

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of MiRealSource, Inc., File No. 0610266

The Federal Trade Commission has accepted for public comment an agreement containing consent order with MiRealSource, Inc. (“MiRealSource” or “Respondent”). Respondent is a corporation owned by real estate brokers in Southeastern Michigan that operates a multiple listing service (“MLS”) designed to facilitate real estate transactions. The agreement settles charges that Respondent violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed consent order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Respondent

MiRealSource is a Michigan corporation. Its shareholders are real estate brokers doing business in Southeastern Michigan, and they are generally referred to as “members” of the Respondent. MiRealSource has approximately 7,000 members, and these members supply real estate brokerage services to home sellers in Southeastern Michigan and to prospective purchasers seeking homes in that area. One of the primary tools utilized by members to carry out their business efficiently is the MiRealSource MLS. This service facilitates the process of matching sellers and buyers for a large number of individual properties. It functions as a clearinghouse through which members regularly and systematically exchange information on property listings.

II. Industry Background

A Multiple Listing Service, or “MLS,” is a cooperative venture by which real estate brokers serving a common local market area submit their listings to a central service, which in turn distributes the information, for the purpose of fostering cooperation among brokers in real estate transactions. The MLS facilitates transactions by putting together a home seller, who contracts with a broker who is a member of the MLS, with prospective buyers, who may be working with other brokers who are also members of the MLS. Typically, the MLS rules establish criteria for membership, including the requirement that brokers and agents must be licensed by the applicable state regulatory agency to engage in real estate brokerage services.

Prior to the late 1990s, the listings on an MLS generally were directly accessible only to real estate brokers who were members of a local MLS. At that time, the MLS listings typically were made available through books or dedicated computer terminals, and generally could only be accessed by the public by physically visiting a broker's office or by receiving a fax or hand delivery of selected listings from a broker.

Information from an MLS is now typically available to the general public not only through the offices of real estate brokers who are MLS members, but also through three principal categories of internet web sites. First, information concerning many MLS listings is available through Realtor.com, a national web site run by the National Association of Realtors ("NAR"). Realtor.com contains listing information from many local MLS systems around the country and is the largest and most-used internet real estate web site. Second, information concerning MLS listings is often made available through a local MLS-affiliated web site. Third, information concerning MLS listings is often made available on the internet sites of various real estate brokers, who choose to provide these web sites as a way of promoting their brokerage services to potential clients (home buyers and sellers). Most of these various web sites receive information from an MLS pursuant to a procedure known as Internet Data Exchange ("IDX"), which is typically governed by MLS policies. The IDX policies allow operators of approved web sites to display MLS active listing information to the public.

Today the internet plays a crucial role in real estate sales. According to a 2006 survey by the National Association of Realtors ("NAR"), 80 percent of home buyers used the internet to assist in their home search, with 59 percent reporting frequent internet searches. Twenty-four percent of respondents first learned about the home they selected from the internet, the second most common means behind learning about a home from a real estate agent (36 percent).¹ In all, 73 percent of home buyers found the internet to be a "very useful" source of information, and a total of 98 percent found the internet to be either "very useful" or "somewhat useful."² Moreover, the NAR Survey makes clear that the overwhelming majority of web sites used nationally in searching for homes contain listing information that is provided by local MLS systems.³

A. Types of Real Estate Brokerage Professionals

A typical real estate transaction involves two real estate brokers. These are commonly referred to as a "listing broker" and a "selling broker." The listing broker is hired by the seller of the property to locate an appropriate buyer. The seller and the listing broker agree upon

¹ *E.g.*, PAUL C. BISHOP, HARIKA BICKICIOGLU, AND SHONDA D. HIGHTOWER, THE 2006 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS (hereinafter, "NAR Study") at 3-3, 3-4, 3-6.

² *Id.* at 3-5.

³ NAR Study at 3-19.

compensation, which is determined by written agreement negotiated between the seller and the listing broker. In a common traditional listing agreement, the listing broker receives compensation in the form of a commission, which is typically a percentage of the sales price of the property, payable if and when the property is sold. In such a traditional listing agreement, the listing broker agrees to provide a package of real estate brokerage services, including promoting the listing through the MLS and on the internet, providing advice to the seller regarding pricing and presentation, fielding all calls and requests to show the property, supplying a lock-box so that potential buyers can see the house with their agents, running open houses to show the house to potential buyers, reviewing offers, negotiating with buyers or their agents on offers, assisting with home inspections and other arrangements once a contract for sale is executed, and attending the closing of the transaction.

The other broker involved in a typical transaction is commonly referred to as the selling broker. This selling broker will identify and discuss the properties that may be of interest to the buyer, accompany the buyer to see various properties, try to arrange a transaction between buyer and seller, assist the buyer in negotiating the contract, and help in further steps necessary to close the transaction. In a traditional transaction, the listing broker offers the selling broker a fixed commission, to be paid from the listing broker's commission when and if the property is sold. Real estate brokers typically do not specialize as only listing brokers or selling brokers, but often function in either role depending on the particular transaction.

