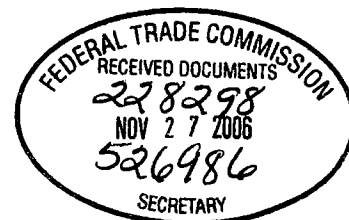


# ORIGINAL

## UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

*PUBLIC*



COMMISSIONERS:                    Deborah Platt Majoras, Chairman  
   Pamela Jones Harbour  
   Jon Leibowitz  
   William E. Kovacic  
   J. Thomas Rosch

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In the Matter of

MIREALSOURCE, INC.,

Docket No. 9321

a corporation.

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### ANSWER AND AFFIRMATIVE DEFENSES

Respondent MiRealSource, Inc. (MiRealSource), through its attorneys, answers the complaint as follows:

#### NATURE OF THE CASE

This matter concerns a corporation, owned by member real estate brokers in Southeastern Michigan, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. MiRealSource has adopted rules and policies that limit the acceptance, publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. These rules discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

Answer: MiRealSource admits the first sentence and admits that certain of its rules make distinctions based on the terms of the listing contract. In all other respects, this allegation is denied.

#### RESPONDENT AND ITS MEMBERS

PARAGRAPH 1. Respondent MiRealSource, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 5700 Crooks Road, Suite 102, Troy, Michigan 48098. The shareholders of Respondent are real estate brokers doing business in Southeastern Michigan, and are commonly referred to as "members" of the Respondent.

Answer: Admitted.

PARAGRAPH 2. Respondent is organized for the purpose of serving its members' interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the MiRealSource Multiple Listing Service. A multiple listing service ("MLS") is a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with members who locate purchasers. When a property is listed on the MiRealSource MLS, it is made available to all members of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to members of the MLS so that a suitable buyer can be found.

Answer: For the first three sentences, MiRealSource admits only that the primary function of MiRealSource is to operate an MLS and that an MLS is a clearinghouse through which member real estate brokerage firms regularly offer cooperation and compensation as to their listings of real estate properties with members who locate purchasers. MiRealSource admits the final 2 sentences.

PARAGRAPH 3. Respondent has more than 7,000 real estate professionals as members. The majority of MiRealSource's members hold an active real estate license and are active in the real estate profession.

Answer: Admitted, except that membership is less than 7,000.

PARAGRAPH 4. The large majority of residential real estate brokerage professionals in Southeastern Michigan are members of MiRealSource. These professionals compete with one another to provide residential real estate brokerage services to consumers.

Answer: Admitted, except that "large majority" and "Southeastern Michigan" are terms that are too imprecise to admit or deny.

PARAGRAPH 5. MiRealSource services the territory within Southeastern Michigan, specifically Macomb, Livingston, Oakland, Genesee, Sanilac, Lapeer, Wayne, Huron, Tuscola, and St. Clair Counties. ("MiRealSource Service Area").

Answer: Admitted that the MiRealSource Service Area consists of the listed counties. MiRealSource neither admits nor denies the paragraph insofar as it alleges more than that.

## **JURISDICTION**

PARAGRAPH 6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

- (A) Affect the purchase and sale of real estate by persons moving into and out of Southeastern Michigan; and
- (B) Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.

Answer: Admitted

### **THE CHALLENGED CONDUCT**

PARAGRAPH 7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to hinder unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

Answer: Denied for the reason that the decisions at issue were unilateral decisions of MiRealSource and did not unreasonably hinder trade.

PARAGRAPH 8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

Answer: Admitted

PARAGRAPH 9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

Answer: Admitted

PARAGRAPH 10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Brokerage Services to home

sellers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

Answer: MiRealSource is unable to admit or deny the allegation in the form stated. MiRealSource is not familiar with “Unbundled Real Estate Brokerage Services” as a generally used or clearly understood term within the real estate brokerage industry. MiRealSource understands that listing brokers can and do offer various services to customers and sometimes offer such services for a fee from a “menu.” Any services, or any combination of them, can be offered as part of different types of listing agreements, including but not limited to Exclusive Agency listings.

PARAGRAPH 11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing m

Answer: MiRealSource is unable to admit or deny the allegation in the form stated. MiRealSource admits that some brokers offer services limited to the listing of a property on an MLS for a flat fee or commission, that such fees or commissions are sometimes less than the fee or commission charged by brokers offering more valuable services, and that such brokers sometimes enter into Exclusive Agency Listings with the seller.

