

Complaint

113 F.T.C.

IN THE MATTER OF

BELLINGHAM-WHATCOM COUNTY
MULTIPLE LISTING BUREAU

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

Docket C-3299. Complaint, Aug. 2, 1990—Decision, Aug. 2, 1990

This consent order prohibits, among other things, a Washington state multiple listing service from refusing to publish exclusive agency or conditional listings or listings containing reserve clauses; from restricting the solicitation of homeowners with current listings for future business; and from suggesting or fixing any commission split or other fees between any listing broker and any selling broker. In addition, the order requires respondent to distribute a statement describing the provisions of the order to all its members.

Appearances

For the Commission: *Randall H. Brook.*

For the respondent: *Stephen C. Watson, Seattle WA.*

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 Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB"), a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(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) "*Listing agreement*" shall mean any agreement between a real

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estate broker and a property owner for the provision of real estate brokerage services.

(3) "*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.

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

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, 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 agent broker.

(6) "*Exclusive right to sell listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property, and 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.

(7) "*Reserve clause listing*" shall mean any exclusive right to sell listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

(8) "*Conditional listing*" shall mean any exclusive agency or exclusive right to sell listing that makes sale of the property conditional on the purchase or sale of other property.

PAR. 2. BWCMLB is a Washington corporation with its office and principal place of business at 1801 "F" Street, Bellingham, Washington.

PAR. 3. BWCMLB is and has been at all times relevant to this complaint a corporation organized 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. 4. In the course and conduct of their businesses, and through the policies, acts, and practices described below, BWCMLB and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. BWCMLB is, and for some time has been, providing a multiple listing service for member real estate brokerage firms. BWCMLB maintains a computerized database of residential real estate available for sale in the Bellingham, Washington area and its

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surroundings (BWCMLB's "service area"). It distributes the information to its members through online terminals and frequent publication of books containing property listings.

PAR. 6. BWCMLB's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together buyers and sellers of residential real estate as well as other services designed to facilitate sales of these properties. Each BWCMLB member agrees to submit all of its exclusive right to sell listings for residential real estate located within BWCMLB's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in BWCMLB's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in BWCMLB's service area. Membership significantly increases the opportunities for brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales.

PAR. 8. Publication of listings through BWCMLB's multiple listing service generally is considered by sellers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in BWCMLB's service area.

PAR. 9. BWCMLB is the sole multiple listing service in the Bellingham, Washington area. The vast majority of brokers that deal in residential real estate in this area are members of BWCMLB. The vast majority of broker-assisted sales of residential real estate in this area go through BWCMLB. Sales of residential real estate listings published by BWCMLB totaled about \$88 million in 1986.

PAR. 10. Except to the extent that competition has been restrained as described herein, BWCMLB members are and have been in competition among themselves in the provision of residential real estate brokerage services within BWCMLB's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through sixteen below, BWCMLB 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 BWCMLB's service area.

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PAR. 12. BWCMLB has been and is now refusing to publish any exclusive agency listing through its multiple listing service.

PAR. 13. BWCMLB has been and is now refusing to publish any reserve clause listing through its multiple listing service.

PAR. 14. BWCMLB has been and is now refusing to publish any conditional listing through its multiple listing service.

PAR. 15. BWCMLB has enacted a rule prohibiting any member other than the listing broker from soliciting the listing of any property, the listing of which is filed with the multiple listing service, until the filed listing has expired.

PAR. 16. BWCMLB has enacted a rule providing that the listing broker receive 40% and the selling broker receive 60% of the commission due on the sale of residential real estate subject to an exclusive right to sell listing in the event that the listing broker fails to specify a selling broker's share on the listing form submitted to BWCMLB.

PAR. 17. The purpose, capacity, tendency, or effect of the combination or conspiracy described in paragraphs twelve through sixteen has been, and continues to be, to restrain competition among brokers and to injure consumers by, *inter alia*:

(a) Preventing brokers from accepting certain contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells 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;

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

(c) Restraining competition among brokers based on their willingness to offer or accept varying commission splits, thereby depriving consumers of the advantages of competition with regard to such splits.

PAR. 18. The policies, acts, practices, and combinations or conspiracies described in paragraphs eleven through sixteen above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct, or the effects thereof, are continuing and will continue or recur in the absence of the relief requested.

