UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **MULTIPLE LISTING SERVICE OF HILTON HEAD ISLAND, INC.,** Defendant.	Civil Action No. 9:07-CV-3435-SB Filed: 10/16/07

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDINGS

On October ___, 2007, the United States filed a civil antitrust complaint alleging that Defendant Multiple Listing Service of Hilton Head Island, Inc. ("Hilton Head MLS") violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by enforcing certain rules that unreasonably restrain competition among real estate brokers in the Hilton Head, South Carolina area. Defendant is a

multiple listing service, which is controlled by its members who are real estate brokers competing to sell brokerage services to consumers in the Hilton Head area. As explained more fully below, brokers seeking to provide brokerage services in the Hilton Head area need to be members of the Hilton Head MLS.

In its Complaint, the United States alleges that the Defendant, by its rules, denies membership to brokers who would likely compete aggressively on price or would introduce Internet-based brokerage, and imposes unreasonable membership costs on publicly-owned brokerage companies. Defendant's rules also stabilize prices by forcing member brokers to provide a certain set of brokerage services, whether or not the consumer desires to purchase those services. The United States also alleges that the Defendant has authorized its Board of Trustees to adopt rules that would regulate commissions and impose discriminatory requirements on Internet-based brokers.

At the same time the Complaint was filed, the United States filed a Stipulation and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. The proposed Final Judgment, which is explained more fully below, requires the Defendant to rescind certain of its rules. The proposed Final Judgment also prohibits Defendant from adopting new rules that have the effect of excluding real estate brokers from membership based on such criteria as their business model, price structure, or office location. The proposed Final Judgment further prohibits Defendant from adopting new rules that would dictate the services and prices that its members must offer to their clients.

The Stipulation and proposed Order require Hilton Head MLS to take the actions required under the proposed Final Judgment. The United States and Hilton Head MLS have also

stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. Description of the Defendant and Its Activities

Hilton Head MLS is organized as a not-for-profit corporation under the laws of South Carolina with its principal place of business on Hilton Head Island, Beaufort County, South Carolina. Hilton Head MLS is a joint venture of over one hundred competing licensed brokers and other licensed real estate professionals doing business in the Hilton Head area.[1]

Most prospective home sellers and buyers engage the services of a broker to purchase and sell homes. Real estate brokers formed the Hilton Head MLS to facilitate the provision of real estate brokerage services to such buyers and sellers. The Hilton Head MLS pools and disseminates information on almost every property available for sale on Hilton Head Island. It combines its members' property listings information into an electronic database and makes this data available to all brokers who are members of the MLS. By listing information on a home in the MLS, a broker can market it to a large number of potential buyers. A broker representing a buyer likewise can search the MLS to provide a home buyer with information about nearly all the listed properties in the area that match the buyer's housing needs.

[1] The Hilton Head MLS requires that brokerage firms, rather than individual brokers, be members of the MLS. For the purposes of this document, any reference to brokers includes also the brokerage firms with which the broker is associated.

Members of the Hilton Head MLS utilize the database as a clearinghouse to, among other things: communicate the listings information of the properties that they have for sale to other members; offer to compensate other members as cooperating brokers if they locate purchasers for those listings; locate properties for prospective purchasers; distribute listings to other members for advertisement purposes; and compile and distribute market statistics. The Hilton Head MLS also maintains records of sold homes. These "sold data" records are very important for brokers working with sellers to set an optimum sales price. Brokers representing a buyer likewise use the sold data to help buyers determine what price to offer for a home.

Access to the database provided by the Hilton Head MLS is critical for brokers who wish to serve buyers or sellers successfully on Hilton Head Island. By virtue of market-wide participation and control over a critically important input, the Hilton Head MLS has market power.

B. Industry Background

The prices consumers paid to brokers for the brokerage services associated with a typical home sales transaction have increased substantially since 2003 on Hilton Head Island and in many other parts of the country. This is because brokers who adhere to traditional methods of doing business typically charge a fee calculated as a percentage of the sales price of the home, and that percentage has tended to be relatively inflexible as housing prices on Hilton Head Island and in many other parts of the country have increased dramatically. As a result of these higher prices, brokers offering competitively significant alternatives to traditional methods have emerged in other areas of the country.

Some brokers in other parts of the United States use technology to automate certain tasks and to communicate more efficiently with consumers. For example, technology enables brokers to contact, communicate with, and service consumers remotely or in-person without the need for a retail office location that consumers can visit. Such technology-savvy brokers can reduce brokerage costs by operating fewer or no physical offices, and may pass cost savings on to consumers through reduced brokerage fees.

