

Complaint

110 F.T.C.

IN THE MATTER OF

MULTIPLE LISTING SERVICE MID COUNTY, INC.

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

Docket C-3227. Complaint, April 20, 1988—Decision, April 20, 1988

This consent order prohibits, among other things, a Brooklyn, N.Y. real estate firm from participating in various practices that have allegedly restrained price and service competition among residential real estate brokers. Respondent is prohibited from: requiring that any applicant or member operate a full time office; fixing, maintaining or recommending any division of commission between selling and listing brokers; adopting any policy that has the purpose or effect of exclusive agency listings; requiring any member to inform Mid County or any of its members of the commission agreed to between any listing broker and homeowner; and adopting any policy having the purpose or effect of delaying the solicitation of a listing agreement.

Appearances

For the Commission: *Michael J. Bloom and Alfred J. Ferrogari.*

For the respondent: *Bruce H. Schneider, Stroock, Stroock, & Lavan,*
New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Multiple Listing Service Mid County Inc. ("Mid County"), 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 and systematically exchange information on listings of real estate properties and share commissions with other members.

(2) "*Broker*" shall mean any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or

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offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) "*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.

(4) "*Member*" shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

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

(6) "*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.

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

(8) "*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.

(9) "*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.

(10) "*Mid County's Service Area*" shall mean the territory within which Mid County provides its multiple listing service.

PAR. 2. Mid County 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 1706 Flatbush Avenue, Brooklyn, New York.

PAR. 3. Mid County 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. 4. In the course and conduct of their businesses, and through the policies, acts and practices described below, Mid County and its members are involved with or affect:

(a) a substantial interstate flow of funds used in the financing of real estate located within Mid County's Service Area:

(b) a substantial amount of financing of real estate located within Mid County's Service Area that is guaranteed or insured under federal government programs;

(c) the sale of a substantial amount of title and homeowners' insurance by interstate insurers to owners of property located within Mid County's Service Area; and

(d) the franchise operations of those interstate chains of real estate brokerage firms that include one or more members of respondent Mid County.

As a result, the general business practices of respondent and its members are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

PAR. 5. Mid County is, and for some time has been, providing a multiple listing service for member real estate brokerage firms.

The 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 located within Mid County's Service Area, as well as other services designed to facilitate sales of such properties.

Each member agrees to submit all of its exclusive agency listings and exclusive right to sell listings pertaining to residential real estate located within Mid County'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. 6. Membership in Mid County's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in Mid County'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 up-to-date and comprehensive information on listings and sales.

PAR. 7. Publication of listings on Mid County'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 Mid County's Service Area.

PAR. 8. Sales of real estate listings published on Mid County's multiple listing service totaled about \$30.3 million in 1983, \$38.9 million in 1984, and for 1986, reached \$53.8 million. Almost the entire dollar volume of such listings consisted of sales of residential real estate located within Mid County's Service Area.

PAR. 9. Except to the extent that competition has been restrained as described herein, Mid County's members are and have been in

competition among themselves in the provision of residential real estate brokerage services within Mid County's Service Area.

PAR. 10. In adopting the policies and engaging in the practices described in paragraphs eleven through sixteen below, Mid County 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 Mid County's Service Area.

PAR. 11. Mid County required as a condition of membership in Mid County that each applicant operate a full-time real estate brokerage office.

The purposes, capacities, tendencies or effects of this requirement have been to impede new membership in Mid County and to impede entry into the business of brokering residential real estate sales in Mid County's Service Area.

PAR. 12. Mid County required that the listing broker retain no more than 40% of the commission due on the sale of residential real estate subject to an exclusive right to sell agreement, and that the remainder go to the selling broker.

Mid County required that the listing broker retain no more than 30% of the commission due on the sale of residential real estate subject to an exclusive agency listing, and that the remainder go to the selling broker.

The purposes, capacities, tendencies or effects of these limitations on the listing broker's ability to retain commissions have been to deprive consumers of the advantages of competition among Mid County's members to list and to sell residential real estate in Mid County's Service Area.

PAR. 13. Mid County subsequently revised its rules to provide that the listing broker shall have exclusive discretion as to the terms of the division of commissions. The term "exclusive discretion," in this context, may be construed as excluding the homeowner from any role in the determination of the division of commissions between the listing broker and the selling broker.

The capacities, tendencies or effects of this rule have been to deprive consumers of the competitive advantages of negotiating with the listing broker the division of commissions.

