

Complaint

116 F.T.C.

IN THE MATTER OF

AMERICAN INDUSTRIAL REAL  
ESTATE ASSOCIATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3449. Complaint, July 6, 1993--Decision, July 6, 1993*

This consent order prohibits, among other things, a Los Angeles area multiple listing service ("MLS") specializing in industrial properties from conditioning broker membership in the MLS on being primarily engaged in industrial real estate brokerage, or on the amount of industrial real estate experience the brokers have, or on the dollar volume of their business. In addition, the agreement prohibits the respondents from restricting any broker's offering or accepting any exclusive agency listing, or requiring disclosure of commissions that deviate from normal commission rates.

*Appearances*

For the Commission: *Paul R. Roark.*

For the respondents: *Eliot G. Disner, Shapiro, Posell, Rosenfeld & Close, Los Angeles, CA.*

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 American Industrial Real Estate Association ("A.I.R."), a corporation, and The Industrial Multiple ("Multiple"), a corporation, hereinafter sometimes referred to as respondents, have 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:

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PARAGRAPH 1. Respondents American Industrial Real Estate Association and The Industrial Multiple are corporations organized, existing, and doing business under and by virtue of the laws of the State of California. Respondents' principal office and place of business are at 345 Figueroa Street, Suite MI, Los Angeles, CA.

PAR. 2. Each respondent is now and has been at all times relevant herein a corporation organized in substantial part for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 3. Respondent A.I.R. controls the acts and practices of its wholly-owned subsidiary, respondent Multiple. Only members of the A.I.R. may be members of the Multiple. Respondents coordinate and act together in carrying out the business of the Multiple.

PAR. 4. Respondents are now, and since 1962 have been, providing a multiple listing service for their members, who are real estate brokers. Only member firms may participate in respondents' multiple listing service. Each member of the Multiple agrees to submit all of his or her firm's exclusive right to sell or lease listings of industrial properties of 5,000 or more square feet in the greater metropolitan Los Angeles area (the Multiple's "service area") for publication on respondents' multiple listing service to the entire membership of the Multiple, and, unless otherwise agreed in writing, to share any brokerage commissions due with any member whose firm successfully locates a purchaser or lessee for any property so listed. Exclusive right to sell or lease listings are those under which a property owner appoints a broker as exclusive agent for the sale or lease of the property and agrees to pay the broker an agreed commission if the property is sold or leased, regardless of who locates the purchaser or lessee. In contrast, exclusive agency listings are those under which the property seller or lessor appoints a broker as exclusive agent, but reserves the right to sell or lease the property personally to a purchaser or lessee that a broker did not find with no commission owed. Variable rate listings are those under which the property seller or lessor appoints a broker as exclusive agent, but where the broker agrees to accept a reduction in the total commis-

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sion due where the property owner or lessor finds the purchaser or lessee.

PAR. 5. The Industrial Multiple is, in its service area, the sole MLS that distributes significant numbers of industrial property listings throughout the area, the sole MLS that specializes in industrial property listings, and the sole MLS to which the vast majority of major industrial brokerage firms in Los Angeles belong. The vast majority of real estate broker-assisted sales and leases of industrial properties in its service area go through the Multiple. In 1985 it was the clearinghouse for over 4,500 listings, disseminating information on more than 35,000,000 square feet of buildings and 60,000,000 square feet of land. In 1987 the Multiple had over 120 member firms.

PAR. 6. Publication of listings through respondents' MLS generally is considered by sellers, lessors, and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for industrial property in the Multiple's service area.

PAR. 7. Membership in respondents' MLS provides valuable competitive advantages in the brokering of industrial properties in the Multiple's service area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with industrial property sellers and lessors, and significantly reduces the costs of obtaining current and comprehensive information on industrial property listings and sales.

PAR. 8. In the course and conduct of their businesses, and through the policies, acts, and practices described below, the respondents and their members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. Except to the extent that competition has been restrained as described herein, respondents' members are and have been in competition among themselves in the provision of industrial real estate brokerage services within the Multiple's service area.

PAR. 10. In adopting the policies and engaging in the practices described in paragraphs eleven through seventeen below, and in adopting and enforcing the rules and regulations of the Multiple dated November 30, 1982, and the by-laws of A.I.R. dated October

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17, 1984, effective on December 1, 1984, respondents have been and are acting as a combination of their members, or in agreement with each other and with some of their members, to restrain trade in the provision of industrial real estate brokerage services within the Multiple's service area. The by-laws of A.I.R. indirectly apply to the members of the Multiple in that membership in A.I.R. is a prerequisite to membership in the Multiple.

