

Complaint

116 F.T.C.

IN THE MATTER OF

UNITED REAL ESTATE BROKERS OF ROCKLAND, LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3461. Complaint, Sept. 27, 1993--Decision, Sept. 27, 1993*

This consent order prohibits, among other things, the New York provider of real estate brokerage services from restricting exclusive-agency listings; restricting brokers from soliciting homeowners with current listings for future business; interfering with the cancellation of a listing; and excluding from membership brokers who do not operate a full-time office, or maintain an office in Rockland County, or who are not residents of New York state.

*Appearances*For the Commission: *Michael J. Bloom and Rhonda McLean.*For the respondent: *David Silverman, Granik, Silverman, Sandberg, Campbell & Nowicki, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent United Real Estate Brokers of Rockland, Ltd., a corporation and successor by merger with its former wholly-owned subsidiary Rockland County Multiple Listing Systems, Inc., has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent United Real Estate Brokers of Rockland, Ltd. (hereafter "Rockland MLS") is a corporation organized, existing, and doing business under and by virtue of the laws of

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the State of New York, with its office and principal place of business located at 255 South Middletown Road, Nanuet, New York.

PAR. 2. Rockland MLS is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. In the course and conduct of their businesses, Rockland MLS and its members maintain and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, and through the policies, acts, and practices described below, Rockland MLS and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Rockland MLS is, and for some time has been, a privately-held corporation licensed as a real estate broker by the State of New York. Rockland MLS characterizes itself as a "real estate directory service," providing a multiple listing service to subscribing member real estate brokers, many of whom are also shareholders in the corporation.

PAR. 5. Only subscribing members may participate in the multiple listing service. The member brokers provide, for a commission, the service of bringing together buyers and sellers of residential real estate, as well as other services designed to facilitate sales of such properties. Each member agrees to submit all "exclusive agency listings" and "exclusive right to sell listings" pertaining to resales of 1-4 family residential real estate located within Rockland County for publication to the entire membership of the multiple listing service, and to share commissions with those member brokers that successfully locate purchasers for properties listed. An "exclusive agency listing" is a listing under which the property owner agrees to pay the broker an agreed commission if the property is sold through any real estate broker, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the broker. An "exclusive right to sell listing" is a listing under which a property owner agrees to pay the broker an agreed commission if the property

is sold, whether the purchaser is located by the broker or any other person, including the owner.

PAR. 6. Pursuant to Rockland MLS's Constitution and By-laws, no subscribing member serves as an agent of another with respect to the sale of any property listed with the MLS; rather, all member brokers are equally responsible in the effort to procure buyers for properties listed with Rockland MLS. By the terms of Rockland MLS's listing form, which is signed by the property owner and the broker procuring the listing (the "listing broker"), the owner engages the entire MLS membership in the effort to sell the property.

PAR. 7. Rockland MLS maintains a computerized database of the residential real estate listings submitted to it by its subscribing members. It distributes the listing information to its members primarily through the publication of listing cards and a listing book which is updated on a weekly basis. A substantial number of respondent's members also receive listing information through on-line computer terminals. Rockland MLS charges a fee to members for publishing and servicing listings on its real estate directory service only if the property is sold before the listing's expiration date; the fee is based on a percentage of the brokerage commission on the sale of the property.

PAR. 8. Property owners and their brokers generally consider publication of listings on Rockland MLS to be the fastest and most effective means of obtaining the broadest market exposure for residential property in Rockland County.

PAR. 9. Membership in Rockland MLS provides valuable competitive advantages in the brokering of residential real estate sales in Rockland County. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales.

PAR. 10. Sales of Rockland County real estate listings published on Rockland MLS have totaled over \$250 million for each year since 1984. For the period January 1988 through October 1988, about 1500 residential listings (including condominiums and

cooperatives) have been sold through Rockland MLS, valued between \$300 million and \$350 million. Rockland MLS currently has about 200 subscribing member brokers. Its membership represents over 98% of the active, residential real estate brokerage firms in Rockland County. For each year since 1984, over 90% of the total dollar sales volume of residential resales through brokers in Rockland County involved listings published with Rockland MLS.

PAR. 11. Except to the extent that competition has been restrained as described herein, Rockland MLS members are and have been in competition among themselves in the provision of residential real estate brokerage services within Rockland County.

PAR. 12. In adopting the policies and engaging in the practices described in paragraphs thirteen through twenty below, Rockland MLS has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services within Rockland County.

PAR. 13. Prior to April 1984, Rockland MLS accepted exclusive agency listings under which owners were free to advertise their properties independently, although they could not advertise below the listed prices during the period of the listings. In 1984, Rockland MLS modified Article IV, Section 1.8 of its Operating Procedure and the terms of its listing forms to refuse exclusive agency listings that permitted any manner of homeowner advertising.