Other brokers around the country now contract with buyers and sellers to provide a subset of services for a flat fee rather than for a percentage of the home sale price. Fee-for-service brokers provide certain enumerated services such as marketing the house or attending closings, while the buyer or seller takes responsibility for other services associated with brokerages such as making offers and counteroffers or conducting open houses on their own. Through fee-for-service packages, buyers and sellers can save money by purchasing only the services that they wish their broker to provide. Brokers in other areas of the country have attracted customers by offering full-service, reduced commission brokerage. Additionally, still other brokers in other areas of the country have sought a competitive advantage by creating nationwide firms. These firms raise capital through public ownership, invest in nationwide brands, and provide brokerage services to consumers in multiple markets.

C. **Description of the Alleged Violation**

Defendant Hilton Head MLS, through the collective voting of its broker membership, has adopted and enforced rules and practices that exclude new entry and restrict member output. These rules are not reasonably necessary to carry out the procompetitive purposes of the multiple listing service. As such, these rules are agreements amongst competitors that restrain competition. Accordingly, in its Complaint, the United States alleges that Defendant's rules constitute a contract, combination, or conspiracy by competitors with market power that unreasonably restrains competition on Hilton Head Island in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Specifically, the Complaint alleges that Defendant has rules and practices that require broker-members to: (1) maintain a physical office within the Hilton Head MLS service area; (2) reside within the area served by the Hilton Head MLS; (3) operate their offices during hours deemed reasonable by the Hilton Head MLS; and (4) hold a South Carolina real estate license as their primary license. (Bylaw Article II, Section II; Bylaw Article VII; & Rule II.) These rules allow Defendant to deny membership to brokers who operate business models that would increase competition. These rules enable Defendant to exclude technology-savvy brokers who serve their clients without a physical office and who can pass along the cost savings to consumers through reduced commission rates. These rules also deprive consumers of the benefits of competition from brokers who work part-time or who are licensed under reciprocity provisions of South Carolina Law.

Defendant's rules have also enabled it to identify applicants for MLS membership who could be aggressive competitors and deny their application for membership. Broker-applicants

are required to disclose their business history and prior employment, undergo a credit check, and obtain letters of recommendation from three current broker-members, *i.e.*, those with whom the applicant would compete. (Bylaw Article VII, Section IV; Bylaw Article VII, Section IV(a); Rule II.A.2.) These rules have allowed unreasonable denials of membership and thus deprived consumers of the benefits of competition.

Defendant has authorized its Board of Trustees to adopt mandatory guidelines that would regulate the commission that listing brokers offer to selling brokers in exchange for their cooperation on the home sale. (Bylaw Article XI, Section I.) The mere prospect that the Board might adopt such controls likely inhibits price competition. Their actual adoption would directly fix and stabilize prices. Defendant also has a rule that requires its members to provide certain services to all brokerage customers, whether or not desired by the customer. (Bylaw Article X; MLS Listing Agreement.) Embodied in the terms of Defendant's mandatory form listing agreement, this rule prevents current and prospective members from operating a fee-for-service business model. This rule decreases competition and harms consumers because it insulates Defendant's members from the competitive pressures posed by brokers who would offer additional pricing and service choices to their customers.

Defendant has also authorized its Board of Trustees to impose discriminatory requirements on Internet-based real estate brokers. (Bylaw Article II, Section II.) Such requirements, if implemented, would competitively disadvantage Internet-based brokers and discourage them from joining the MLS and competing on Hilton Head Island, thereby limiting consumer choice. The mere prospect that the Board might adopt such controls likely deters

Hilton Head brokers from developing an Internet-based model and thereby inhibits such service competition.

In addition, Defendant has a "change in ownership" rule that requires publicly-held brokerages to make a significant payment to the Defendant every time a share of their stock changes hands. (Bylaw Article VII, Section X; Rules II.A.3; II.B & II.E.). This rule competitively disadvantages publicly-owned companies and discourages them from joining the MLS and competing on Hilton Head Island, thereby limiting consumer choice.

D. Harm from the Alleged Violation

Taken together, Defendant's rules discourage competition on price and service, and inhibit competitive actions that would alter the status quo. Furthermore, there are no plausible justifications that these rules are reasonably necessary to carry out the procompetitive purposes of the multiple listing service. As a result of Defendant's anticompetitive rules, consumers of brokerage services on Hilton Head Island have fewer choices of service options and pay higher prices for real estate brokerage services than do consumers in other parts of the country.

Data analyzed from a MLS in another area of the country support these allegations. Data have shown an inverse correlation between the share of homes listed by fee-for-service brokers in the area and the level of cooperating commission offered to buyer's brokers for homes in that area. Thus, controlling for other influences, where fee-for-service brokers account for a greater portion of listings in an area, traditional brokers in that area offer lower cooperating commissions, on average, to brokers representing buyers.

