

**ANALYSIS OF AGREEMENT CONTAINING  
CONSENT ORDER TO AID PUBLIC COMMENT**

***In the Matter of Multiple Listing Service, Inc., File No. 061 0090***

The Federal Trade Commission has accepted for public comment an agreement containing consent order with Multiple Listing Service, Inc. (“MLS, Inc.” or “Respondent”). Respondent operates a multiple listing service (“MLS”) that is designed to facilitate real estate transactions by sharing and publicizing information on properties for sale by customers of real estate brokers. The agreement settles charges that MLS, Inc. 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 order has been placed on the public record for thirty (30) days to receive comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement 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 order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by proposed Respondent that it violated the law or that the facts alleged in the complaint against the Respondent (other than jurisdictional facts) are true.

**I. The Respondent**

MLS, Inc. is a Wisconsin corporation that provides multiple listing services to each of the local associations of real estate professionals based in the Milwaukee metropolitan area and surrounding counties. It is owned by several realtor boards and associations, and has more than 6500 members. Respondent serves the great majority of the residential real estate brokers in its service area, and is the sole MLS serving that area. MLS, Inc. also owns and operates a web site, wihomes.com, that provides listing information directly to consumers over the internet.

**II. The Conduct Addressed by the Proposed Consent Order**

In general, the conduct at issue in this matter is largely the same as the conduct addressed by the Commission in six other consent orders involving MLS restrictions in the past year.<sup>1</sup> A general discussion of industry background and the Commission’s reasoning is contained in the Analysis to Aid Public Comment issued in connection with five of those consent orders in the

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<sup>1</sup> *Information and Real Estate Services, LLC*, FTC File No. 061 0087; *Northern New England Real Estate Network, Inc.*, FTC File No. 051 0065; *Williamsburg Area Ass’n of Realtors, Inc.*, FTC File No. 061 0268; *Realtors Ass’n of Northeast Wisconsin, Inc.*, FTC File No. 061 0267; *Monmouth County Ass’n of Realtors, Inc.*, FTC File No. 051 0217; *Austin Bd. of Realtors*, FTC File No. 051 0219. See generally <http://www.ftc.gov/opa/2006/10/realestatesweep.shtm>.

“real estate sweep” announced in October 2006.<sup>2</sup>

### **A. The Respondent Has Market Power**

MLS, Inc. serves residential real estate brokers in the Milwaukee metropolitan area and surrounding counties in Wisconsin. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in MLS, Inc. is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.<sup>3</sup> By virtue of broad industry participation and control over a key input, MLS, Inc. has market power in the provision of residential real estate brokerage services to sellers and buyers of real property in southeast Wisconsin.

### **B. Respondent’s Conduct**

The complaint accompanying the proposed consent order alleges that Respondent has violated the FTC Act by adopting rules and policies that limit the publication and marketing of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts. Listing contracts are the agreements by which property sellers obtain services from their chosen real estate brokers. The restrictions challenged in the complaint accompanying the proposed order state that information about properties will not be made available on popular real estate web sites unless the listing contracts follow the traditional format approved by the MLS. When implemented, these restrictions prevent properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the “Realtor.com” web site operated by the National Association of Realtors, the local web site “wihomes.com” operated by MLS, Inc., and web sites operated by brokers or brokerage firms that are MLS members. The complaint alleges that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along.

As was the case with the other MLSs that agreed to consent orders with the Commission, the contract favored by Respondent here is known as an “Exclusive Right to Sell Listing,” and is the kind of listing agreement traditionally used by listing brokers to provide the full range of residential real estate brokerage services. Among the contracts disfavored by the Respondent is the kind known as an “Exclusive Agency Listing,” which brokers can use to offer limited brokerage services to home sellers in exchange for set fees or reduced commissions.

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<sup>2</sup> See <http://www.ftc.gov/os/caselist/0610268/0610268consentanalysis.pdf>.

<sup>3</sup> 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.

Respondent adopted the challenged rules and policies in May 2001. In October 2006, prior to agreeing to the proposed consent order and prior to the Commission's acceptance of the consent order and proposed complaint for public comment, the Board of Directors of MLS, Inc. voted to rescind the restriction. The members of the MLS affected by these rules were notified in November 2006 of the Board's intention to change its rules.

**C. Competitive Effects of the Respondent's Rules and Policies**

MLS, Inc.'s rules and policies have discouraged its members from offering or accepting Exclusive Agency Listings. Thus, the restrictions impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. Furthermore, the rules and policies have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. By prohibiting Exclusive Agency Listings from being transmitted to popular real estate web sites, the MLS, Inc. restrictions have adverse effects on home sellers and home buyers. 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. In particular, the rules deny home sellers choices for marketing their homes and deny home buyers the chance to use the internet easily to 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 Policy**

The Respondent's rules at issue here advance no legitimate procompetitive purpose. As a theoretical matter, if 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 restrictions adopted by the Respondent here. Exclusive Agency Listings are not a credible means for 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 other provisions in MLS, Inc.'s rules ensure that a cooperating broker—a broker who finds a buyer for the property—is compensated for the brokerage service he or she provides.

Under existing MLS rules that apply to any form of listing agreement, the listing broker must ensure that the home seller pays compensation to 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 Respondent's existing rules that do not distinguish between forms of listing contracts, and does not justify the series of exclusionary rules and policies adopted by MLS, Inc. 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.

#### **IV. The Proposed Consent Order**

Despite the recent decision by Respondent's Board of Directors to remove the challenged restrictions, it is appropriate for the Commission to require the prospective relief in the proposed consent order. Such relief ensures that MLS, Inc. cannot revert to the old rules or policies, or engage in future variations of the challenged conduct. The conduct at issue in the current case is itself a variation of practices that have been the subject of past Commission orders; 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.<sup>4</sup>

The proposed order is designed to ensure that Respondent does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the joint venture operated by MLS, Inc. The proposed order prohibits Respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. The proposed order includes examples of such practices, but the conduct it enjoins is not limited to those five enumerated examples. In addition, the proposed order states that, within thirty days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. MLS, Inc. is further required to notify its participants of the order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the Respondent's structure, and periodic filings of written reports concerning compliance.

The proposed order applies to Respondent and entities it owns or controls, including MetroMLS and any affiliated web site it operates. The order does not prohibit participants in the MLS, or other independent persons or entities that receive listing information from 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.

The proposed order will expire in 10 years.

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<sup>4</sup> 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.*, Docket No. C 3449, 1993 WL 1thirty (30)09648 (F.T.C. Jul. 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C 3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham Whatcom County Multiple Listing Bureau*, Docket No. C 3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C 3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).