

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA,       )  
                                  )  
                  Plaintiff,       )  
                                  )  
                  v.                )  
                                  )  
FIRST MULTIPLE LISTING        )  
SERVICE, INC.,                )  
                                  )  
                  Defendant.     )

Civil Action No. C80-1861A

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. §§ 16 (b)-(h)), the United States of America submits this Competitive Impact Statement relating to the proposed consent judgment in this civil antitrust proceeding.

I.

Nature of the Proceeding

On October 28, 1980, the Department of Justice filed a civil antitrust complaint under Section 4 of the Sherman Act (15 U.S.C. § 4) alleging that First Multiple Listing Service, Inc. had violated Section 1 of the Sherman Act (15 U.S.C. § 1). First Multiple Listing Service, Inc. ("FMLS" or "Defendant") is in the business of operating a real estate multiple listing service for the benefit of its members.

who are licensed real estate brokers doing business in the Atlanta, Georgia area, which is made up of 19 contiguous counties ("Atlanta area").

The complaint filed in this action alleges that FMLS and certain other persons combined and conspired, since at least as early as January 1, 1973, to restrict membership in Defendant and to adopt and enforce rules and regulations otherwise restricting competition between and among licensed real estate brokers and other persons engaged in the business of selling real estate in the Atlanta area, in violation of Section 1 of the Sherman Act. The complaint asked the Court to restrain Defendant from establishing, maintaining, or enforcing by-laws, rules and regulations which: (a) unreasonably restrict membership in Defendant; (b) arbitrarily exclude from membership in Defendant any real estate broker licensed by the State of Georgia; or (c) contribute to the violation alleged in the complaint.

Entry of the proposed consent judgment will terminate the action, including dismissal of Defendant's two counterclaims against the United States, except that the Court will retain jurisdiction over the matter for possible further proceedings which may be required to interpret, modify or enforce the judgment, or to punish alleged violations of any of the provisions of the judgment.

## II.

### Detailed Description of the Practices Involved in the Alleged Violation

Defendant is a Georgia corporation engaged in facilitating the sale of residential real estate in the Atlanta area by compiling the real estate listings of its members into a listing book and periodically disseminating copies of such listing books, as well as copies of new listings, to its members. In this manner, each FMLS-affiliated real estate broker and agent is conveniently apprised of a large number of properties for sale in the Atlanta area by member firms. FMLS offers its members other advantages, such as the use of a "lock box" system which provides convenient access to homes offered for sale through FMLS and a computerized data bank and computer terminals which provide its members with easy access to all available information on all FMLS listings. In addition to benefiting its members, FMLS' multiple listing service benefits the public by ensuring that prospective purchasers have convenient access to the maximum number of properties in the Atlanta area. Homesellers obtain the assurance that a large number of brokers and agents have been made aware of the fact that their property is being offered for sale.

Historically, FMLS has focused its attention on "North Atlanta," an area generally to the north of the city, while Metropolitan Multi-List, Inc. ("MML"), a multiple listing



service owned by the DeKalb County Board of Realtors, has operated primarily in a section of Atlanta generally to the east and south of FMLS' area of dominance. Many brokers who wish to compete in North Atlanta have found membership in MML to be of limited utility, and membership in FMLS to be a competitive necessity.

In its complaint, the United States alleged that access to FMLS' services is essential for a broker to compete in the North Atlanta market. The United States also alleged that by adopting restrictive prerequisites for FMLS membership, FMLS and its members restricted competition in the business of selling residential real estate in the Atlanta area, thereby depriving buyers and sellers of the benefits of free and open competition. Specifically, the United States challenged FMLS' requirements that an applicant for membership has to:

- (a) have operated as a broker in the State of Georgia for two years immediately prior to the date of application for membership;
- (b) have submitted proof that the applicant had sold and closed sale on 240 residences in the two years immediately prior to application for membership, within the defined boundaries of FMLS;
- (c) have received the affirmative vote of at least 75 percent of the active shareholders

(85 percent if the applicant was applying for membership as a stockholder);

- (d) have been recommended by two members of FMLS and have received the approval of FMLS' board of directors, if applying for membership as a stockholder; and
- (e) have ceased being a member of, or using the services of, any other multiple listing service, wherever located.