PAR. 11. Respondents, through Multiple rule I.B.1.a., among other rules and regulations, have excluded from membership in the Multiple licensed brokers, otherwise qualified, who were not "primarily" engaged in industrial real estate. Respondents have excluded brokers who were actively engaged in industrial real estate brokerage but who were also engaged to a significant extent, as independent brokers, in selling and/or leasing properties that were not industrial properties.

PAR. 12. Respondents, through A.I.R. by-law II.A.1.(B), among other rules and regulations, have required applicants to have been involved in a minimum number of industrial property transactions, as established from time to time by the Board of Directors, in the two years prior to application to qualify for membership in the Multiple. From November 1984 through December 1986, respondents required applicants to have been involved in a minimum of sixteen transactions in the two years prior to application.

PAR. 13. Respondents, through A.I.R. by-law II.A.1.(B), among other rules and regulations, have required applicants to have been involved in a minimum dollar volume of industrial property transactions, as established from time to time by the Board of Directors, in the two years prior to application to qualify for membership in the Multiple. From November 1984 through December 1986, the minimum dollar volume required by respondents was \$4 million.

PAR. 14. Respondents, through A.I.R. by-law II.A.1.(B), among other rules and regulations, have required applicants to have four years experience selling industrial real estate as a licensed broker or salesperson to qualify for membership in the Multiple.

PAR. 15. Respondents have applied their rules and regulations in an unreasonably discriminatory fashion to deny access to the Multiple to qualified brokers whom respondents wanted for some reason to exclude. For example, in determining whether applicants have met the minimum number and dollar volume of industrial transactions, as required by A.I.R. by-law II.A.1.(B), respondents have determined that properties are not "industrial" for some applicants, and have thus excluded those applicants, when similar properties were found to be "industrial" and thus counted toward the minimum number and dollar volume requirements for other applicants.

PAR. 16. Respondents, through Multiple rule II.A.2.c., among other rules and regulations, have prohibited their members from accepting exclusive agency listings for any industrial property of 5,000 square feet or more within the Multiple's service area, and have refused to publish any exclusive agency listing through their multiple listing service, thus restricting the multiple listing service to exclusive right to sell or lease listings. In addition, although respondents' rules do not prohibit publication of variable rate listings, respondents have suppressed their acceptance and publication.

PAR. 17. Respondents have required that a listing broker disclose the total commission to which he or she has agreed, not just the commission that the listing broker is offering to cooperating brokers for procuring a buyer or lessee. In particular, Multiple rule III.A.6. requires that a member publicize to all other members any departure from the member firm's standard fee schedule.

PAR. 18. The purposes, effects, tendency, or capacity of the combination or agreement described in paragraphs eleven through seventeen above have been and are to restrain competition in one or more of the following ways, among others:

a. By preventing the entry of brokers and brokerage firms into the Multiple based on rules and regulations not reasonably related to the efficient operation of the MLS, thereby depriving consumers of the advantages of competition that would result from the excluded brokers having access to the MLS;

b. By preventing brokers from accepting certain contractual terms, such as terms that allow the property seller or lessor to pay no commission if the seller or lessor sells or leases the property other than through the broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

c. By limiting the ability of property sellers and lessors to compete against real estate brokers in finding purchasers and lessees;

d. By reducing the likelihood of discounting or other price competition among members of the Multiple.

PAR. 19. The policies, acts, practices, and combinations or agreements described in paragraphs eleven through seventeen above constitute unfair methods of competition and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 considered the matter and having determined that it had reason to believe that the respondents have 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents American Industrial Real Estate Association and The Industrial Multiple are corporations organized, existing, and doing business under and by virtue of the laws of the State of California. Respondents' principal office and place of business are at 345 Figueroa Street, Suite M1, Los Angeles, CA.

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

#### ORDER

#### DEFINITIONS

The following definitions shall apply to this order:

1. "*Applicant*" shall mean any broker who is duly licensed by the State of California as a real estate broker within the State of California and who has applied on behalf of his or her firm for membership in respondents' multiple listing service.

2. "*Exclusive agency listing*" shall mean any listing under which the property seller or lessor appoints a broker as exclusive agent for the sale or lease of the property at an agreed commission,

but reserves the right to sell or lease the property personally to a direct purchaser or lessee (one not procured in any way through the efforts of any broker) with no commission owed.