PAR. 14. Article 6 of Mid County's Code of Ethics states: "To prevent dissension and misunderstanding and to assure better service to the owner, the broker should urge the exclusive listing of property unless contrary to the best interests of the owner." The phrase "exclusive listing of property," in this context, may be construed as referring only to exclusive right to sell listings.

The capacities, tendencies or effects of Article 6 of Mid County's

Code of Ethics have been and are to discourage brokers from soliciting or accepting exclusive agency listings, and to deprive consumers of the advantages of competition with respect to the types of real estate brokerage services offered by Mid County's members.

PAR. 15. Mid County has required and continues to require that brokers disclose to one another, or to Mid County, the total commission or the split of commission.

The purposes, capacities, tendencies or effects of this policy or practice have been to fix commission rates, and to reduce the likelihood of discounting or other price competition among members of Mid County.

PAR. 16. Mid County enforced 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.

The purposes, capacities, tendencies or effects of this practice have been to restrain competition by members other than listing brokers to obtain renewal of listings of properties located within Mid County's Service Area, to stabilize the price of brokerage services pertaining to the sale of residential real estate located in Mid County's Service Area, and to deprive owners of property located within Mid County's Service Area of the advantages of price and other forms of competition that otherwise would be offered.

PAR. 17. The policies, acts, practices, and combinations or conspiracies described in paragraphs ten 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 may continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent 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 respondents with violation of the Federal Trade Commission Act; and

The respondent, 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, 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) Respondent Multiple Listing Service Mid County Inc., 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 1706 Flatbush Avenue, Brooklyn, 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

For purposes of this order, the following definitions shall apply:

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

(2) "*Broker*" shall mean any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(3) "*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.

(4) "*Member*" shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by Mid County.

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

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

(6) "*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.

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

(8) "*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.

(9) "*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.

I.

It is ordered, That respondent Mid County, 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 respondent's 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:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

(1) operate an office full-time or during customary or specified hours;

(2) derive any particular amount or portion of income from real estate brokerage; or

(3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and non-discriminatory 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.

(B) Adopting any policy or taking any other action that has the

purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

(1) any broker's offering or accepting any exclusive agency listing;

or

(2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying 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 Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

II.

It is further ordered, That respondent Mid County 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 Mid County.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and 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 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 Mid County within thirty (30) days of the new member's admission.

III.

It is further ordered, That respondent Mid County 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 respondent 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 respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent 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 respondent has complied with this order.

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

Commissioner Bailey not participating.

APPENDIX A

[Respondent'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. To avoid litigation, Multiple Listing Service Mid County has entered into such a consent agreement. The agreement is not an admission that Mid County

or any of its members has violated any law. For your information, the substantive provisions of the consent decree are reproduced below:

ORDER

I.

It is ordered, That respondent Mid County, 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 respondent's 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:

(A) Requiring, urging, recommending or suggesting that any applicant or member:

- (1) operate an office full-time or during customary or specified hours;
- (2) derive any particular amount or portion of income from real estate brokerage; or
- (3) engage in real estate brokerage full-time or during customary or specified hours;

Provided, however, That nothing contained in this subpart shall prohibit respondent from adopting 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.

(B) Adopting any policy or taking any other action that has the purpose or effect of unreasonably discriminating against any prospective applicant, applicant or member that is a new entrant in the market or new to respondent's multiple listing service.

(C) Fixing, establishing, maintaining, recommending or suggesting any rate, range or amount of any division or split of commission or other fees between any selling broker and any listing broker.

(D) Adopting or maintaining any policy or taking any other action that has the purpose or effect of restricting any homeowner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(E) Restricting or interfering with:

- (1) any broker's offering or accepting any exclusive agency listing; or
- (2) the publication on respondent's multiple listing service of any exclusive agency listing of a member;

Provided, however, That nothing contained in this subpart shall prohibit respondent from: (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether exclusive agency or exclusive right to sell.

(F) Requiring any member to publish or otherwise distribute to or among members of respondent, or to respondent, the rate or amount of commission agreed to between any listing broker and any property owner; provided, however, that nothing contained in this subpart shall prohibit respondent from publishing or otherwise distributing to or among members of respondent the rate or amount of commission to be paid.

(G) Adopting or maintaining any policy, or taking any other action that has the purpose, capacity, tendency or effect of prohibiting, discouraging or delaying 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 infor-

mation provided to it by Mid County that pertains to a specific listed property in the solicitation of a listing agreement for that property.

Mid County previously revised several of its policies in response to concerns expressed by the Federal Trade Commission staff. Further, Mid County has now made additional changes to certain of its by-laws, rules, and regulations to comply with the consent agreement.