B. Types of Real Estate Listings

The relationship between the listing broker and the seller of the property is established by agreement. The two most common types of agreements governing listings are Exclusive Right to Sell Listings and Exclusive Agency Listings. An Exclusive Right to Sell Listing is the traditional listing agreement, pursuant to which the property owner 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 listing broker a commission if and when the property is sold, whether the buyer of the property is secured by the listing broker, the owner or another broker.

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

Some real estate brokers have attempted to offer services to home sellers on something other than the traditional full-service basis. Many of these brokers, often for a flat fee paid at the inception of the listing contract and not contingent on whether the home sells during the term of that contract, will offer sellers access to the MLS's information-sharing function as well as a promise that their listing will appear on the most popular real estate web sites. Under such arrangements, the listing broker does not offer additional real estate brokerage services as part of

the flat fee package, but allows sellers to purchase additional services if sellers so desire. These non-traditional arrangements often are structured using Exclusive Agency Listing contracts.

There is a third type of real estate transaction that does not involve a real estate broker or the services of the MLS, and it is known as a “For Sale By Owner” or “FSBO” transaction. With a FSBO transaction, a home owner will attempt to sell a house without the involvement of any real estate broker and without paying any compensation to such a broker, by advertising the availability of the home through traditional advertising mechanisms (such as a newspaper) or FSBO-specific web sites.

There are two critical distinctions between an Exclusive Agency Listing and a FSBO for the purpose of this analysis. First, the Exclusive Agency Listing employs a listing broker for access to the MLS and popular web sites providing MLS listing information open to the public; a FSBO transaction does not. Second, an Exclusive Agency Listing sets terms of compensation to be paid to a selling broker, while a FSBO transaction often does not.

III. The Conduct Addressed by the Proposed Consent Order

The complaint in this matter, issued on October 10, 2006,⁴ alleges that MiRealSource has violated the FTC Act by adopting rules or policies that limit the publication and marketing of certain sellers’ properties, but not others, based solely on the terms of their respective listing contracts. The complaint alleges that Respondent favored Exclusive Right to Sell Listings and disfavored Exclusive Agency Listings through, among other things, the adoption of a rule excluding the latter listings entirely from the MLS.

The allegations explain that Respondent also adopted a series of further rules to stifle competition from real estate brokers using alternative business models to provide brokerage services in Southeastern Michigan. These rules include: (1) the “Web Site Policy,” which limits the publication of certain residential real estate listings on popular real estate web sites; (2) the “Listing Broker Policy,” which requires a Listing Broker to perform a minimum set of services; (3) the “Physical Office Policy,” which requires each member to have an office in the state of Michigan; (4) the “FSBO Policy,” which restricts how and where home sellers can advertise and market their homes; and (5) the “Co-Mingling Policy,” which (for a time) restricted MiRealSource listing information from being searched on public web sites along side listing information from other sources.

Such rules limit the acceptance, publication, and marketing of certain residential real estate listing contracts, thereby limiting home sellers’ ability to choose a listing type that best serves their specific needs. The complaint alleges that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the

⁴ See <http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf>.

manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along. In addition, the complaint alleges that MiRealSource actively enforced the anticompetitive rules and policies through violation letters to members and substantial fines.

Some of the conduct at issue in this matter also is similar to the conduct addressed by the Commission in its recent consent orders involving real estate boards and associations operating MLSs in Texas, New Hampshire, New Jersey, Virginia, Wisconsin and Colorado.⁵ As in those matters, certain rules or policies of Respondent challenged in the complaint preclude information about properties from being made available on popular real estate web sites because the listing contracts do not follow the traditional format approved by the MLS. These rules or policies prevent properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the national “Realtor.com” web site operated by the National Association of Realtors, the local web site operated by MiRealSource, and individual members’ web sites.

A. The Respondent Has Market Power

MiRealSource serves residential real estate brokers in Southeastern Michigan. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in the MiRealSource MLS is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.⁶ By virtue of broad industry participation and control over a key input, MiRealSource has market power in the provision of residential real estate brokerage services to sellers and buyers of real property in the MiRealSource Service Area.

B. Respondent’s Conduct

Non-traditional forms of listing contracts, including Exclusive Agency Listings, are used by listing brokers to offer lower-cost real estate services to consumers. The series of rules and

⁵ *In the Matter of Austin Bd. of Realtors*, Docket No. C-4167 (Final Approval, Aug. 29, 2006); *In the Matter of Northern New England Real Estate Network, Inc.*, Docket No. C-4175 (Final Approval, Nov. 22, 2006); *In the Matter of Monmouth County Association of Realtors, Inc.*, Docket No. C-4176 (Final Approval, Nov. 22, 2006); *In the Matter of Williamsburg Area Association of Realtors, Inc.*, Docket No. C-4177 (Final Approval, Nov. 22, 2006); *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*, Docket No. C-4178 (Final Approval, Nov. 22, 2006); *In the Matter of Information and Real Estate Services, LLC*, Docket No. C-4179 (Final Approval, Nov. 22, 2006). The ABOR consent order was published with an accompanying Analysis To Aid Public Comment at 71 Fed. Reg. 41023 (July 19, 2006). The other five consent orders were published at 71 Fed. Reg. 61474 (October 12, 2006).