The United States also challenged moratoria by FMLS on the admission of new members, FMLS' rules governing access to its listing books and keys, and FMLS' membership and user fees as they impacted on the ability of both members and non-members to compete on equal terms.

Had further proceedings been necessary, the United States would have submitted evidence to prove its contentions. However, after both parties had engaged in extensive discovery, FMLS demonstrated a willingness to reach a settlement without resorting to what would have been additional costly proceedings. FMLS has agreed to eliminate the practices which the United States alleged to be anticompetitive and violative of Section 1 of the Sherman Act. The proposed consent decree will serve to ensure that FMLS does not reintroduce such objectionable practices and provides the United States with substantially all of the relief which would have been sought if the case had proceeded to a litigated judgment.

### III.

#### Explanation of the Proposed Consent Judgment and Its Anticipated Effects on Competition

The United States and Defendant have stipulated that the proposed consent judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The stipulation between the parties provides that there has been no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e), entry of the proposed consent judgment is conditioned upon a determination by the Court that the proposed consent judgment is in the public interest.

An explanation of each of the material provisions of the proposed consent judgment is set forth below, together with a statement of its anticipated effects on competition.

#### A. Reasonable and Non-Discriminatory Requirements for Membership in FMLS

The proposed consent judgment prohibits FMLS from refusing membership in FMLS, 1/ i.e., from refusing to make available any and all of its services, to any person who meets the following reasonable and non-discriminatory requirements:

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1/ The judgment defines the term "member", as "... any person who is entitled to access to the services offered by Defendant's multiple listing service, whether or not said person is a stockholder in Defendant...." The term "member" will be used in the same fashion in this Competitive Impact Statement.



- (1) holds a real estate broker's license issued by the appropriate State of Georgia governmental licensing authority and is deemed by said authority to be acting as a principal broker, and whose license is deemed to be in active status by said authority;
- (2) is not the subject of any pending proceedings before the appropriate State of Georgia governmental licensing or disciplinary authority which may result in the suspension or revocation of the applicant's broker's license;
- (3) agrees to abide by Defendant's charter, by-laws, rules and regulations insofar as they are not inconsistent with the terms of the Final Judgment; and
- (4) agrees to pay to Defendant:
  - (a) a charge equal to the reasonable set-up costs of preparing to make Defendant's services available to the person;
  - (b) a reasonable security deposit, to secure against any unpaid claims or charges that may be asserted by Defendant against the person; and

(c) reasonable and non-discriminatory fees for use of Defendant's services, which shall be equal on a per use basis for all members, whether or not stockholders of Defendant, and which shall not differentiate between persons who became members before or after the date of the Final Judgment. Such fees shall reflect the reasonable expenses of Defendant's operations, and may provide for a reasonable minimum annual fee for access to Defendant's services reflecting a reasonable approximation of the cost of Defendant's standing ready to provide services.

Thus, under the provisions of the proposed judgment, all members of Defendant's multiple listing service, whether stockholders or not, have to pay reasonable and non-discriminatory fees for the use of Defendant's services, reflecting the reasonable expenses of Defendant's operations and equal on a per use basis. Under a related provision of the proposed judgment, in the event that Defendant collects set-up



charges or service fees in excess of its actual requirements, including the payment of a return to stockholders and the accumulation and maintenance of reasonable reserves, such excess monies shall be returned to the members or credited to their accounts in proportion to their respective contributions to the amount of the surplus.

The reasonable expenses of Defendant's operations, for purposes of the proposed decree, shall include, in addition to Defendant's other expenditures in providing its services to members:

- (i) the accumulation and maintenance of reasonable reserves to be used exclusively for developing, maintaining, or improving the services and facilities used or to be used by Defendant to serve its members, and
- (ii) an annual return to stockholders, which may be distributed to stockholders as dividends or retained by Defendant for the benefit of stockholders, calculated on the basis of the book value of Defendant's outstanding stock as of the close of the nearest preceding accounting period.