PARAGRAPH 12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a member of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

Answer: MiRealSource assumes that this allegation relates to the MLS operated by MiRealSource. The allegations are neither admitted nor denied for lack of knowledge insofar as they relate to any other MLS. As it relates to the MiRealSource MLS, the first two sentences are admitted. The third and fourth sentences are denied in the form alleged, but MiRealSource admits that its rules require that each listing filed with MiRealSource specify any compensation being offered to a selling broker, that the listing broker may be held responsible for the payment of such compensation and that its rules establish procedures for resolving disputes regarding such responsibility.

PARAGRAPH 13. Beginning in 2003, Respondent adopted a series of rules designed to thwart competition by firms using alternative business models for real estate brokerage services in Southeastern Michigan. During this time frame, Respondent was

well aware that these alternative business models used Exclusive Agency Listings to offer a menu of services that a home seller could choose from at a significantly lower price. Respondent believed that these alternative business models were gaining ground with home sellers and home buyers during this time period and adopted rules in response to this additional competition.

**Answer:** Denied.

PARAGRAPH 14. In or about August 2003, Respondent adopted a rule that precludes the acceptance of any listings into the MiRealSource MLS other than Exclusive Right to Sell Listings (the "Exclusion Policy"). The Exclusion Policy became effective on or about August 8, 2003. The Exclusion Policy was aimed at precluding Exclusive Agency Listings from the MiRealSource MLS.

**Answer:** MiRealSource admits that since on or about the date stated, its rules for its MLS provide only for Exclusive Right to Sell listings, and that definitionally this excludes Exclusive Agency listings from its MLS.

PARAGRAPH 15. In or about the summer of 2003, MiRealSource adopted a "Co-Mingling Policy." The Co-Mingling Policy precluded MiRealSource members that operated public web sites from permitting MiRealSource listing information on such sites from being searched by users of the sites together with listing information from other sources. The Co-Mingling Policy was adopted by MiRealSource to prevent information concerning Exclusive Agency Listings from being mixed in with MiRealSource listings on public web sites. In or about the summer of 2005, MiRealSource eliminated the Co-Mingling Policy because full service broker members complained about the rule.

**Answer:** MiRealSource admits the first and second sentences, except that it neither admits nor denies the labeling of the rule in question. MiRealSource denies that the third sentence accurately states MiRealSource's purpose in adopting the referenced policy. MiRealSource denies the final sentence, but it admits that it eliminated the referenced policy because it concluded that it was not considered desirable by its members.

PARAGRAPH 16. In or about early 2004, Respondent adopted a rule specifying the minimum set of real estate brokerage services that a listing broker was required to offer in order to have a listing on the MiRealSource MLS (the "Listing Broker Policy"). MiRealSource adopted the Listing Broker Policy because Unbundled Service Providers were using listing agreements that allow home sellers to choose from a menu of services for a fee. At or about the time that the Listing Broker Policy was adopted, MiRealSource believed that these alternative pricing models were gaining ground with home sellers and home buyers.

**Answer:** MiRealSource admits that since on or about the date stated, its rules for its MLS have defined the responsibilities of a broker placing a listing on its MLS. MiRealSource denies that the second sentence accurately states MiRealSource's purpose in adopting the referenced policy. MiRealSource neither admits nor denies the final sentence in the form alleged, but admits that prior to adopting the policy in question, it believed that misunderstandings between its members as to the responsibilities of a listing broker were

becoming an increasing problem.

PARAGRAPH 17. In or about August 2004, MiRealSource amended its Rules and Regulations to contain the following language: "Each Shareholder requesting MLS service must maintain a physical office." In 2006, MiRealSource amended this language to the following: "Each Shareholder requesting MLS service must maintain a physical office in the state of Michigan." MiRealSource adopted these rule changes in order to make sure that listing brokers carried out the minimum set of real estate brokerage services required under the Listing Broker Policy.

**Answer:** MiRealSource admits the first and second sentences. MiRealSource denies that the final sentence accurately states MiRealSource's purpose in adopting the referenced policy.