3. "*Industrial property*" or "*industrial real estate*" shall mean land and/or buildings used for, or intended at the time of listing to be used for, such purposes as manufacturing, warehousing, distribution, research and development, data processing, and activities related to such industrial uses, rather than by businesses that deal primarily with the general public, and having a minimum area of 5,000 square feet.

4. "*Listing agreement*" or "*listing*" shall mean any agreement between a real estate broker and a property seller or lessor for the provision of real estate brokerage services.

5. "*Member*" shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondents.

6. "*Multiple listing service*" or "*MLS*" shall mean a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with members who locate purchasers or lessees.

7. "*Variable rate listing*" shall mean any listing under which the property seller or lessor appoints a broker as exclusive agent for the sale or lease of the property, but where the broker agrees to accept a reduction in the total commission due where the property owner or lessor finds the purchaser or lessee.

#### I.

*It is ordered*, That each respondent, and its successors, assigns, directors, officers, committees, representatives, agents, or employees, directly, indirectly, or through any device, in or 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 cease and desist from:

A. Adopting, maintaining, or enforcing any by-law, rule, regulation, policy, agreement or understanding, or taking any other action that has the purpose, tendency, or effect of conditioning membership in The Industrial Multiple or use of respondents' MLS on:

1. An applicant: (a) being primarily engaged in industrial real estate brokerage, (b) receiving a specified percentage of income from industrial real estate commissions, or (c) having a specified percentage of his or her real estate transactions involve industrial property;

2. An applicant having completed, listed, or otherwise been involved with any minimum number or minimum dollar volume of industrial real estate sales or leases over any period of time;

3. An applicant having been engaged in industrial real estate brokerage for any period of time; or

4. Any criterion that is applied in an unreasonably discriminatory manner.

*Provided, however,* that nothing contained in this order shall prohibit respondents from adopting or enforcing any non-discriminatory policy to assure that its members are, and hold themselves out to the public as being, actively engaged in and competent in industrial real estate brokerage and that listings published on respondents' multiple listing service are adequately serviced.

B. Restricting or interfering with:

1. Any broker's offering or accepting any exclusive agency listing or variable rate listing;

2. The publication on respondents' MLS of any exclusive agency listing in any way other than by requiring designation of the listing as one granting an exclusive agency or by imposing terms applicable to all listings accepted for publication by respondents' MLS; or

3. The publication on respondents' MLS of any variable rate listing in any way other than by requiring designation of the listing as one granting a variable rate or by imposing terms applicable to all listings accepted for publication by respondents' MLS.

*Provided, however,* that nothing contained in this order shall prohibit respondents from adopting or enforcing reasonable and non-discriminatory rules requiring that exclusive agency listing contracts, as a condition for publication through The Industrial Multiple, contain clauses providing that any dispute between the parties of the contract over who was the procuring cause of a buyer or lessee for the listed property shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

C. Adopting, maintaining, or enforcing any policy or taking any other action that has the purpose, tendency, or effect of:

1. Requiring any broker that charges a commission that deviates from that broker's normal commission schedule to disclose the specific deviation or the fact of a deviation to other brokers or either of the respondents; or

2. Requiring that members disclose to other members or the respondents any information regarding the commission rates or fees to be paid by sellers or lessors.

*Provided, however,* that nothing contained in this subpart shall prohibit respondents from publishing or otherwise distributing to or among members of respondents' MLS the rate or amount of commission to be paid to a non-listing broker for a particular transaction.

II.

*It is further ordered,* That respondents shall:

A. Within thirty (30) days after this order becomes final, furnish a copy of this order to each of their members, and to each applicant who has been denied membership in respondents' MLS since January 1, 1984.

B. Within sixty (60) days after this order becomes final, amend their by-laws, rules and regulations, and all other of their 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 a copy of this order to each new member of A.I.R., to each new member of The Industrial Multiple, and to any person who inquires about, or who submits an application for, membership in A.I.R. or its MLS.

D. Within sixty (60) 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 respondents have complied and are complying with this order.

E. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondents have complied with and are complying with this order.

F. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in either respondent, 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 either corporation that may affect compliance obligations arising out of this order.

Commissioners Azcuenaga and Starek concurring in part and dissenting in part.

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

The Commission today issues a consent order that would, among other things, bar the multiple listing service of Industrial Multiple from requiring real estate brokers to disclose to other brokers the amount of commission that a property seller will pay when the property is sold. Order paragraph I.C. In light of comments received during the period for public comment on the order and additional economic analysis based on those comments, I am persuaded that the conduct challenged in paragraph I.C. of the order may help accomplish a legitimate purpose of the multiple listing service, that is, the efficient marketing of real estate.