PAR. 14. Rockland MLS, pursuant to Article I, Section 18.3 of its Operating Procedure, has been and is now prohibiting its member brokers from entering into "blue star arrangements" with property owners desiring an exclusive agency listing. A "blue star arrangement" is any listing that is submitted to Rockland MLS in which, pursuant to the property owner's request, all appointments to show the property are made through the listing broker's office.

PAR. 15. Rockland MLS, pursuant to Article I, Section 10.1 of its Operating Procedure and an Addendum to said Procedure, requires that member brokers taking an exclusive agency listing

receive no more than 20% of the commission if another member broker sells the property, whereas member brokers taking an exclusive right to sell listing may receive up to 35% of the commission if another member broker sells the property. Rockland MLS has further disadvantaged and discouraged exclusive agency listings relative to exclusive right to sell listings by publishing these listings through its weekly listing book without the description or photograph that normally accompanies exclusive right to sell listings.

PAR. 16. Rockland MLS, pursuant to Article I, Section 22 of its Operating Procedure, has been and is now prohibiting any member other than the listing broker from directly or indirectly soliciting the listing of any property, the listing of which is filed with the multiple listing service, until after midnight of the expiration date of the filed listing.

PAR. 17. Rockland MLS, pursuant to Article II, Section 3 of its Operating Procedure, has been and is now requiring that members responding to a property owner's request for release from the listing agreement obtain a signed release from the owner stating that in the event the owner sells his property during the balance of the period of the listing, the owner will be liable to the listing member for a commission.

PAR. 18. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws and the Preamble of its Operating Procedure, has been and is now requiring as a condition of membership in Rockland MLS that each member broker or applicant for membership operate a full-time real estate brokerage office.

PAR. 19. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws, has been and is now requiring that each member broker or applicant for membership maintain a real estate brokerage office in Rockland County.

PAR. 20. Rockland MLS, pursuant to Article IV, Section 3 of its Constitution and By-Laws, has been and is now requiring that each member broker or applicant for membership be a domiciled resident of the State of New York. Although Rockland MLS may nevertheless sometimes admit to membership out-of-state brokers,

it requires that such out-of-state brokers pay an initiation fee that is substantially higher than the fee charged to New York State residents.

PAR. 21. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Rockland MLS and its members as described in paragraphs thirteen through twenty above have been and are unreasonably to restrain competition among brokers, and to injure consumers by, *inter alia*:

(1) Restraining brokers from competing with respect to the commissions they charge for their real estate brokerage services;

(2) Unreasonably discriminating against exclusive agency listings relative to exclusive right to sell listings, thereby inhibiting brokers from competing based on their willingness to accept exclusive agency listings and restricting consumers' choices with respect to the way they sell their property;

(3) Substantially limiting the ability of residential property owners to compete with real estate brokers in locating purchasers;

(4) Restricting brokers from competing with the listing broker and with each other to obtain renewal of listings of properties, thereby depriving property owners of information and the advantage of price and service competition that brokers would otherwise offer;

(5) Unreasonably restraining the entry of new brokerage firms in competition with Rockland MLS's multiple listing service;

(6) Substantially limiting consumers' abilities to choose among a variety of brokerage firms competing on the basis of price, contract terms, and services; and

(7) Depriving consumers of information pertinent to selecting a brokerage firm, and of the benefits of competition among brokers.

PAR. 22. The policies, acts, practices, and combinations or conspiracies described in paragraphs thirteen through twenty above constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent United Real Estate Brokers of Rockland, Ltd. (a corporation and successor by merger with its former wholly-owned subsidiary, Rockland County Multiple Listing Systems, Inc.) and the respondent named in the caption hereof having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act; and

The respondent (sometimes hereafter referred to as "Rockland MLS"), its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

(1) Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York,

with its office and principal place of business located at 255 South Middletown Road, Nanuet, New York.

(2) The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

The following definitions shall apply to this order:

(1) "*Multiple listing service*" shall mean a clearinghouse through which member real estate brokerage firms regularly exchange information on listings of real estate properties and share commissions with other members.

(2) "*Applicant*" shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

(3) "*Member*" shall mean any real estate broker or brokerage firm represented by a broker that is entitled to participate in the multiple listing service offered by Rockland MLS.

(4) "*Listing agreement*" shall mean any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(5) "*Listing broker*" shall mean any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(6) "*Selling broker*" shall mean any broker, other than the listing broker, who procures the purchaser for a listed property.

(7) "*Exclusive agency listing*" shall mean any listing under which the property owner agrees to pay the broker an agreed commission if the property is sold through any real estate broker, but reserves the right to sell the property personally to a direct buyer (one not procured in any way through the efforts of any broker) at

an agreed reduction in the commission or with no commission owed to the broker.

