

Complaint

IN THE MATTER OF

AUSTIN BOARD OF REALTORSCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT*Docket C-4167; File No. 051 0219**Complaint, August 29, 2006 – Decision, August 29, 2006*

This consent order addresses charges that the Austin Board of Realtors engaged in a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services. The respondent adopted a rule that prevented information on certain real estate listings provided to the Austin/Central Texas Realty Information Service (ACTRIS) from being included in Multiple Listing Service websites available to the general public. The order prohibits the respondent from treating Exclusive Agency Listings, or any other lawful listing agreements with sellers of property, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, adopting any policy, rule, or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings. The order prohibits the respondent from adopting or enforcing any policy to deny, restrict, or interfere with the ability of its members or ACTRIS participants to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties. The order contains a general proviso that preserves to the Austin Board of Realtors the ability to adopt or enforce any policy, rule, practice, or agreement that it can show is reasonably ancillary to the legitimate and beneficial objectives of the Multiple Listing Service. In addition, the order requires the Austin Board of Realtors to notify its members and ACTRIS participants of the order, to notify the Commission of changes in the Board's structure, and to file regular written reports of its compliance with the terms of the order.

Participants

For the *Commission*: Joel Christie and Peggy Bayer Femenella.

For the *Respondent*: Joseph R. Knight, Baker Botts LLP.

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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 the Austin Board of Realtors (“Respondent” or “ABOR”), a corporation, also trading and doing business as Austin/Central Texas Realty Information Service 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:

NATURE OF THE CASE

This case involves a local, private real estate association that operates a Multiple Listing Service, which is a joint venture among its members designed to foster real estate brokerage services. ABOR has adopted a rule that limits the publication of certain listing agreements on popular internet real estate web sites, in a manner that injures real estate brokers that use such listing agreements to offer lesser services at a lower price compared to the full service package. This rule deprives such brokers and the home sellers they represent of a significant benefit afforded by the MLS. The rule discriminates on the basis of lawful contractual terms between the listing real estate broker and the seller of the property, and lacks any justification that such a rule improves competitive efficiency. Consumers will be harmed by this rule because it denies a lower cost option to sellers and increases search costs to buyers. As such, this rule constitutes a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services.

RESPONDENT AND ITS MEMBERS

1. Respondent Austin Board of Realtors, (“ABOR”) is a not for profit corporation organized, existing and doing business

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under and by virtue of the laws of the State of Texas. Respondent's principal place of business is at 10900 Stonelake Boulevard, Suite 100, Austin, Texas 78759. ABOR operates for the benefit of its members.

2. ABOR has more than 5,000 real estate professionals as members, and is affiliated with the National Association of Realtors ("NAR"). The majority of ABOR's members hold an active real estate license and are active in the real estate profession.

3. The large majority of residential real estate brokerage professionals in the Austin, Texas, metropolitan area are members of ABOR. These professionals compete with one another to provide residential real estate brokerage services to consumers.

4. ABOR is now and has been providing since 1952 a Multiple Listing Service ("MLS") for members doing business in the metropolitan Austin, Texas area. A 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.

5. The ABOR MLS is organized through the Austin/Central Texas Realty Information Service ("ACTRIS"), which is a Texas not for profit corporation, all of whose stock is owned by ABOR. ACTRIS rules and policies, and any amendments thereto, must be approved by the ABOR Board of Directors.

6. When a property is listed on ACTRIS, 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.

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7. ACTRIS services the territory within central Texas, specifically metropolitan Austin, including Bastrop, Blanco, Burnet, Caldwell, Fayette, Gillespie, Hays, Hutto, Lee, Llano, Milam, Travis and Williamson counties in the State of Texas (“ACTRIS Service Area”).

8. ACTRIS is the only MLS that services metropolitan Austin, Texas. ACTRIS is the dominant MLS in the ACTRIS Service Area.

JURISDICTION

9. ABOR 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.

10. The acts and practices of ABOR, including the acts and practices alleged herein, have been or are in or affecting commerce within the meaning of Section 4 of the Federal Trade Commission Act.

ABOR CONDUCT

11. In 2005, ACTRIS adopted and ABOR approved a rule that stated: “Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis” (the “Web Site Policy”).

12. The Web Site Policy prevented certain lawful residential property listings provided to ACTRIS, called “Exclusive Agency Listings,” from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

13. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property

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owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without assistance of a broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

14. Exclusive Agency Listings are often used by members of ABOR to offer lower-cost real estate services to consumers, including lawful arrangements pursuant to which a real estate broker or agent provides that a property offered for sale shall be listed on the MLS, but the listing broker or agent will not provide some or all of the services offered by other real estate brokers or will only offer such additional services on an _ la carte basis.

