 3-3, 3-4.

² *Id.* See *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006), available at <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/HmBuyerSellerSurvey06?OpenDocument>.

³ NAR Study at 3-19.

The other broker involved in a typical transaction is commonly known as the selling broker. In a typical transaction, a prospective buyer will seek out a selling broker to identify properties that may be available. This selling broker will discuss the properties that may be of interest to the buyer, accompany the buyer to see various properties, try to arrange a transaction between buyer and seller, assist the buyer in negotiating the contract, and help in further steps necessary to close the transaction. In a traditional transaction, the listing broker offers the selling broker a fixed commission, to be paid from the listing broker's commission when and if the property is sold. Real estate brokers typically do not specialize as only listing brokers or selling brokers, but often function in either role depending on the particular transaction.

B. Types of Real Estate Listings

The relationship between the listing broker and the seller of the property is established by agreement. The two most common types of agreements governing listings are Exclusive Right to Sell Listings and Exclusive Agency Listings. An Exclusive Right to Sell Listing is the traditional listing agreement, under which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the listing broker a commission if and when the property is sold, whether the buyer of the property is secured by the listing broker, the owner or another broker.

An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but under which the property owner or principal reserves a right to sell the property without assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

Some real estate brokers have attempted to offer services to home sellers on something other than the traditional full-service basis. Many of these brokers, often for a flat fee, will offer sellers access to the MLS's information-sharing function, as well as a promise that the listing will appear on the most popular real estate web sites. Under such arrangements, the listing broker does not offer additional real estate brokerage services as part of the flat fee package, but allows sellers to purchase additional services if sellers so desire. These non-traditional arrangements often are structured using Exclusive Agency Listing contracts.

There is a third type of real estate listing that does not involve a real estate broker, which is a "For Sale By Owner" or "FSBO" listing. With a FSBO listing, a home owner will attempt to sell a house without the involvement of any real estate broker and without paying any compensation to such a broker, by advertising the availability of the home through traditional advertising mechanisms (such as a newspaper) or FSBO-specific web sites.

There are two critical distinctions between an Exclusive Agency Listing and a FSBO for the purpose of this analysis. First, the Exclusive Agency Listing employs a listing broker for access to the MLS and web sites open to the public; a FSBO listing does not. Second, an

Exclusive Agency Listing sets terms of compensation to be paid to a selling broker, while a FSBO listing often does not.

III. The Conduct Addressed by the Proposed Consent Orders

Each of the proposed consent orders is accompanied by a complaint setting forth the conduct by the respondent that is the reason for the proposed consent order. In general, the conduct at issue in these matters is largely the same as the conduct addressed by the Commission in its recent consent order involving the Austin Board of Realtors (“ABOR”).⁴

The complaints accompanying the proposed consent orders allege that respondents have violated Section 5 of the FTC Act by adopting rules or policies that limit the publication and marketing on the internet of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts. The rules or policies challenged in the complaints state that information about properties will not be made available on popular real estate web sites unless the listing contracts are Exclusive Right to Sell Listings. When implemented, these “Web Site Policies” prevented properties with non-traditional listing contracts from being displayed on a broad range of public web sites.

The respondents adopted the challenged rules or policies at various times between 2001 and 2005. Each respondent, prior to the Commission’s acceptance of the consent orders and proposed complaints for public comment, rescinded or modified its rules to discontinue the challenged practices. The members of each respective MLS affected by these rules have been notified of the recent changes.

The complaints allege that the respondents violated Section 5 of the FTC Act by unlawfully restraining competition among real estate brokers in their respective service areas by adopting the Web Site Policies.

A. The Respondents Have Market Power

Each of the respondents serves the great majority of the residential real estate brokers in its respective service area. These professionals compete with one another to provide residential real estate brokerage services to consumers.

Each of the respondents also is the sole or dominant MLS serving its respective service area. Membership in each of the respondents’ MLS systems is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in the

⁴ *In the Matter of Austin Bd. of Realtors*, Docket No. C-4167 (Final Approval, Aug. 29, 2006). The ABOR consent order was published with an accompanying Analysis To Aid Public Comment at 71 Fed. Reg. 41023 (July 19, 2006).

respective service area.⁵ Each respondent, through the MLS that it operates, controls key inputs needed for a listing broker to provide effective real estate brokerage services, including: (1) a means to publicize to all brokers the residential real estate listings in the service area; and (2) a means to distribute listing information to web sites for the general public. By virtue of industry-wide participation and control over a key input, each of the respondents has market power in the provision of residential real estate brokerage services to sellers and buyers of real property in its respective service area.

B. Respondents' Conduct

At various times between 2001 and 2005, each of the respondents adopted a rule that prevented information on listings other than traditional Exclusive Right to Sell Listings from being included in the information available from its respective MLS to be used and published by publicly-accessible web sites.⁶ The effect of these rules, when implemented, was to prevent such information from being available to be displayed on a broad range of web sites, including the NAR-operated "Realtor.com" web site; the web sites operated by several of the respondents; and member web sites.

