

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

*In the Matter of
Fidelity National Financial, Inc./Lender Processing Services, Inc.
File No. 1310159*

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Fidelity National Financial, Inc. (“Fidelity”) and Lender Processing Services, Inc. (“LPS”) (collectively, “Respondents”). Fidelity proposes to acquire LPS, a combination that would reduce competition in seven relevant markets in Oregon where Respondents own overlapping title plant assets. The proposed Consent Agreement remedies the competitive concerns arising from the acquisition. The proposed Consent Agreement requires, among other things, that Respondents divest: a copy of LPS’s title plants covering Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties in Oregon; and an ownership interest equivalent to LPS’s share in a joint title plant serving the Portland, Oregon, metropolitan area.

On May 28, 2013, Respondents entered into an acquisition agreement under which Fidelity would acquire all of the outstanding common stock of LPS for approximately \$2.9 billion (the “Acquisition”). The Commission’s Complaint alleges that the acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between Respondents and by increasing the likelihood of collusion or coordinated interaction in the relevant geographic markets.

II. The Parties

Fidelity, a publicly-traded company headquartered in Jacksonville, Florida, provides title insurance, transaction services, and technology solutions to the mortgage industry. Fidelity is the nation’s largest title insurance company, operating six underwriting subsidiaries.

LPS, a publicly-traded company headquartered in Jacksonville, Florida, provides transaction services and technology solutions to the mortgage industry. LPS’s transaction services include title insurance underwriting provided by its National Title Insurance of New York, Inc. (“NTNY”) subsidiary.

Respondents own overlapping title plants in Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon. Fidelity and LPS are also partners in a title plant

serving the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

III. Title Information Services

Lenders require assurance of title before issuing a mortgage loan, typically in the form of title insurance. Title insurance protects against the risk that a sale of real property fails to result in the transfer of clear title. Before a title insurance policy can issue, a title agent or abstractor must first conduct a title search. Title search is the due diligence process that enables title insurance underwriters to assess (and mitigate, if necessary) the risk of subsequent title challenges. The title agent or abstractor examines property-specific records to establish the chain of title and to identify any potential obstacles – such as liens or encumbrances – that might impair the transfer of title.

To facilitate the title search process, title agents and underwriters often utilize title plants. Title plants are privately-owned (either individually or jointly) databases of information detailing the title status of real property parcels. Title plants compile, normalize, and re-index county-level property records, which are often difficult to access or inefficient to search directly. Oregon law requires title insurers and title insurance producers, who are the sole users of title information services, to own an interest in a title plant in each county in which they issue policies. This law means that there are no alternatives to title plants in Oregon counties.

IV. The Complaint

The Commission’s Complaint alleges that the acquisition agreement between Fidelity and LPS constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. The Complaint further alleges that consummation of the agreement may substantially lessen competition in the provision of title information services in seven relevant markets in Oregon, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act.

The Complaint alleges that a relevant product market in which to analyze the effects of the Acquisition is the provision of title information services. “Title information services” means the provision of selected information, or access to information, contained in a title plant to a customer or user.

The Complaint alleges that the relevant geographic markets are local in nature. Title information is generated, collected, and used on a county (or county-equivalent) level. Therefore, geographic markets for title information services are highly localized and consist of each of the counties or other local jurisdictions covered by the title plants at issue. The geographic areas of concern outlined in the Complaint are Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon; and the tri-county Portland, Oregon, metropolitan area, consisting of Clackamas, Multnomah, and Washington counties.

The Complaint alleges, absent the proposed relief, that the Acquisition would increase the risk of coordinated anticompetitive effects in the relevant markets. In Clatsop, Columbia, Coos, and Tillamook counties, the Acquisition would reduce the number of independent title plant owners to two. In Josephine and Polk counties, the Acquisition would leave only three independent title plant owners. In each of these six counties, each title plant has a single owner that is also the title plant's sole user. In contrast, one jointly-owned title plant serves the Portland, Oregon, metropolitan area; each co-owner has full access to this title plant. The Acquisition would leave five joint owners of that joint title plant, but would reduce the number of owners necessary to expel other owners from the joint title plant.

The Complaint alleges that entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would be costly and time-consuming, requiring any potential entrant to assemble a complete and accurate index of historical property records.

V. The Proposed Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from the Acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Respondents must divest a copy of LPS's title plants serving Clatsop, Columbia, Coos, Josephine, Polk, and Tillamook counties, Oregon, to a Commission-approved acquirer. Respondents must complete these divestitures within five (5) months of the closing date of the Acquisition. The required divestitures will eliminate the competitive harm that otherwise would have resulted in these counties by restoring the number of independent title plant owners within each county to the pre-acquisition level.

The proposed Consent Agreement also requires Respondents to divest an ownership interest equivalent to LPS's share in the joint title plant that serves the Portland, Oregon, metropolitan area to a Commission-approved buyer. Respondents must complete this divestiture within five (5) months of the closing date of the Acquisition. The proposed Consent Agreement requires that the divestiture purchaser's interest in the joint title plant, when combined with Fidelity's post-merger interest, must not equal or exceed 70 percent. The divestiture will ensure that no two joint owners of the plant could coordinate to expel other members of the joint title plant in this relevant market. The proposed Consent Agreement further prohibits Fidelity from exercising its voting rights, or influencing others to exercise their voting rights, to expel the divestiture buyer from the joint title plant for failure to conduct an active title business for a period of three (3) months.

In addition to the required divestitures, the proposed Consent Agreement obligates Respondents to provide the Commission with prior written notice of title plant acquisitions in any county in Oregon in three sets of circumstances: (1) if the acquisition would result in three or fewer title plants covering the county; (2) if the acquisition would result in three or fewer owners of a joint plant; and (3) if the acquisition would result in

Fidelity controlling a 50 percent or greater share in a joint plant. Each of these circumstances would raise competitive concerns in the market for title information services, and could reduce competition in the market for title insurance underwriting in Oregon. These transactions likely would not come to the Commission's attention without the prior notification provision.

VI. The Order to Maintain Assets

The Decision and Order and the Order to Maintain Assets obligate Fidelity to continue to update and maintain the individual title plants, the Portland Tri-County Plant interest, and the Portland Tri-County Plant until the required divestitures are complete. This will ensure that the divested assets remain viable sources of title information to support the title insurance underwriting operations of the acquirer or acquirers. The Order to Maintain Assets explicitly requires Fidelity not to compromise these assets' ability and suitability to meet Oregon's requirements for title insurers and title insurance producers.

VII. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite and inform public comment on the Consent Agreement, including the proposed divestitures. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.