⁶ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

policies adopted by Respondent were joint action by a group of competitors to withhold distribution of listing information from rivals who did not contract with their brokerage service customers in a way that the group wished. This type of conduct was condemned by the Commission 20 years ago. In the 1980s and 1990s, several local MLS boards banned Exclusive Agency Listings from the MLS entirely. The Commission investigated and issued complaints against these exclusionary practices, obtaining several consent orders.⁷ The complaint alleges that, in addition to following these past practices, MiRealSource also extended its exclusionary rules to the more modern method of distributing listing information publicly via the internet.

C. Competitive Effects of the Respondent's Rules and Policies

The MiRealSource rules and policies have prevented its members from offering or accepting Exclusive Agency Listings. Thus, the rules impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. The Respondent's rules and policies have caused some brokers to exit from the real estate business in Southeastern Michigan, or to refrain from offering non-traditional brokerage services in that market or to not enter at all. Furthermore, the rules have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements.

By preventing Exclusive Agency Listings from being included in the MLS and transmitted to public-access real estate web sites, the MiRealSource rules and policies have adverse effects on home sellers and home buyers. When home sellers switch to full service listing agreements from Exclusive Agency Listings that often offer lower-cost real estate services to consumers, the sellers may purchase services that they would not otherwise buy. This, in turn, may increase the commission costs to consumers of real estate brokerage services. In particular, the rules deny home sellers choices for marketing their homes and deny home buyers the chance to use the internet easily to see all of the houses listed by real estate brokers in the area, making their search less efficient.

D. There is No Competitive Efficiency Associated with the Web Site Policy

The Respondent's rules at issue here advance no legitimate procompetitive purpose. As a theoretical matter, if buyers and sellers could avail themselves of an MLS system and carry out real estate transactions without compensating any of its broker members, an MLS might be concerned that those buyers and sellers were free-riding on the investment that brokers have made in the MLS and adopt rules to address that free-riding. But this theoretical concern does

⁷ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, Docket No. C-3449, 1993 WL 13009648 (F.T.C. Jul. 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C-3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

not justify the rules or policies adopted by MiRealSource. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing, and other provisions in the MiRealSource rules ensure that a selling broker – a broker who finds a buyer for the property – is compensated for the brokerage service he or she provides.

Under existing MLS rules that apply to any form of listing agreement, the listing broker must ensure that the home seller pays compensation to the cooperating selling broker (if there is one), and the listing broker may be liable himself for a lost commission if the home seller fails to pay a selling broker who was the procuring cause of a completed property sale. The possibility of sellers or buyers using the MLS but bypassing brokerage services is already addressed effectively by the Respondent's existing rules that do not distinguish between forms of listing contracts, and does not justify the series of exclusionary rules and policies adopted by MiRealSource. It is possible, of course, that a buyer of an Exclusive Agency Listing may make the purchase without using a selling broker, but this is true for traditional Exclusive Right to Sell Listings as well.

IV. The Proposed Consent Order

The proposed order is designed to ensure that the Respondent does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the MLS.

The proposed order prohibits MiRealSource from adopting or enforcing any rules or policies that deny or limit the ability of MLS members to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. More specifically, the proposed order prohibits MiRealSource from preventing its members from offering or accepting Exclusive Agency Listings or other lawful listing agreements; cooperating with Listing Brokers or agents that offer or accept Exclusive Agency Listings or other lawful listing agreements; publishing Exclusive Agency Listings or other lawful listing agreements on the MLS and Approved Web Sites; publishing their information concerning listings on public real estate web sites, including but not limited to www.FSBO.com; requiring members to have a physical office; and offering unbundled real estate brokerage services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services. The proposed order also prohibits MiRealSource from denying or restricting the services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; or treating Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

In addition to these substantive provisions, the proposed order states that, within forty-five days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. Respondent is further required to notify its members of the applicable

order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the respondent's structure, and periodic filings of written reports concerning compliance. The relief in the proposed consent order ensures that the Respondent cannot revert to the old rules or policies, or engage in future variations of the challenged conduct.

The proposed order applies to MiRealSource and entities it owns or controls, including its respective MLS and any affiliated web site it operates. The order does not prohibit members, or other independent persons or entities that receive listing information from Respondent, from making independent decisions concerning the use or display of such listing information on member or third-party web sites, consistent with any contractual obligations to Respondent.

The proposed order will expire in 10 years.