Non-traditional forms of listing contracts, including Exclusive Agency Listings, are often used by listing brokers to offer lower-cost real estate services to consumers. The Web Site Policies of each of the respondents were joint action by a group of competitors to withhold distribution of listing information to publicly accessible web sites from competitors who did not contract with their brokerage service customers in a way that the group wished. This conduct was a new variation of a type of conduct that the Commission condemned 20 years ago. In the 1980s and 1990s, several local MLS boards banned Exclusive Agency Listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders.⁷

⁵ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

⁶ For example, MCAR's rule stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis. (Office exclusive and exclusive agency listings will not be forwarded to IDX sites.)" (MCAR Rules and Regulations (2004)). The NNEREN rule used somewhat different wording: "Exclusive Agency listings will not be included in NNEREN datafeeds to any web site accessed by the general public such as nneren.com, REALTOR.com, third party feeds, IDX, etc." (NNEREN Rules and Regulations (Feb. 2005)).

⁷ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, 116 F.T.C. 704 (1993); *In the Matter of Puget Sound Multiple Listing Assoc.*, 113 F.T.C. 733 (1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990); *In the Matter of Metro MLS, Inc.*, 113 F.T.C. 305 (1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*,

C. Competitive Effects of the Web Site Policies

The Web Site Policies have the effect of discouraging members of the respective respondents' MLS systems from offering or accepting Exclusive Agency Listings. Thus, the Web Site Policies substantially impede the provision of unbundled brokerage services, and make it more difficult for home sellers to market their homes. The Web Site Policies have caused some home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements.⁸

When home sellers switch to full service listing agreements from Exclusive Agency Listings that often offer lower-cost real estate services to consumers, the sellers may purchase services that they would not otherwise buy. This, in turn, may increase the commission costs to consumers of real estate brokerage services. By preventing Exclusive Agency Listings from being transmitted to public-access real estate web sites, the Web Site Policies have adverse effects on home sellers and home buyers. In particular, the Web Site Policies deny home sellers choices for marketing their homes and deny home buyers the chance to use the internet to easily see all of the houses listed by real estate brokers in the area, making their search less efficient.

D. There is No Competitive Efficiency Associated with the Web Site Policies

The respondents' rules at issue here advance no legitimate procompetitive purpose. If, as a theoretical matter, buyers and sellers could avail themselves of an MLS system and carry out real estate transactions without compensating any of its broker members, an MLS might be concerned that those buyers and sellers were free-riding on the investment that brokers have made in the MLS and adopt rules to address that free-riding. But this theoretical concern does not justify the rules or policies adopted by the various respondents here. Exclusive Agency Listings do not enable home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing, and the MLS rules of each of the respondents already provide protections to ensure that a selling broker – a broker who finds a buyer for the property – is compensated for the brokerage service he or she provides.

It is possible, of course, that a buyer of an Exclusive Agency Listing may make the purchase without using a selling broker, but this is true for traditional Exclusive Right to Sell Listings as well. Under the existing MLS rules of each of the respondents that apply to any form of the listing agreement, the listing broker must ensure that the home seller pays compensation to

106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

⁸ WAAR does not appear to have implemented the Web Site Policies, as Exclusive Agency Listings have been included in IDX feeds before, during and after its policy was in effect. However, its adoption and publication of the policy alone has inhibited the use of such listings in the Williamsburg area by at least one local real estate broker, who chose not to use Exclusive Agency Listings because he did not wish to violate the local rule.

the cooperating selling broker (if there is one), and the listing broker may be liable himself for a lost commission if the home seller fails to pay a selling broker who was the procuring cause of a completed property sale. The possibility of sellers or buyers using the MLS but bypassing brokerage services is already addressed effectively by the respondents' existing rules that do not distinguish between forms of listing contracts, and does not justify the Web Site Policies.

IV. The Proposed Consent Orders

Despite the recent cessation by each of the respondents of the challenged practices, it is appropriate for the Commission to require the prospective relief in the proposed consent orders. Such relief ensures that the respondents cannot revert to the old rules or policies, or engage in future variations of the challenged conduct. The conduct at issue in the current cases is itself a variation of practices that have been the subject of past Commission orders; as noted above, in the 1980s and 1990s, the Commission condemned the practices of several local MLS boards that had banned Exclusive Agency Listings entirely, and several consent orders were imposed.

The proposed orders are designed to ensure that each MLS does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the MLS systems operated by the respondents. The proposed orders prohibit respondents from adopting or enforcing any rules or policies that deny or limit the ability of their respective MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. The proposed orders include examples of such practices, but the conduct they enjoin is not limited to those five enumerated examples. In addition, the proposed orders state that, within thirty days after each order becomes final, each respondent shall have conformed its rules to the substantive provisions of the order. Each respondent is further required to notify its participants of the applicable order through its usual business communications and its website. The proposed orders require notification to the Commission of changes in the respondent entities' structures, and periodic filings of written reports concerning compliance with the terms of the orders.

The proposed orders apply to each of the named respondents and entities it owns or controls, including its respective MLS and any affiliated web site it operates. The orders do not prohibit participants in the respondents' MLS systems, or other independent persons or entities that receive listing information from a respondent, from making independent decisions concerning the use or display of such listing information on participant or third-party web sites, consistent with any contractual obligations to respondent(s).

The proposed orders will expire in 10 years.