(8) “*Exclusive right to sell listing*” shall mean any listing under which a property owner agrees to pay the broker an agreed commission if the property is sold, whether the purchaser is procured by the broker or any other person, including the owner.

(9) “*Blue star arrangement*” shall mean any listing that is submitted to Rockland MLS in which, pursuant to the property owner's request, all appointments to show the property are made through the listing broker's office.

I.

It is ordered, That respondent Rockland MLS, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, shall forthwith cease and desist from adopting or maintaining any rule or policy or taking any other action that has the purpose, capacity, tendency, or effect of:

(A) Restricting or interfering with the acceptance or publication of exclusive agency listings by any means, including:

(1) Preventing or discouraging its member brokers from accepting exclusive agency listings in which property owners are free to advertise in newspapers or any other media the sale of their property;

(2) Preventing or discouraging its member brokers from accepting exclusive agency listings accompanied by a blue star arrangement;

(3) Requiring that the listing broker receive a lesser portion of the commission for exclusive agency listings than for exclusive right to sell listings when another member broker sells the property; or

(4) Adopting or enforcing any policy or practice that treats exclusive agency listings in a less advantageous manner than exclusive right to sell listings with respect to the acceptance and publication of photographs and descriptions of the listed property disseminated to its member brokers;

Provided, however, that nothing contained in this subpart shall preclude respondent from (a) prohibiting homeowners with exclusive agency listings from placing their own “for sale” sign on their property or from advertising below the listed price during the term of the listing; (b) requiring designation of the listing as one granting an exclusive agency; (c) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; or (d) imposing terms applicable to all listings accepted for publication by Rockland MLS.

(B) Restricting or interfering with the solicitation of a listing agreement for any property, *provided, however*, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Rockland MLS that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with Rockland MLS by another member used information provided to it by Rockland MLS in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than Rockland MLS.

(C) Restricting or interfering with any member and property owner cancelling a listing before the listing's expiration date, *provided, however*, that nothing contained in this subpart shall prohibit respondent from: (1) requiring notice of the cancellation, including a copy of the cancellation agreement; and (2) charging a reasonable and nondiscriminatory fee for any service it provides if

the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs of any service it provides.

(D) Requiring, urging, recommending, or suggesting that any applicant for membership or member:

- (1) Operate an office full-time or engage in real estate brokerage full-time;
- (2) Maintain an office in Rockland County;
- (3) Be a domiciled resident of the State of New York; or
- (4) Pay any additional initiation fees or any other fees based upon the member's or applicant's status as an out-of-state resident;

Provided, however, that nothing in this subpart shall prohibit respondent from adopting, maintaining, or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

II.

It is further ordered, That respondent Rockland MLS shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of Rockland MLS.

(B) Within sixty (60) days after this order becomes final, amend its constitution and by-laws, operating procedure, rules, regulations, policies or procedures, and all other of its materials to conform to the provisions of this order and provide each member with a copy of the amended by-laws, rules and regulations, and other amended materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to each

new member of Rockland MLS within thirty (30) days of the new member's admission.

III.

It is further ordered, That respondent Rockland MLS shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which Rockland MLS has complied and is complying with this order.

(B) In addition to the report required by paragraph III(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at any such other times as the Federal Trade Commission or its staff may by written notice to Rockland MLS require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which Rockland MLS has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which Rockland MLS has complied with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in Rockland MLS, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in Rockland MLS that may affect compliance obligations arising out of this order.

APPENDIX A

As you may be aware, the Federal Trade Commission has entered into consent decrees with several multiple listing services in order to halt certain multiple listing service practices that have

been alleged to be unlawful restraints of trade. To avoid litigation, respondent United Real Estate Brokers of Rockland, Ltd., as successor by merger with Rockland County Multiple Listing Systems, Inc. has entered into such a consent agreement. The agreement is not an admission that respondent ("Rockland MLS") or any of its members has violated the law. For your information, Rockland MLS is prohibited from adopting or maintaining any rule or policy or taking any other action that has the purpose, capacity, tendency, or effect of:

(A) Restricting or interfering with the acceptance or publication of exclusive agency listings by any means, including:

(1) Preventing or discouraging its member brokers from accepting exclusive agency listings in which property owners are free to advertise in newspapers or any other media the sale of their property;

(2) Preventing or discouraging its member brokers from accepting exclusive agency listings accompanied by a blue star arrangement;

(3) Requiring that the listing broker receive a lesser portion of the commission for exclusive agency listings than for exclusive right to sell listings when another member broker sells the property; or

(4) Adopting or enforcing any policy or practice that treats exclusive agency listings in a less advantageous manner than exclusive right to sell listings with respect to the acceptance and publication of photographs and descriptions of the listed property disseminated to its member brokers;

Provided, however, that nothing contained in this subpart shall preclude respondent from (a) prohibiting homeowners with exclusive agency listings from placing their own "for sale" sign on their property or from advertising below the listed price during the term of the listing; (b) requiring designation of the listing as one granting an exclusive agency; (c) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; or (d) imposing

terms applicable to all listings accepted for publication by Rockland MLS.