III. EXPLANATION OF THE PROPOSED AMENDED FINAL JUDGMENT

The proposed Final Judgment will restore the competition that the agreement among the Hilton Head MLS members has eliminated and will prevent Hilton Head MLS from engaging in similar conduct in the future. The proposed Final Judgment will first require Hilton Head MLS to rescind all of the current MLS rules discussed above. Second, the proposed Final Judgment will enjoin Hilton Head MLS from adopting or enforcing any rules that will have a similar purpose or effect. More specifically, the proposed Final Judgment will prevent the Defendant from adopting rules or engaging in practices that (i) exclude active, licensed real estate professionals from their respective membership class in the MLS; (ii) fail to furnish under like terms to any member any services it furnishes to other members in its membership class; (iii) discriminate against any member based on its office location, corporate structure, level or type of compensation, scope of service, or method of service; (iv) require members to perform brokerage services in excess of those required by state law; (v) prescribe the terms of agreements between a member and its clients or any other person who is a prospective home buyer or seller; (vi) refuse to accept and place in the Multiple Listing Service any member's MLS listing; (vii) set standards or guidelines concerning compensation, (viii) charge members a fee for any change in ownership, (ix) require a member to maintain an office or reside in the MLS Service Area or any other particular location, or (x) alter any of its three classes of membership without the prior approval of the Department of Justice. The proposed Final Judgment will also require Hilton Head MLS to provide each of its members, trustees, employees, and agents with a copy of the proposed Final Judgment; inform all persons who inquired about membership in the last two years but who are not members of the MLS of the changes in the MLS rules caused by the proposed Final

Judgment; and place on the home page of its publicly accessible website a notice of the proposed Final Judgment with a link to the proposed Final Judgment and the amended rules.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the Defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will

be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

John Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 Seventh Street, N.W., Suite 300
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED AMENDED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendant. Given the inherent delays of a full trial and the appeals process, the United States is satisfied that the relief contained in the proposed Final Judgment will quickly establish, preserve, and ensure competition for real estate brokerage services in the Hilton Head MLS Service Area.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED AMENDED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with amendments to the APPA in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B); *see generally United States v. SBC Commc'ns, Inc.*, Nos. 05-2102 and 05-2103, 2007 WL 1020746, at *9-16 (D.D.C. Mar. 29, 2007) (assessing public interest standard under APPA and effect of 2004 amendments).[2] As courts have held – both before and after the 2004 amendments – the United States is entitled to deference in crafting its

[2] *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006) (substituting "shall" for "may" in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). The 2004 amendments do not affect the substantial precedent in this and other circuits analyzing the scope and standard of review for APPA proceedings. *See SBC Commc'ns*, 2007 WL 1020746, at *9 ("[A] close reading of the law demonstrates that the 2004 amendments effected minimal changes . . . .").

antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy, which are the "two most significant legal questions" relating to a public interest determination. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995); *SBC Commc'ns*, 2007 WL 1020746, at *12-*16.[3]

With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[4] In making its public interest

---

[3] The *Microsoft* court explained that a court making a public interest determination under the APPA should consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *Microsoft*, 56 F.3d at 1458-62.

[4] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

determination, a district court must accord due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *SBC Commc'ns*, 2007 WL 1020746, at *16 (United States entitled to "deference" as to "predictions about the efficacy of its remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 2007 WL 1020746, at *16.

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not

pursue. *Id.* at 1459-60. As the United States District Court for the District of Columbia recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 2007 WL 1020746, at *14.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 2007 WL 1020746, at *9.[5]

[5] *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("[T]he Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Amended Final Judgment.

Dated: October____, 2007

Respectfully submitted,

LISA A. SCANLON
OWEN M. KENDLER
CHRISTOPHER M. RIES

Attorneys for the United States of America
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Suite 300
Washington, DC 20530
Telephone: (202) 616-5954
Facsimile: (202) 514-7308

CERTIFICATE OF SERVICE

I hereby certify that on _____, I caused a copy of the foregoing Competitive Impact Statement to be served on counsel for Defendant in this matter in the manner set forth below:

Jane W. Trinkley
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 2911
(via e-mail and first-class mail)

Counsel for Defendant

Respectfully submitted,

REGINALD I. LLOYD
UNITED STATES ATTORNEY

By: _____

Barbara M. Bowens (I.D. 4004)
Assistant United States Attorney
1441 Main Street, Suit 500
Columbia, South Carolina 29201

_____

CHRISTOPHER M. RIES

Attorney for the United States of America
U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Suite 300
Washington, DC 20530
Telephone: (202) 616-5954
Facsimile: (202) 514-7308