15. Many brokers offering real estate brokerage services pursuant to Exclusive Agency Listings, are able to provide home sellers with exposure of their listing through the MLS for a flat fee that is very small compared to the commission prices traditionally charged. Exclusive Agency Listings often reserve to the home seller the right to sell the property without owing more to the listing broker.

16. The Web Site Policy specifically prevents Exclusive Agency Listings from being published on web sites approved by ABOR and ACTRIS, including (1) ACTRIS-member web sites; (2) the ABOR-owned “Austinhomesearch.com” web site; and (3) the NAR-operated “Realtor.com” web site (collectively, “Approved Web Sites”).

17. The Web Site Policy has the effect of discouraging members of ABOR and participants in ACTRIS from accepting Exclusive Agency Listings. In the first three months that the Web Site Policy was in effect, the number of Exclusive Agency Listings on the ACTRIS MLS in Austin dropped from 18 percent to approximately 2.5 percent of all the listings on the MLS.

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ABOR MARKET POWER

18. The provision of residential real estate brokerage services to sellers and buyers of real property in the Austin, Texas and/or the ACTRIS Service Area is a relevant service market.

19. 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 ACTRIS 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 ACTRIS Service Area.

20. By virtue of industry-wide participation and control over a key input, ABOR and ACTRIS have market power in the ACTRIS Service Area.

21. Membership or participation in ACTRIS is essential to a broker providing effective residential real estate brokerage services to sellers and buyers of real property in the ACTRIS Service Area. Membership significantly increases the opportunities of 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. 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 ACTRIS Service Area.

APPROVED WEB SITES ARE KEY INPUTS

22. Access to the Approved Web Sites is a key input in the brokerage of residential real estate sales in the ACTRIS Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the

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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 Approved Web Sites.

23. The most efficient, and at least in some cases the only, means for ABOR members to have their properties listed on the Approved Web Sites is by having ACTRIS transmit those listings.

24. Property owners and their brokers in the ACTRIS Service Area generally consider publication of listings on Approved Web Sites, in conjunction with publication of listings on the ACTRIS MLS, to be the most effective means of obtaining the broadest market exposure for residential property in the ACTRIS Service Area.

EFFECTS OF WEB SITE POLICY

25. The Web Site Policy has reduced the use of Exclusive Agency Listings in the ACTRIS Service Area. Prior to the initiation of the Web Site Policy, about 1,500 of 8,500, or 18 percent, of the listings on ACTRIS were Exclusive Agency Listings. After the Web Site Policy was implemented, the number of Exclusive Agency Listings dropped to about 250 out of 10,000, or 2.5 percent.

26. The Web Site Policy may reduce consumer choices regarding both the purchase and sale of homes and cause consumers to pay for real estate brokerage services that they would not otherwise buy.

**THE WEB SITE POLICY OFFERS NO EFFICIENCY
BENEFIT**

27. There is no cognizable and plausible efficiency justification for the Web Site Policy. The Web Site Policy is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

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VIOLATION

28. In adopting the policies and engaging in the Acts and Practices described herein, ABOR 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 metropolitan Austin, Texas and/or the ACTRIS Service Area.

29. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of ABOR and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers.

30. 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-ninth day of August, 2006, issues its Complaint against Respondent Austin Board of Realtors.

By the Commission

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Austin Board of Realtors, hereinafter sometimes referred to as

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“Respondent” or “ABOR,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of the Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2004), the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Austin Board of Realtors is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business at 10900 Stonelake Boulevard, Suite 100, Austin, Texas 78759.

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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**I.**

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “ABOR” means the Austin Board of Realtors, its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, partnerships, and joint ventures; and all the directors, officers, employees, consultants, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by the ABOR, and is specifically meant to include ACTRIS and Austinhomesearch.com.
- B. “ABOR Member” means any person that holds any class of membership in ABOR as defined by ABOR’s by-laws, policies and/or rules.
- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- D. “ACTRIS” means the Austin/Central Texas Realty Information Service, a wholly-owned subsidiary of ABOR, which operates the MLS organized and directed by ABOR.

