

Complaint

IN THE MATTER OF

MIREALSOURCE, INC.

CONSENT ORDER, ETC. , IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket D-9321; File No. 061 0266

Complaint, October 10, 2006 — Decision, March 20, 2007

This consent order addresses rules and policies adopted by MiRealSource, a real estate corporation in Southeastern Michigan that operates a Multiple Listing Service, which shares and publicizes information on properties for sale. These rules and policies discriminated against certain kinds of lawful contracts between listing real estate brokers and their customers. The order prohibits MiRealSource from adopting or enforcing any rules or policies that deny or limit the ability of Multiple Listing Service members to enter into Exclusive Agency Listings or any other lawful listing agreements with sellers of properties. The order also prohibits MiRealSource from denying or restricting the services of the Multiple Listing Service to Exclusive Agency Listings or treating Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings. The order also requires that, within forty-five days after it becomes final, MiRealSource shall have conformed its rules to the substantive provisions of the order. In addition, the respondent is required to notify its members of the applicable order through its usual business communications and its website, to notify the Commission of changes in its structure, and to file periodic written reports concerning compliance.

Participants

For the *Commission*: *Peggy Bayer Femenella, Joel Christie, Sean P. Gates, Linda Holleran, and Christopher Renner.*

For the *Respondent*: *Kimberly Allen and Sheldon Klein, Butzel Long, P.C.; and Charles O. Houston III, Ferriby & Houston.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that MiRealSource, Inc. (hereinafter sometimes referred to as “Respondent” or “MiRealSource”), a corporation, has violated and is now violating the provisions of said Act, 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 matter concerns a corporation, owned by member real estate brokers in Southeastern Michigan, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. MiRealSource has adopted rules and policies that limit the acceptance, publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. These rules discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

RESPONDENT AND ITS MEMBERS

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

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brokers doing business in Southeastern Michigan, and are commonly referred to as Amembers” of the Respondent.

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

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

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

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

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JURISDICTION

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

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

THE CHALLENGED CONDUCT

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

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

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

PARAGRAPH 10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Brokerage Services to home sellers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

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

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

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broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

PARAGRAPH 13. Beginning in 2003, Respondent adopted a series of rules designed to thwart competition by firms using alternative business models for real estate brokerage services in South-eastern Michigan. During this time frame, Respondent was well aware that these alternative business models used Exclusive Agency Listings to offer a menu of services that a home seller could choose from at a significantly lower price. Respondent believed that these alternative business models were gaining ground with home sellers and home buyers during this time period and adopted rules in response to this additional competition.

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

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

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

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

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

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

PARAGRAPH 20. MiRealSource actively enforces the Exclusion Policy, Listing Broker Policy, Web Site Policy, and FSBO Policy through violation letters and fines. As of September 2006, the fine for submitting an Exclusive Agency Listing as an Exclusive Right to Sell Listing is: 1st offense - \$1,000; 2nd offense - \$2,000; 3rd offense - \$5,000; 4th offense - Office Member removed from MLS.

MIREALSOURCE HAS MARKET POWER

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

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

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

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

PARAGRAPH 25. The most efficient and, at least in some cases, the only means for MiRealSource members to have their listed properties visible to the public on the Approved Web Sites is by having MiRealSource transmit those listings.

PARAGRAPH 26. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the MiRealSource MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, MiRealSource has market power in the MiRealSource Service Area.

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**THE MIREALSOURCE POLICIES HAVE NO
EFFICIENCY BENEFIT**

PARAGRAPH 27. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

PARAGRAPH 28. In adopting the policies and engaging in the acts and practices described herein, MiRealSource has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the MiRealSource Service Area.

PARAGRAPH 29. The acts and practices of MiRealSource described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by MiRealSource will be placed in the MiRealSource MLS, and thereby eliminate certain forms of competition. The acts and practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

PARAGRAPH 30. The acts and practices of MiRealSource described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of trade that have no cognizable and plausible efficiency justifications.

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

PARAGRAPH 32. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondent that the eighth day of January, 2007, at 10:00a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

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If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Rule 3.52.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

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NOTICE OF CONTEMPLATED RELIEF

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully remedy the violation of the FTC Act, the Commission may order such other or further relief as it finds necessary or appropriate.

DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “MiRealSource” means MiRealSource, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business as of September 2006 at 5700 Crooks Road, Suite 102, Troy, Michigan 48098. The term also means the MiRealSource Board of Directors, its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, Shareholders, participants, 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 MiRealSource, and is specifically meant to include MiRealSource MLS and/or each of the MiRealSource Websites.
- B. “MiRealSource Shareholder” means a member of MiRealSource, including licensees of the shareholder, affiliates, and licensees of the affiliates.