The commission arrangement to which the listing broker and the property owner have agreed is information that is important for selling brokers to have in deciding how much effort to invest toward selling the listed property. The Commission partially credits this justification in the proposed order (and in previous orders of the Commission involving multiple listing services) when it permits the multiple listing service to designate listings in which the property owner may avoid or reduce the commission by making a direct sale. To the extent that other brokers are not informed about the commission terms between the listing broker and the property owner, over time, efforts on the part of brokers other than listing brokers to sell properties may decrease and the sales of properties may be adversely affected<sup>1</sup>. Given this plausible efficiency rationale for the Industrial Multiple rule, and in the absence of demonstrable anticompetitive effects, I no longer can find reason to believe sufficient to challenge the rule under Section 5 of the Federal Trade Commission Act.

<sup>1</sup>To the extent that disclosure is consistent with the listing broker's interest in eliciting the cooperation of other brokers in marketing the property, the order ban on disclosure by the multiple listing service may simply raise the cost of disseminating and obtaining the information.

I dissent from paragraph I.C. of the order and concur with the remainder of the order.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III  
CONCURRING IN PART AND DISSENTING IN PART

I concur with the decision of the Commission to accept the Consent Order with Industrial Multiple for final issuance, with the exception of paragraph I(C). I agree with the concerns expressed in Commissioner Azcuenaga's statement regarding this paragraph. The record contains very little evidence suggesting that I(C) is targeted at behavior that is likely to be anticompetitive, and an efficiency justification for the challenged conduct is at least plausible. Therefore, I cannot conclude, without a full rule of reason analysis, that the conduct challenged in paragraph I(C) of the Order violates Section 5 of the FTC Act.

Paragraph I(C) prevents Industrial Multiple from requiring that a listing agent disclose either the fact that the commission schedule of a real estate listing deviates from that agent's standard schedule or the amount by which the commission deviates. Disclosure of such information has at least the potential for anticompetitive effects, because it publicizes discounting practices and thereby may enable retaliatory measures against discounters. But we have almost no evidence regarding this anticompetitive potential.

My concerns are based, in significant part, on a comment submitted by the National Association of Realtors ("NAR") regarding the potential market impact of I(C). NAR argues that this order provision would prevent Industrial Multiple from requiring the disclosure of information to cooperative brokers that is material to their determination of the likelihood that they will earn a commission if they produce a buyer for a property. Cooperative brokers can more efficiently determine how to allocate their time and other resources if they are more fully informed about the potential risks and benefits of attempting to produce buyers for each property.

In a variable-rate listing, the total commission paid is lower when the seller, rather than a real estate agent, produces a buyer.<sup>1</sup> In the case of such listings, a co-op agent is at a competitive disadvantage. The seller would prefer an offer of a certain amount if it is received directly rather than through a co-op broker, because a lower total commission would have to be paid. The greater is the difference between the commission paid when the seller produces a buyer and the commission paid when a co-op agent produces a buyer, the greater is the risk that an offer presented by a co-op agent will be rejected. Co-op agents can better determine how to allocate their efforts the more fully informed they are about a listing's commission schedule and the incentives inherent in the listing for the listing agent, seller, and co-op agent. The required disclosure of information about a listing's commission schedule could enhance cooperation between listing agents and cooperative agents, and in so doing increase the efficiency of the market.

It may be necessary for Industrial Multiple to impose a requirement to disclose such information on listing agents in order to accomplish this efficiency, because the unilateral incentives of listing agents may not result in such disclosure. Listing agents sometimes may not want to announce certain information about variable rate listings, because they are aware that some co-op brokers would not pursue sales of those properties as vigorously. The proposition that requirements to disclose information can result in people making more well-informed choices, thereby enhancing the efficient operation of markets, is not foreign to the Commission.<sup>2</sup>

Accordingly, I dissent from the decision to accept paragraph I(C) of the order and concur with the decision to accept the remainder of the order.

<sup>1</sup>In some instances, variable rate listings also provide for a reduced commission when the listing agent (rather than a co-op agent) produces a buyer.

<sup>2</sup>It is not clear from the evidence presented that Industrial Multiple's requirements here necessarily are efficient. However, the evidence does not suggest that an efficient result is any less likely than an anticompetitive outcome. Therefore, I do not have reason to believe that Industrial Multiple's required information disclosures are likely to be anticompetitive.