

IN THE MATTER OF

MULTIPLE LISTING SERVICE OF THE
GREATER MICHIGAN CITY AREA, INC.

also d/b/a

MULTIPLE LISTING SERVICE OF LAPORTE COUNTY, INC.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3163. Complaint, Sept. 11, 1985—Decision, Sept. 11, 1985*

This consent order requires an Indiana firm providing a multiple listing service to member real estate brokers doing business in LaPorte County, Ind., among other things, to cease fixing, establishing or maintaining commission rates for brokerage services; urging its members to charge the customary market rate of commission; taking adverse action against non-conforming brokers; or otherwise engage in conduct having the tendency to restrain competition in the real estate brokerage market. The company is also barred from interfering with any statement disseminated in an advertisement that truthfully refers or relates to another broker's business practices; restricting a broker from offering or accepting an exclusive agency listing, reserve clause listing or open listing; and restraining a broker's participation or involvement in a competitive organization or service. The firm is further required to publish exclusive agency listings or reserve clause listings in its multiple listing service; timely amend their by-laws, rules and regulations, and other materials to conform to the provisions of the order; and provide area real estate brokers with a prescribed statement setting forth those terms. Additionally, the order prohibits the firm from improperly denying a membership application; requires a written notice of denial together with the reasons for the denial to be provided to rejected applicants; and requires the firm to maintain records relating to membership applications for a specified period.

Appearances

For the Commission: *Alan J. Friedman* and *Oscar M. Voss*.

For the respondents: *Thomas D. Sallwasser, Sallwasser & McClain, Laporte, Ind.*

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 Multiple Listing Service Of The Greater Michigan City Area, Inc., a corporation, also trading and doing business as Multiple Listing Service Of LaPorte County, Inc., 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:

1. As used in this complaint:

a. *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 members who locate purchasers.

b. *Member or member firm* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondent Multiple Listing Service Of The Greater Michigan City Area, Inc.

c. *Applicant* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed by the Indiana Real Estate Commission as a real estate broker within the State of Indiana and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

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

e. *Exclusive right to sell listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold, regardless of who locates the purchaser.

f. *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 commission to the broker.

g. *Exclusive agency listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold through any real estate broker, but, if the owner locates the purchaser independently of any real estate broker, the owner owes a reduced commission or no commission to the broker.

h. *Open listing* shall mean any listing under which the property owner grants the broker a nonexclusive agency to locate a purchaser for the property, such that the owner is free to enter into other open listings with other real estate brokers and owes a commission only to the broker who locates the purchaser.

2. Respondent Multiple Listing Service Of The Greater Michigan City Area, Inc. ("MLS") is a corporation organized, existing and doing business under any by virtue of the laws of the State of Indiana. Respondent MLS's principal office and place of business is at 5450 North Johnson Road, Michigan City, Indiana, in LaPorte County. The population of LaPorte County is approximately 105,000 and the popu-

lation of Michigan City (the County's largest city) is approximately 40,000.

3. Respondent MLS is now and has been at all times relevant herein a corporation organized for its own profit and that of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

4. Respondent MLS is now and has been since 1970 providing a multiple listing service for member real estate brokerage firms doing business in LaPorte County. 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, as well as other related services designed to facilitate such sales. Each member firm agrees to submit all of its LaPorte County residential property listings (except for new residences in which the member has an ownership interest) for publication on the multiple listing service to the entire MLS membership and to share brokerage commissions with those member firms that successfully locate purchasers for properties it has listed. The MLS charges a fee to members for publishing listings on its multiple listing service only if the property is sold before the listing's expiration date; the fee is based on a percentage of the earned brokerage commission on the sale of the property. The MLS allows only exclusive right to sell listings to be published on its multiple listing service.