Commissioner Azcuenaga dissenting with respect to paragraph 16 of the complaint and paragraph I.C of the order.

DECISION AND ORDER

The Federal Trade Commission has initiated an investigation of certain acts and practices of Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB"). BWCMLB has been furnished with a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge BWCMLB with violation of the Federal Trade Commission Act.

BWCMLB, its attorney, and counsel for the Commission have executed an agreement containing a consent order, an admission by BWCMLB of all the jurisdictional facts set forth in the draft of complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by BWCMLB that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules.

The Commission having thereafter considered the matter and having determined that it had reason to believe that BWCMLB has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed that 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 issues its complaint, makes the following jurisdictional findings, and enters the following order:

(1) Respondent BWCMLB is a Washington corporation with its office and principal place of business at 1801 "F" Street, Bellingham, Washington.

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

(3) "*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.

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

(5) "*Exclusive agency listing*" shall mean any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, 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 agent broker.

(6) "*Reserve clause listing*" shall mean any listing that includes a provision reserving the property owner's right to sell the property to one or more persons individually named in the listing agreement without owing a full commission to the broker.

(7) "*Conditional listing*" shall mean any exclusive agency or exclusive right to sell listing that makes sale of the property conditional on the purchase or sale of other property.

(8) "*BWCMLB*" shall mean Bellingham-Whatcom County Multiple Listing Bureau and its successors, assigns, directors, officers, committees, agents, representatives, members, and employees.

I.

It is ordered, That respondent BWCMLB, 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 cease and desist from:

A. Restricting or interfering with:

1. The publication on BWCMLB's multiple listing service of any exclusive agency listing of a member; or

2. The publication on BWCMLB's multiple listing service of any reserve clause listing or conditional listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

Provided, however, that nothing contained in this subpart shall prohibit BWCMLB from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by BWCMLB 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 BWCMLB by another member used information provided to it by BWCMLB 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 BWCMLB.

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

II.

It is further ordered, That BWCMLB 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 BWCMLB.

B. Within sixty (60) days after this order becomes final, amend its bylaws, rules and regulations, and all other of its materials to conform to the provisions of this order, and provide each member with a copy of the amended bylaws, 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 BWCMLB within thirty (30) days of the new member's admission.

III.

It is further ordered, That BWCMLB 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 BWCMLB 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 such other times as the Federal Trade Commission or its staff may by written notice to BWCMLB require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which BWCMLB 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 BWCMLB has complied with this order.

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

Commissioner Azcuenaga dissenting with respect to paragraph 16 of the complaint and paragraph I.C of the order.

APPENDIX A

[BWCMLB's Regular Letterhead]

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, Bellingham-Whatcom County Multiple Listing Bureau ("BWCMLB") has entered into such a consent agreement. The agreement is not an admission that BWCMLB or any of its members has violated any law. For your information, BWCMLB is prohibited from the following practices:

A. Restricting or interfering with:

1. the publication on BWCMLB's multiple listing service of any exclusive agency listing of a member; or

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2. the publication on BWCMLB's multiple listing service of any reserve clause listing or conditional listing of a member.

B. Adopting or maintaining any policy, or taking any other action that has the purpose, tendency, or effect of restricting or interfering with the solicitation of a listing agreement for any property.

Provided, however, that nothing contained in this subpart shall prohibit BWCMLB from adopting or enforcing any reasonable and nondiscriminatory policy that prohibits any member from using information provided to it by BWCMLB 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 BWCMLB by another member used information provided to it by BWCMLB 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 BWCMLB.

C. Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any selling broker and any listing broker.

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

Although I have voted to accept the consent orders in *Bellingham-Whatcom County* and *Puget Sound Multiple Listing Association*, I have dissented from a paragraph in each complaint and the corresponding relief, because I have not found reason to believe that the rule concerning default commission splits is unlawful. The default split rule specifies how the commission shall be split between the listing and selling brokers but applies only if the listing broker fails to specify the split on the property listing form submitted to the multiple listing service. The rule does not affect the level of commissions (price), it does not mandate the division of commissions and it applies only in those apparently rare situations in which the listing broker fails to specify a split. I find it difficult to imagine how the rule could be anticompetitive, and, at the margin, the rule may speed the process of listing properties with the service and may reduce subsequent transaction costs.