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- 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. “MiRealSource MLS” means any MLS owned, operated or controlled, in whole or in part, directly or indirectly, by MiRealSource, and any of its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of the affiliates, partnerships, and joint ventures, and all the directors, officers, Shareholders, participants, employees, consultants, agents, and representatives of the foregoing.
- E. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “*Mirealsource.com*” means the Website operated by MiRealSource that allows the general public to search information concerning real estate listings from MiRealSource.
- H. “*Realtor.com*” means the Website 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 MiRealSource.

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- I. “Approved Website” means a Website to which MiRealSource or MiRealSource MLS provides information concerning listings for publication including, but not limited to, MiRealSource Shareholder IDX Websites, *Mirealsource.com*, and *Realtor.com*.
- J. “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 broker a commission when the property is sold, whether by the broker, the owner or another broker, or any other definition that MiRealSource ascribes to the term “Exclusive Right to Sell Listing.”
- K. “Exclusive Agency Listing” means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, or any other definition that MiRealSource ascribes to the term “Exclusive Agency Listing.”
- L. “Services of the MLS” means the benefits and services provided by the MLS to assist MiRealSource Shareholders 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

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available on *Mirealsource.com*, *Realtor.com* and IDX Websites.

II.

IT IS ORDERED that Respondent MiRealSource, its successors and assigns, and its Board of Directors, officers, committees, 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 Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of MiRealSource to deny, restrict or interfere with the ability of MiRealSource Shareholders 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 MiRealSource Shareholders from offering or accepting Exclusive Agency Listings;
2. prevent MiRealSource Shareholders from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
3. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the MiRealSource MLS and Approved Websites;
4. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing

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information concerning listings on public real estate web sites, including but not limited to *www.FSBO.com*;

5. prevent MiRealSource Shareholders from using the MiRealSource MLS unless they maintain a physical office;
6. prevent MiRealSource Shareholders from offering unbundled real estate brokerage services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services;
7. 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
8. 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 searching, sorting, ordering, 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 subscription or participation 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.

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.

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IV.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each MiRealSource Shareholder of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each MiRealSource Shareholder 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 MiRealSource'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 MiRealSource Shareholder; and (B) placing on the publicly accessible MiRealSource Website (www.MiRealSource.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 Website 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 Website 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 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.

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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 ten (10) years from the date the Order is issued.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this tenth day of October, 2006, issues its Complaint against Respondent MiRealSource, Inc.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having heretofore issued its complaint charging Respondent MiRealSource, Inc. with violations of Section 5 of the Federal Trade Commission Act, as amended, and Respondent MiRealSource, Inc. having been served a copy of that complaint, together with a notice of contemplated relief, and Respondent MiRealSource, Inc. having answered the complaint denying said charges and asserting affirmative defenses but admitting the jurisdictional allegations set forth herein; and

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The Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, an admission by the Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only, is entered into by Respondent 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules, 16 C.F.R. § 3.25(c) (2006); and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments received from interested parties pursuant to Sections 2.34 and 3.25(f) of its Rules, 16 C.F.R. §§ 2.34, 3.25(f) (2006), now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent MiRealSource, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 5700 Crooks Road, Suite 102, Troy, Michigan 48098.

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.

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ORDER**I.**

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

- A. “Respondent” or “MiRealSource” means MiRealSource, Inc., the MiRealSource Board of Directors, theits predecessors, its successors and assigns of MiRealSource, Inc., its divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, committees, employees, consultants, agents, and representatives of the foregoing, when acting in such capacity. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by MiRealSource, and is specifically meant to include MiRealSource MLS and/or each of the MiRealSource Websites.
- B. “MiRealSource Shareholder” means a member of MiRealSource, including licensees of the shareholder, affiliates, and licensees of the affiliates.
- 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. “MiRealSource MLS” means any MLS owned, operated or controlled, in whole or in part, directly or indirectly, by MiRealSource.