5. Membership in respondent MLS provides valuable competitive advantages in the brokering of residential real estate in LaPorte County. MLS membership significantly increases the opportunities of brokerage firms to enter into listings with residential property owners, as owners generally consider MLS publication of listings to be the fastest and most effective and convenient means of obtaining the broadest market exposure for residential property in LaPorte County. MLS membership also significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales that is important for brokerage firms to compete effectively in the market. Respondent MLS provides the only real estate multiple listing service serving LaPorte County. About 65 percent of the active, full time residential real estate brokerage firms doing business in LaPorte County have been and are now members of the MLS. Only two of the eight largest residential real estate brokerage firms in terms of dollar sales are not currently members of the MLS. For 1982, about 65 percent of the total dollar volume of residential real estate sales in LaPorte County through brokerage firms involved listings published on the MLS's multiple listing service by current MLS members. Also for 1982, approximately 80 percent of the total dollar volume of residential real estate sales in Michigan City through brokerage firms

involved listings published on the MLS's multiple listing service by current MLS members.

6. Sales of real estate listings published on the MLS's multiple listing service totaled about \$30 million for 1981, at least \$22 million for 1982, and about \$31 million for 1983. Almost the entire dollar sales volume of MLS-published listings represents sales of residential real estate in LaPorte County.

7. Approximately thirty firms are members of the MLS's multiple listing service. Each member owns one share of MLS stock, entitling each firm to one vote in the operation of the multiple listing service. Only members may own MLS stock and participate in the MLS's multiple listing service.

8. The MLS requires each member to pledge adherence to MLS regulations and other MLS policies. Members found to be in violation of any MLS regulation or other MLS policy are subject to fine or to suspension or termination of membership.

9. Real estate brokers doing business in the State of Indiana must be licensed by the Indiana Real Estate Commission pursuant to state law. The state law licensing requirements include:

- a. completion of prescribed courses of study;
- b. one year experience as a licensed salesperson for a licensed real estate broker or equivalent experience; and
- c. passing a written examination.

10. Except to the extent that competition has been restrained as described in Paragraphs 12 through 22 below, the MLS members are now and have been in competition among themselves and with other firms in the provision of residential real estate brokerage services.

11. In adopting the policies and engaging in the acts and practices described in Paragraphs 12 through 22 below, the MLS has been and is now acting as a combination of its members, or in conspiracy with some of its members or others, to restrain trade in the provision of residential real estate brokerage services.

12. Upon the formation of the MLS in 1970, the MLS adopted regulations requiring that members charge for brokerage services "only such fees as are . . . in accordance with local practice in similar transactions" and that "any listing filed with [the MLS] shall provide for payment of a commission in accordance with the customary practices within [LaPorte County]." These regulations are still in effect. Almost all of the LaPorte County brokerage firms, including almost all of the current MLS members, have been and are now customarily charging commission rates of six or seven percent of the gross sales price of residential property.

and elsewhere, most or all of the brokerage firms serving Michigan City, including most or all of the member firms of the MLS at that time, jointly determined to raise the customary commission rate for brokering residential property in Michigan City from six percent to seven percent of the gross sales price of the property. Within about six months after this joint determination was made, the predominant commission rate on the sale of residential property in Michigan City increased from six to seven percent, and seven percent continues to be the predominant rate charged by Michigan City brokerage firms.

14. The MLS, in conspiracy with some MLS members, has obstructed truthful comparative advertising, including truthful advertising of low commission rates. An MLS code of ethics requirement in effect since the MLS's formation in 1970 states that a member "shall never publicly criticize a competitor" During July to September 1978 or thereabouts, an MLS member became the first LaPorte County brokerage firm since at least 1970 to advertise a commission rate below six percent and to refer in advertising to its costs and services in comparison with other area firms. Despite the truthfulness of this advertising, the president of the MLS and other MLS members charged that this firm's advertising constituted improper public criticism of a competitor and, through the MLS, jointly coerced the advertising member to stop this conduct. Since this incident, no MLS member has attempted to advertise in a similar fashion.