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- E. “ACTRIS Participant” means any person authorized by ACTRIS to use or enjoy the benefits of ACTRIS, including but not limited to Participants, Subscribers and Authorized Assistants as those terms are defined in the Austin Board of Realtors Austin/Central Texas Realty Information Service Rules and Regulations.
- F. “IDX” means the internet data exchange process that converts the MLS listing database to a database that can be integrated within any web site.
- G. “IDX Web Site” means a Web Site that is capable of integrating the MLS listing database within the Web Site.
- H. “Austinhomesearch.com” means the Web Site operated by ABOR that allows the general public to search information concerning real estate listings from ACTRIS.
- I. “Realtor.com” means the Web Site operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from ACTRIS.
- J. “Approved Web Site” means a Web Site to which ABOR or ACTRIS provides information concerning listings for publication including, but not limited to, ABOR Member IDX Web Sites, Austinhomesearch.com, and Realtor.com.
- K. “Exclusive Right to Sell Listing” means 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 listing broker a commission when the property is sold, regardless of whether the buyer is found by the listing broker, the owner or another broker.

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- L. “Exclusive Agency Listing” means 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 also reserves to the property owner or principal a right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced commission or no commission when the property is sold.
- M. “Services of the MLS” means the benefits and services provided by the MLS to assist ABOR Members or ACTRIS Participants in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on Austinhomesearch.com, Realtor.com and IDX Web Sites.

II.

IT IS FURTHER ORDERED that Respondent ABOR, its successors and assigns, and its directors, officers, committees, members, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Web Sites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 45, shall forthwith cease and desist

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from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of ABOR Members or ACTRIS Participants to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

1. prevent ABOR Members or ACTRIS Participants from offering or accepting Exclusive Agency Listings;
2. prevent ABOR Members or ACTRIS Participants from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
3. prevent ABOR Members or ACTRIS Participants from publishing information concerning listings offered pursuant to Exclusive Agency Listings on Approved Web Sites;
4. deny or restrict 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; and
5. treat 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.

Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding membership requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

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III.

IT IS FURTHER ORDERED that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

IV.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each ABOR Member and ACTRIS Participant of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each ABOR Member and ACTRIS Participant with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of ABOR's business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each ABOR Member and ACTRIS Participant; and (B) placing on the publicly accessible MLS Rules and Regulations page of the ABOR Web Site (www.ABOR.com) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Web Site as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Web Site for five (5) years from the date it becomes final.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed

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change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other proposed changes in the corporation which may affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on August 29, 2016.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Austin Board of Realtors (“ABOR” or “Respondent”), an association of real estate brokers in the Austin, Texas, metropolitan area. The Agreement settles charges that ABOR violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in a concerted refusal to deal except on

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specified terms with respect to a key input for the provision of real estate services. 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 order. The 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. 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 and agents 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. Membership in the MLS is limited to member brokers who generally must possess a license to engage in real estate brokerage services and meet other criteria set by MLS rules.

Prior to the late 1990s, the listings on an MLS were typically directly accessible only to real estate brokers who were members of a local MLS. The MLS listings typically were made available through books or dedicated computer terminals, and generally

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could only be accessed by the general 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 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, such as Austinhomesearch.com. 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. 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.

As a survey of home buyers and sellers conducted by the National Association of Realtors has shown, home buyers are increasingly relying upon the internet in their search for homes, and web sites of the kind affected by the Web Site Policy are the most popular internet sites for home buyers.¹ According to the NAR survey, 74 percent of home buyers nationally used the internet to assist in their home search, with 53 percent reporting frequent internet searches; 15 percent of respondents first learned

¹ PAUL C. BISHOP, THOMAS BEERS AND SHONDA D. HIGHTOWER, THE 2004 NATIONAL ASSOCIATION OF REALTORS PROFILE OF HOME BUYERS AND SELLERS ("NAR Survey") at 3-3, 3-4, 3-5, 3-6, 3-18.

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about the home they selected from the internet; 69 percent of home buyers found the internet to be a “very useful” source of information, and a total of 96 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 known 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 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, 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.

² *Id.* See *Home Buyer & Seller Survey Shows Rising Use of Internet, Reliance on Agents* (Jan. 17, 2006), available at <http://www.realtor.org/PublicAffairsWeb.nsf/Pages/HmBuyerSellerSurvey06?OpenDocument>.

³ NAR Survey at 3-18.

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The other broker involved in a typical transaction is commonly known as the Selling Broker. In a typical transaction, a prospective buyer will seek out a Selling Broker to identify properties that may be available. This Selling Broker will 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, under 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 under 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.

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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, will offer sellers access to the MLS's information-sharing function, as well as a promise that the 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 listing that does not involve a real estate broker, which is a "For Sale By Owner" or "FSBO" listing. With a FSBO listing, 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 web sites open to the public; a FSBO listing does not. Second, an Exclusive Agency Listing sets terms of compensation to be paid to a Selling Broker, while a FSBO listing often does not.