PARAGRAPH 18. In or about the summer of 2004, Respondent adopted a rule that prevents certain lawful residential property listings provided to MiRealSource, including Exclusive Agency Listings, from being transmitted to real estate web sites: "Information which can be downloaded and/or otherwise displayed, is limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy"). The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites approved by MiRealSource to receive information concerning properties listed on the MiRealSource MLS, including (1) the NAR-operated "Realtor.com" web site; (2) the MiRealSource-owned "Mirealsource.com" web site; and (3) MiRealSource-member web sites (collectively, "Approved Web Sites").

**Answer:** MiRealSource admits that since on or about the date stated, its rules have contained the language quoted in the first sentence, but denies that MiRealSource describes that rule as a "Website Policy." MiRealSource further admits that its listings are limited to Exclusive Right to Sell Listings and it does not transmit information to other websites regarding listings not listed on the MiRealSource MLS. MiRealSource neither admits nor denies the paragraph in any other respect, as it does not understand the allegations.

PARAGRAPH 19. In or about March 2005, Respondent adopted a rule that restricts how and where home sellers can advertise and market their homes (the "FSBO Policy"). The FSBO Policy states: "A Broker-Owner can not have an Exclusive Right to Sell (ERS) Listing in the MiRealSource system while appearing as an Exclusive Agency (EA) Listing in another MLS service, on any 'For Sale By Owner' (FSBO) site, or display a 'For Sale By Owner' sign on the property - effective May 1, 2005." The FSBO Policy was also aimed at keeping Exclusive Agency Listings out of the MiRealSource MLS.

**Answer:** MiRealSource admits that since on or about the date stated, its rules have contained the quoted language, but denies that MiRealSource describes that rule as a "FSBO Policy." MiRealSource denies that the remainder of the paragraph accurately states MiRealSource's purpose in adopting the referenced policy.

PARAGRAPH 20. MiRealSource actively enforces the Exclusion Policy, Listing Broker Policy, Web Site Policy, and FSBO Policy through violation letters and fines. As of September 2006, the fine for submitting an Exclusive Agency Listing as an Exclusive

Right to Sell Listing is: 1st offense - \$1,000; 2nd offense - \$2,000; 3rd offense - \$5,000; 4th offense - Office Member removed from MLS.

Answer: Admitted

### **MIREALSOURCE HAS MARKET POWER**

PARAGRAPH 21. The provision of residential real estate brokerage services to sellers and buyers of real property in Southeastern Michigan and/or the MiRealSource Service Area is a relevant market.

Answer: Denied that either Southeastern Michigan or the MiRealSource Service Area constitutes a single relevant market with respect to the provision of residential real estate brokerage services to sellers and buyers of real property.

PARAGRAPH 22. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the MiRealSource MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the MiRealSource Service Area.

Answer: MiRealSource can neither admit nor deny the allegation in the form stated, as there are numerous alternative means of publishing and sharing of information relating to residential real estate listings within MiRealSource's Service Area and MiRealSource lacks information as to whether its services are "generally considered by sellers, buyers and their brokers" to have the characteristics alleged.

PARAGRAPH 23. Participation in MiRealSource is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the MiRealSource Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners and to assist prospective buyers in obtaining properties that fit their needs, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the MiRealSource Service Area.

Answer: Denied in the manner and form stated. MiRealSource admits only that it would not exist if an adequate number of potential members did not believe that MiRealSource provided a valuable and cost-effective service.

PARAGRAPH 24. Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the MiRealSource Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Web Sites.

Answer: Denied.

PARAGRAPH 31. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of MiRealSource and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the MiRealSource Service Area.

Answer: Denied.

PARAGRAPH 32. The policies, acts, practices, and combinations or conspiracies described herein 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.

Answer: Denied.

### **AFFIRMATIVE DEFENSES**

MiRealSource, through its attorneys, states as its affirmative defenses that the Complaint is barred in whole or in part:

1. by the State Action doctrine;
2. by the Ancillary Restraint doctrine;

**WHEREFORE**, MiRealSource requests that the Commission enter an Order:

1. Entering judgment in favor of MiRealSource;
2. Dismissing the Complaint with prejudice; and
3. Granting such other relief as it deems just and proper.



Respectfully submitted,

**BUTZEL LONG, P.C.**

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CERTIFICATE OF SERVICE

I, Marilyn Gardner, hereby certify that on November 20, 2006, have cause a copy of this proof of service, as well as the attached Answer to be served on the following persons by First Class mail:

Office of the Secretary  
Federal Trade Commission  
Room H-135  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Sean P. Gates, Esq.  
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Marilyn Gardner