15. Since at least 1978, and in order to deter the entry of new competitors and to impede price competition, respondent MLS has been and is now requiring any duly licensed real estate broker seeking MLS membership on behalf of his or her firm to have owned and operated a real estate brokerage business in LaPorte County for one year immediately preceding the date of application. In addition, the MLS has been requiring that the applicant, for this one year period (and that each member to retain membership):

- a. derive the major or principal portion of earned income from full time practice of real estate brokerage; and
- b. operate from an established place of business in LaPorte County at a nonresidential location.

In one instance, in 1980, the MLS denied membership to a brokerage firm that had been regularly charging a four percent commission rate. Even though this firm had operated in LaPorte County under the same ownership since at least 1975, it was denied membership on the ground that it did not have a business office located in a non-residential location in LaPorte County for the requisite one year period.

16. In addition, the MLS has required some brokerage firms that

met the one year waiting periods described in Paragraph 15 above to wait for membership substantial additional periods of time. In 1980, the MLS notified one applicant that met the MLS's one year waiting period to reapply in about three months as no applications would be considered until that time. In 1978, before the above-described one year waiting periods were required, the MLS refused to process a membership application of a brokerage firm that had been operating full time in LaPorte County from a non-residential location for a number of years. About three or four months after receipt of this application, and only upon inquiry by the applicant, the MLS told the applicant that no new members were being accepted at that time and that no information could be provided on when new membership would be available.

17. Through the policies, acts, or practices described in Paragraphs 15 and 16 above, and since 1978, the MLS has unreasonably prevented or delayed the membership of at least eight firms by denying membership, failing to act upon applications, or deterring the submission of applications. At least six of these firms were new entrants and at least three of the eight, as of their dates of application or during their first year of operation, had regularly or frequently charged commission rates below six percent.

18. The MLS has been and is now prohibiting any member from entering into any exclusive agency listing, and the MLS has been and is now refusing to publish any exclusive agency listing on its multiple listing service.

19. The MLS has been and is now prohibiting any member from entering into any reserve clause listing with an individual residential property owner, and the MLS has been and is now refusing to publish any such listing on its multiple listing service.

20. The MLS has been and is now prohibiting any member from entering into any open listing with a residential property owner.

21. Respondent MLS has been and is now prohibiting any member from participating, without the approval of the MLS, in any organization that competes with the MLS's multiple listing service.

22. The MLS has been and is now unreasonably restricting the ability of members and property owners to cancel residential listings before the listing's expiration date. The MLS, through a regulation in effect since the MLS's formation in 1970, prohibits any member from entering into any agreement with a property owner to cancel a residential listing before the listing's expiration date without prior approval of the MLS. Although the MLS has approved a number of cancellations that release the member from further obligation to provide brokerage services under the listing (such as when the owner is

prohibiting any cancellation that would partially or fully release the owner from further obligation to pay a commission should the property be sold before the listing's original expiration date. The MLS also has been and is now prohibiting any cancellation that would provide for the transfer of the listing from a member to one of the member's former associates who has recently started his or her own firm.

23. The purposes or effects, and the tendency and capacity, of the policies, acts, or practices of the MLS and its members as described in Paragraphs 12 through 22 above have been and are to unreasonably restrain competition in one or more of the following ways, among others:

- a. stabilize, fix, maintain, or interfere with prices of real estate brokerage services;
- b. restrain price competition among brokerage firms;
- c. unreasonably restrain the entry of new brokerage firms and of new joint ventures or shared brokerage or multiple listing services in competition with the MLS's multiple listing service;
- d. restrain competition among brokerage firms based on willingness to accept different contract terms that may be attractive and beneficial to consumers, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property through alternative means;
- e. substantially limit the ability of consumers to negotiate lower prices for brokerage services and brokerage contract terms that may be more advantageous than an exclusive right to sell listing;
- f. substantially limit the ability of residential property sellers to compete with real estate brokers in locating purchasers;
- g. substantially limit consumers' ability to choose among a variety of brokerage firms competing on the basis of price, contract terms, and services; and
- h. deprive consumers of information pertinent to selecting a brokerage firm, and of the benefits of competition.