II. The Complaint

The Complaint alleges that ABOR, a Texas not-for-profit corporation operating for the benefit of its members, has violated Section 5 of the FTC Act. Specifically, the proposed Complaint alleges that ABOR has unlawfully restrained competition among real estate brokers in central Texas by adopting a policy that constitutes a concerted refusal to deal except on specified terms.

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A. ABOR Has Market Power

ABOR has more than 5,000 real estate professionals, and the large majority of residential real estate brokerage professionals in the Austin, Texas, metropolitan area are members of ABOR. These professionals compete with one another to provide residential real estate brokerage services to consumers.

The ABOR MLS is organized through the Austin/Central Texas Realty Information Service (“ACTRIS”) and ACTRIS is the only MLS that serves metropolitan Austin, Texas. Membership in ACTRIS is critical to a broker providing residential real estate brokerage services to sellers and buyers of real property in the ACTRIS service area. ABOR, through ACTRIS, controls key inputs needed for a Listing Broker to provide effective real estate brokerage services, including: (1) a means to publicize to all brokers the residential real estate listings in central Texas; and (2) a means to distribute listing information to web sites for the general public. By virtue of industry-wide participation and control over a key input, ABOR and ACTRIS have market power in the provision of residential real estate brokerage services to sellers and buyers of real property in the Austin, Texas and/or the ACTRIS Service Area.

B. ABOR Conduct

In February 2005, ABOR adopted a rule that prevented information on Exclusive Agency Listings provided to ACTRIS from being transmitted to real estate web sites available to the general public (the “Web Site Policy”). The Web Site Policy specifically prevents any information on listings other than traditional Exclusive Right to Sell Listings from being included in the IDX-formatted information that is available from ACTRIS to be used and published by publicly-accessible web sites.⁴ The

⁴ The ABOR rule states: “Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an

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effect of this rule is to prevent such information from being available to be displayed on a broad range of web sites, including the NAR-operated “Realtor.com” web site; the ABOR-owned “Austinhomesearch.com” web site; and ABOR member web sites.

Exclusive Agency Listings are often used by members of ABOR acting as Listing Brokers to offer lower-cost real estate services to consumers. ABOR’s Web Site Policy is joint action by a group of competitors to withhold distribution of listing information to publicly accessible web sites from competitors who do not contract with their brokerage service customers in a way that the group wishes. This conduct represents a new variation of a type of conduct that the Commission condemned 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.⁵

C. Competitive Effects of the Web Site Policy

The Web Site Policy has the effect of discouraging members of ABOR and participants in ACTRIS from accepting Exclusive Agency Listings. Thus, the Web Site Policy strongly impedes one way of providing unbundled brokerage services, and may

exclusive right to sell basis.” *ACTRIS Rules and Regulations* at 18 (February 2006).

⁵ *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, Docket No. C-3461, 116 F.T.C. 972 (1993); *In the Matter of American Industrial Real Estate Association*, Docket No. C-3449, 116 F.T.C. 704 (1993); *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (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, 115 F.T.C. 305 (1990); *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, Docket No. C-3163, 106 F.T.C. 95 (1985); *In the Matter of Orange County Board of Realtors, Inc.*, Docket No. C-3162, 106 F.T.C. 88 (1985).

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make it more difficult for home sellers to market their homes. The Web Site Policy has caused some home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. According to ACTRIS records, prior to the initiation of the Web Site Policy, about 1,500 of 8,500, or 18 percent, of the listings on ACTRIS were Exclusive Agency Listings. After the Web Site Policy was implemented, the number of Exclusive Agency Listings as shown on ACTRIS records dropped to about 250 out of 10,000, or 2.5 percent.

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. By preventing Exclusive Agency Listings from being transmitted by ACTRIS to public-access real estate web sites, the Web Site Policy has adverse effects on home sellers and home buyers. In particular, the Web Site Policy denies home sellers choices for marketing their homes and denies home buyers the chance to use the internet to easily 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.

There are no cognizable and plausible efficiency justifications for the Web Site Policy. An MLS in some circumstances might be concerned with the possibility that buyers and sellers of properties under an Exclusive Agency Listing could “free-ride” on the legitimate and valuable cooperative efforts that the MLS is intended to foster, by using the services of the MLS to carry out real estate transactions but bypassing the brokerage services that were one of the principal reasons why the MLS was created. However, this concern does not provide justification for the Web Site Policy as implemented by ABOR and ACTRIS. Exclusive Agency Listings are not a credible means for home buyers or

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sellers to bypass the use of the brokerage services that ACTRIS was created to promote, because a Listing Broker is always involved in an Exclusive Agency Listing, and the ABOR rules already include protections against such misuse.