(B) Restricting or interfering with the solicitation of a listing agreement for any property, *provided, however,* that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by Rockland MLS that pertains to a specific listed property in the solicitation of a listing agreement for that property. Such reasonable and nondiscriminatory policy may include adoption of a rebuttable presumption that any member soliciting sellers for listings then listed with Rockland MLS by another member used information provided to it by Rockland MLS in the solicitation, as long as the soliciting member may fully rebut the presumption by providing a declaration under oath or other evidence that the solicitation was based upon information obtained from sources other than Rockland MLS.

(C) Restricting or interfering with any member and property owner cancelling a listing before the listing's expiration date, *provided, however,* that nothing contained in this subpart shall prohibit respondent from: (1) requiring notice of the cancellation, including a copy of the cancellation agreement; and (2) charging a reasonable and nondiscriminatory fee for any service it provides if the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs of any service it provides.

(D) Requiring, urging, recommending, or suggesting that any applicant for membership or member:

(1) Operate an office full-time or engage in real estate brokerage full-time;

(2) Maintain an office in Rockland County;

(3) Be a domiciled resident of the State of New York; or

(4) Pay any additional initiation fees or any other fees based upon the member's or applicant's status as an out-of-state resident;

Provided, however, that nothing in this subpart shall prohibit respondent from adopting, maintaining or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I have voted to accept the consent order. In general, the order is consistent with previous Commission orders in cases involving multiple listing services. I write separately to note my dissent from paragraphs I.A.3 and I.B of the order.

Paragraph I.A.3 of the order provides that Rockland must cease requiring that the listing broker receive a lesser share of the commission for exclusive agency listings, as defined in the order, than for exclusive right to sell listings, as defined, when another broker makes the sale. On its face, the provision appears to require only that Rockland cease discriminating against exclusive agency listings. What is not apparent from the face of the order is that paragraph I.A.3 applies to Rockland's multiple listing service rule that fixes the commission split between listing and selling brokers. To the extent that the order applies only to the discriminatory aspect of the split and not to the fact that the split is fixed, the provision may implicitly approve the fixed split, which appears to be inconsistent with Commission precedent.

In *Multiple Listing Service Mid County, Inc.*, 110 FTC 482 (1988), the Commission's complaint alleges that a multiple listing service rule fixing maximum commission splits for listing brokers "deprive[s] consumers of the advantages of competition among . . . [brokers] to list and to sell residential real estate," *id.* at 485, and the order bars the MLS from "[f]ixing . . . any rate, range or amount of any division or split of commission or other fees between" selling

and listing brokers. *Id.* at 489. Indeed, in two other multiple listing service cases, Puget Sound¹ and Bellingham-Whatcom,² the Commission even prohibited so-called "default" split rules that specified how the commission should be split in the apparently rare situations in which the listing broker failed to specify the split.³ There is no apparent reason to distinguish between the rule implicitly sanctioned in Rockland and the rule prohibited in Mid County, and Rockland's rule mandating the split for all listings appears more likely than the default split rules prohibited in Puget Sound and Bellingham-Whatcom to have anticompetitive effects.

Paragraph I.B of the order requires Rockland to eliminate its restrictions on broker solicitation of listings while a listing agreement with another broker is in effect. This provision of the order is consistent with precedent. As our learning about multiple listing services has increased, however, the efficiency justification for anti-solicitation rules (to prevent brokers from exploiting the efforts of the listing broker) has become more clear and more credible. Because the rule now appears to be justifiable, and in the absence of evidence of anticompetitive effects, I no longer can find reason to believe sufficient to challenge the rule under Section 5 of the Federal Trade Commission Act.

¹ Puget Sound Multiple Listing Service, Docket C-3300 (Aug. 2, 1990).

² Bellingham-Whatcom County Multiple Listing Service, Docket C-3299 (Aug. 2, 1990).

³ I dissented from these prohibitions, on the grounds that the rules did not affect the level of commissions, did not mandate the division of commissions and applied only when the listing broker failed to specify a split. *See* Separate Statement of Commissioner Mary L. Azcuenaga, Concurring in Part and Dissenting in Part in Puget Sound and Bellingham-Whatcom.