24. In the conduct of their businesses and through the policies, acts, and practices described in Paragraphs 12 through 22 above, the MLS and its members involve or affect:

- a. a substantial interstate flow of funds used in the financing of LaPorte County real estate;
- b. a substantial amount of LaPorte County real estate financing guaranteed or insured under federal government programs;
- c. the sale of a substantial amount of title and homeowners' insurance by interstate insurers to LaPorte County property owners;
- d. the franchise operations of those interstate chains of real estate

brokerage firms that include one or more members of respondent MLS; and

e. the interstate sale of computer services to respondent MLS.

As a result of these and other events and effects, the policies, acts, and practices of the MLS and its members as described in Paragraphs 12 through 22 above are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

25. The policies, acts, practices, and combinations or conspiracies described in Paragraphs 12 through 22 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 is continuing in nature and will continue 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 Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent 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; 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, having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34(b) of its Rules and the recommendations of its staff; and

The respondent having been furnished with a copy of a revised draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration, and the respondent, its attorney, and counsel for the Commission having thereafter executed a revised agreement containing consent order dated August 28, 1984; and

The Commission having thereafter reconsidered the matter and having determined that it had reason to believe that the respondent has violated the said Act as stated in the revised complaint, and that

spect, and having thereupon withdrawn its acceptance of the original agreement and accepted the revised agreement and placed such revised 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(b) of its Rules and the recommendations of its staff; and

The revised agreement containing the following consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid revised draft of complaint, a statement that the signing of said revised agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such revised complaint, and waivers and other provisions as required by the Commission's Rules;

Now in 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 is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 5450 North Johnson Road, in the City of Michigan City, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For the 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 members who locate purchasers.

2. *Member* shall mean any real estate brokerage firm that is entitled to participate in the multiple listing service offered by respondent Multiple Listing Service Of The Greater Michigan City Area, Inc.

3. *Applicant* shall mean any owner or co-owner of a real estate brokerage firm who is duly licensed by the Indiana Real Estate Commission as a real estate broker within the State of Indiana and who has applied on behalf of his or her firm for membership in respondent's multiple listing service.

4. *Market* shall mean the provision of real estate brokerage services for residential properties located in LaPorte County, Indiana.

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

6. *Exclusive right to sell listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold, regardless of who locates the purchaser.

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 commission to the broker.

8. *Exclusive agency listing* shall mean any listing under which the property owner agrees to pay the broker a certain commission if the property is sold through any real estate broker, but, if the owner locates the purchaser independently of any real estate broker, the owner owes a reduced commission or no commission to the broker.

9. *Open listing* shall mean any listing under which the property owner grants the broker a nonexclusive agency to locate a purchaser for the property, such that the owner is free to enter into other open listings with other real estate brokers and owes a commission only to the broker who locates the purchaser.

I.

It is ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., and its directors, officers, committees, representatives, agents, employees, subsidiaries, successors, and assigns, directly or indirectly or through any device, in or 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 cease and desist from:

A. Fixing, establishing, or maintaining any rate, range or amount of commission for real estate brokerage services, or otherwise restraining price competition among real estate brokers, including but not limited to:

1. requiring, urging, recommending, or suggesting that any broker charge for brokerage services only such commissions or commission rates as are in accordance with local practice in similar transactions;

2. requiring, urging, recommending, or suggesting that any listing filed with respondent's multiple listing service provide for payment of a commission in accordance with the customary practices within the market;

3. requiring, urging, recommending, or suggesting that any broker refrain from charging or advertising any commission or commission

rate below what is customarily charged or prevailing in the market;
or

4. taking or threatening any action that has the purpose or effect of penalizing, discriminating against, or interfering with any broker's charging or advertising any commission or commission rate below what is customarily charged or prevailing in the market.

B. Declaring to be unethical or otherwise restricting or interfering with any statement in a generally disseminated advertisement by a broker that truthfully refers or relates to the business practice of any other real estate broker, such as truthful comparisons of commissions, commission rates, operating costs, services, methods of operation, or brokerage terms or conditions. Generally disseminated advertisements shall include any advertisement through the media, through printed distributions covering a particular geographic area or a particular association of persons, or through other general means.