The ABOR Web Site Policy does not involve situations where brokerage services are bypassed entirely. The policy only operates where home sellers purchase services from a Listing Broker using an Exclusive Agency contract, not when home sellers are pursuing a FSBO sale and purchase no brokerage services at all. 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. Under existing ACTRIS rules that apply to any form of the 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 ABOR's existing rules that do not distinguish between forms of listing contracts, and does not justify the Web Site Policy.

III. The Proposed Consent Order

The proposed order is tailored to ensure that the MLS does not misuse its market power, but also takes care to ensure that the procompetitive incentives of joint ventures such as ABOR and ACTRIS remain intact. The proposed order enjoins ABOR from treating Exclusive Agency Listings, or any other lawful listing agreements with sellers of property, in a less advantageous manner than Exclusive Right to Sell Listings.

More specifically, ABOR is enjoined from adopting or enforcing any policy to deny, restrict, or interfere with the ability of ABOR members or ACTRIS participants to enter into

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Exclusive Agency Listings or other lawful listing agreements with the sellers of properties. The proposed consent order prohibits ABOR from preventing its members or ACTRIS participants 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; or publishing Exclusive Agency Listings or other lawful listing agreements on web sites otherwise approved to use ACTRIS information. The proposed order also prohibits ABOR from denying or restricting the Services of the MLS⁶ 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.

The proposed order contains a general proviso that preserves to ABOR the ability to adopt or enforce any policy, rule, practice or agreement that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS. This includes reasonable rules regarding membership requirements, payment of dues, administrative matters, or other policies. The proviso is intended to preserve existing or future rules or regulations of

⁶ “Services of the MLS” means the benefits and services provided by the MLS to assist ABOR members or ACTRIS Participants in selling, leasing and valuing property and/or brokering real estate transactions, including but not limited to: (1) having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and (2) having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on Austinhomesearch.com, Realtor.com and IDX Web Sites.

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ACTRIS that ABOR can demonstrate are reasonably related to the legitimate and pro-competitive purposes of the MLS.

In addition, the proposed order requires ABOR, within thirty days after the Order becomes final, to conform its rules to the substantive provisions of the Order. ABOR is also required to notify ABOR members and participants in ACTRIS of the Order through email communications and its website. The proposed order requires notification of changes in the structure of ABOR, and requires ABOR to file regular written reports of ABOR's compliance with the terms of the Order.

The proposed Order applies to ABOR and entities that it owns or controls, including ACTRIS and Austinhomesearch.com. The Order by its terms does not prohibit ABOR members, or other persons or entities independent of ABOR that receive listing information from ABOR for use on their websites, from making independent decisions concerning their use or display of ACTRIS listing information that are consistent with their contractual obligations to ACTRIS.

The proposed order will expire in 10 years.

Complaint

IN THE MATTER OF

LINDE, AG AND THE BOC GROUP PLCCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket C-4163 File No. 061 0114
Complaint, July 17, 2006 – Decision, August 29, 2006

This consent order addresses the acquisition of The BOC Group plc by Linde, AG. Both respondents are engaged in, among other things, the production and sale of industrial gases, including liquid oxygen and liquid nitrogen and bulk refined helium. To remedy the anticompetitive effects resulting from the acquisition, the order requires Linde to divest all of its merchant liquid oxygen and nitrogen producing business in certain geographic markets to a Commission-approved buyer. Linde will divest air separation units and related assets it currently owns and operates in the following eight locations: Canton, Ohio; Dayton, Ohio; Madison, Wisconsin; Waukesha, Wisconsin; Carrollton, Georgia; Jefferson, Georgia; Rockhill, South Carolina; and Bozrah, Connecticut. The order also requires Linde to divest bulk refined helium assets, including helium source contracts, ancillary distribution assets, and customer contracts, to Taiyo Nippon Sanso Corporation or another Commission-approved buyer. If the divestitures are not accomplished satisfactorily within the time specified, the Commission may appoint a trustee to divest the assets. The order also requires the parties to file periodic reports with the Commission until the divestitures are accomplished.

Participants

For the *Commission*: Roberta S. Baruch, John D. Carroll, Rendell A. Davis, Jr., Sean G. Dillon, Joseph Eckhaus, and Brendan J. McNamara.

For the *Respondent*: Leon Greenfield and William Kolasky, Wilmer, Cutler, Pickering, Hale & Dorr; and Kenneth S. Prince, Shearman & Sterling.