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- E. “IDX” means an internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “MiRealSource Websites” means any public Website operated (not merely hosted) by MiRealSource, including but not limited to, *Mirealsource.com*.
- H. “*Realtor.com*” means the Website 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 MiRealSource.
- I. “AAproved Website” means a Website to which MiRealSource or MiRealSource MLS provides information concerning listings for publication including, but not limited to, MiRealSource Shareholder IDX Websites, MiRealSource Websites, and *Realtor.com*.
- J. “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 broker a commission when the property is sold, whether by the broker, the owner or another broker.
- K. “Exclusive Agency 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, but also reserves to the seller a

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general right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

- L. “Services of the MLS” means the benefits and services provided by the MLS to assist MiRealSource Shareholders 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 MiRealSource Websites, *Realtor.com* and IDX Websites.
- M. The term “Unbundled Real Estate Brokerage Services” means a lawful arrangement pursuant to which a real estate broker or its agent provides that a property offered for sale shall be listed on an MLS, but the listing broker or its agent will not provide some or all of the additional services offered by other real estate brokers or will only offer such additional services as may be chosen from a menu of services for a fee.

II.

IT IS FURTHER ORDERED that Respondent MiRealSource, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a the MiRealSource MLS or MiRealSource Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall

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forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of MiRealSource to deny, restrict or interfere with the ability of MiRealSource Shareholders 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 MiRealSource Shareholders from offering or accepting Exclusive Agency Listings;
2. prevent MiRealSource Shareholders from cooperating with listing brokers or their agents that offer or accept Exclusive Agency Listings;
3. prevent MiRealSource Shareholders from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the MiRealSource MLS and Approved Websites;
4. prevent MiRealSource Shareholders, or the sellers of properties who have entered into lawful listing agreements with MiRealSource Shareholders, from publishing information concerning listings (or, in the case of a seller, the seller's listing) on public real estate web sites, including but not limited to *www.FSBO.com*;
5. prevent MiRealSource Shareholders from using the MiRealSource MLS unless they maintain a physical office;
6. prevent MiRealSource Shareholders from offering Unbundled Real Estate Brokerage Services, including but not limited to requiring MiRealSource Shareholders to provide a minimum set of real estate brokerage services;

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7. 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
8. 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 searching, sorting, ordering, 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 subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, including but not limited to, rules allowing a participant to make independent decisions regarding the display of listing information on that participant's web site or the display of listing information provided by that participant on the MiRealSource MLS on the web sites of others, so long as Respondent can show that the policy, rule, practice or agreement is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that Respondent shall, no later than forty five (45) 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 MiRealSource Shareholder of the amendments to its rules and regulations to conform to the provisions of this Order;

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and (2) provide each MiRealSource Shareholder 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 MiRealSource'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 MiRealSource Shareholder; and (B) placing on the publicly accessible MiRealSource Website (www.MiRealSource.com) a statement that there has been an Order and related rule changes, along with a link to the Order, for a period of no less than ninety (90) days. The Order shall remain accessible through common search terms and archives on the Website 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 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.

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VII.

IT IS FURTHER ORDERED that this Order shall terminate on March 20, 2017.

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 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

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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,

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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

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, "ANAR Study") at 3-3, 3-4, 3-6.

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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 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

² *Id.* at 3-5.

³ NAR Study at 3-19.

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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

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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

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

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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 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,

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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

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.

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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 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.

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).

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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 pro-competitive 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

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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 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 pro-competitive 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

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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

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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.

Complaint

IN THE MATTER OF

HOSPIRA, INC., AND MAYNE PHARMA LIMITED

CONSENT 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-4182; File No. 071 0002

Complaint, January 18, 2007 — Decision, March 21, 2007

This consent order address the acquisition by respondent Hospira, Inc., of respondent Mayne Pharma Limited. Both respondents are engaged in the development, manufacture, marketing, sale, and distribution of generic injectable pharmaceutical products. The acquisition would eliminate competition between Hospira and Mayne, and reduce the number of competitors in the market for the manufacture and sale of generic injectable hydromorphone hydrochloride, and would eliminate potential competition between Hospira and Mayne in the markets for the manufacture and sale of generic injectable morphine sulfate, preservative-free morphine sulfate, nalbuphine hydrochloride, and deferoxamine mesylate. The order requires the companies to assign and divest to Barr Pharmaceuticals, Inc., or another Commission-approved acquirer the Mayne rights and assets necessary to manufacture and market certain generic injectable pharmaceuticals. The order requires Hospira and Mayne to provide transitional services to enable the Commission-approved acquirers to obtain all of the necessary approvals from the FDA. The order also requires Hospira and Mayne to file reports with the Commission periodically until the divestitures and transfers are accomplished.

Participants

*For the Commission: Michele Cerullo, Andrew J. Forman,
David L. Inglefield, Christine Naglieri, and David von Nirschl.*

*For the Respondents: David A. Clanton and David J. Laing,
Baker & McKenzie LLP; and William Kolasky and Jeffrey D.
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