C. Adopting any policy or taking any other action that has the purpose or effect of:

1. requiring that any applicant or prospective applicant must have been engaged to any degree or in any manner or capacity in real estate brokerage for any period of time before becoming eligible for membership in respondent's multiple listing service;

2. requiring that any prospective applicant, applicant, or member must:

a. engage in real estate brokerage full time;

b. derive any particular amount or portion of income from real estate brokerage; or

c. operate from an established place of business at a nonresidential location;

3. restricting the acceptance of any membership application for processing to unreasonably infrequent or limited periods of time during the year;

4. unreasonably delaying action on any membership application or the induction of any new member; or

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

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.

D. Restricting or interfering with:

1. any broker's offering or acceptance of any exclusive agency listing or reserve clause listing; or

2. the publishing on respondent's multiple listing service of any exclusive agency listing or reserve clause listing of a member.

E. Publishing on respondent's multiple listing service any exclusive agency listing or reserve clause listing:

1. in any manner different from the publishing of any exclusive right to sell listing; or

2. in any category separate from exclusive right to sell listings;

provided, however, that nothing contained in subparts I.D. or I.E. shall prohibit respondent from: (a) including a simple designation that a published listing is an exclusive agency listing or reserve clause listing rather than an exclusive right to sell listing; (b) charging a reasonable and nondiscriminatory fee based on costs for any service it provides; and (c) applying reasonable terms and conditions equally applicable to, and not discriminatory in their impact upon, the publication of any listing, whether exclusive agency, reserve clause, or exclusive right to sell.

F. Prohibiting any broker from entering into any open listing.

G. Restricting or interfering with any broker's development of, or participation or involvement in, any organization, service, or venture that competes in any way with respondent's multiple listing service.

H. Restricting or interfering with any member and property owner cancelling a listing before the listing's expiration date; *provided, however*, that nothing contained in this subpart shall prohibit respondent from: (1) requiring three days advance notice of the cancellation, including a copy of the cancellation agreement; (2) charging a reasonable and nondiscriminatory fee for any service it provides if the property subject to the cancelled listing is sold before the original expiration date of the listing and said fee is not otherwise owed to respondent by another member; and (3) charging a reasonable and nondiscriminatory fee based on costs for any service it provides.

II.

It is further ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., shall:

A. Within sixty (60) days after this order becomes final, amend its by-laws, code of ethics, and rules and regulations and any other of its materials to conform to the provisions of this order.

B. Within thirty (30) days after this order becomes final, make its best efforts to distribute an announcement in the form shown in

Appendix A to the principal(s) of each real estate brokerage firm doing business in LaPorte County, Indiana (including each member and including any other brokerage firm listed in the most current telephone yellow page directories for Michigan City and the city of LaPorte), including a sufficient number of copies to permit each real estate broker and salesperson associated with any such firm to receive the announcement.

C. For a period of five (5) years after this order becomes final, furnish promptly a copy of this order to:

1. any person who inquires in writing about, or who submits an application for, membership in respondent's multiple listing service; and
2. any other person who requests a copy.

III.

It is further ordered, That respondent Multiple Listing Service Of The Greater Michigan City Area, Inc., shall:

A. Within sixty (60) days after this order becomes final, submit a 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. For a period of ten (10) years after this order becomes final:

1. provide to any applicant who has been denied membership prompt and clear written notice of the denial, specifying the membership requirements not met and explaining in what manner the requirements are not met; and

2. keep all documents that discuss, refer, or relate to any denied or approved application for a period of five (5) years from the final decision on such application, maintaining all such documents in one separate file segregated by the names of the applicants.

C. For a period of ten (10) years after this order becomes final, make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, all documents that relate to determining whether respondent has been and is complying with this order, including but not limited to the documents required to be kept by subpart III. B. of 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