The proposed judgment makes it clear that the aggregate annual rate of return to all stockholders as a group, referred to above, shall not exceed the sum of the following items:

- (i) 130 percent of the average (for the calendar year next preceding the date of such determination) of the auction average interest rates for three-month U.S. Treasury bills calculated on the sum of (aa) \$25,000, plus (bb) an amount arrived at by multiplying the book value of Defendant's aggregate outstanding stock by a simple fraction of which the numerator shall be the value of Defendant's net (depreciated) property and equipment and the denominator shall be the value of Defendant's total assets, all as determined as of the close of Defendant's most recent accounting period next preceding the date of such determination; plus
- (ii) 100 percent of the average (for the calendar year next preceding the date of such determination) of the auction average interest rates for three-month United States Treasury bills calculated on the balance of book value remaining after deducting from total book value \$25,000 plus the portion thereof derived in accordance with the formula specified in subpart (bb) above.

The following is intended to illustrate the application of the above rules governing the interaction of the judgment's provisions relating to reasonable expenses and returns of excess fees. Let us assume that: (1) the total amount of set-up charges or service fees of Defendant was \$750,000 for a particular fiscal year; (2) its expenses were \$600,000 (including the accumulation of reasonable reserves but excluding a return to shareholders); (3) the aggregate book value of its outstanding stock was \$500,000; (4) the value of its total assets was \$1,000,000, including \$18,000 worth of net (depreciated) property and equipment; and (5) the average of the auction average interest rates for three-month U.S. Treasury Bills was 10%. The total amount available for the payment of dividends to stockholders would be \$51,020, derived as follows:

$$130\% \times 10\% \times (\$25,000 + [\frac{\$500,000 \times \$18,000}{\$1,000,000}]) +$$

$$100\% \times 10\% \times (\$500,000 - [\$25,000 + (\frac{\$500,000 \times \$18,000}{\$1,000,000})]) \cdot \frac{2}{1}$$

The excess set-up charges or service fees are required under the judgment to be returned to members (stockholders or otherwise) or credited to their accounts. The excess monies to be returned or credited would then be \$98,980 (\$750,000 - (\$600,000 + \$51,020)).

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2/ This example, as well as the other example used herein, is intended as a guide to the reader as to how the calculations are to be made, not to illustrate dollar amounts which necessarily have any relationship to actual amounts of money likely to be involved.



Another provision of the judgment makes it clear that should FMLS determine to redeem one or more shares of its outstanding stock from its shareholders, the redemption of such shares shall not be considered an expense for which Defendant can levy fees. However, nothing in the proposed judgment would prohibit Defendant from using monies obtained as the purchase price of new shares of stock or from the allowable return to stockholders on invested capital, based on U.S. Treasury Bill rates, for the purchase or redemption of its own stock.

Although nonstockholder members would have the right to use all of Defendant's services on the same basis as stockholders, the proposed consent judgment also requires Defendant to sell a share of stock in Defendant to any person who elects to purchase a share of stock, provided he or she meets the requirements specified above and agrees to pay Defendant the specified price. Defendant would be prohibited from discriminating among stockholders with regard to the rights, benefits, or privileges of stock ownership. The purchase price for a share of stock would be the lesser of either (a) \$25,000, or (b) a sum equal to (i) the book value of one share of Defendant's stock, plus (ii) an amount arrived at by multiplying the book value of one share of Defendant's stock by a simple fraction of which the numerator shall be the value, not to exceed \$20,000, of Defendant's net (depreciated) property and equipment and the denominator shall be the value of Defendant's total assets, all as determined as of the close

of Defendant's most recent accounting period next preceding the date of such purchase. 3/ To illustrate the application of this formula in arriving at a stock purchase price, let us assume FMLS were to have a total book value of \$500,000, and that its assets totaled \$1,000,000, including \$18,000 worth of net (depreciated) property and equipment. Assume further that there were 50 shareholders. The maximum allowable charge to an additional, new member for a share of FMLS stock would be \$10,180 derived as follows:

$$\begin{aligned} \$10,000 + (\$10,000 \times \frac{\$18,000}{\$1,000,000}). \end{aligned}$$

Finally, the proposed judgment requires that if a question is raised as to whether an applicant meets the judgment's criteria for obtaining access to Defendant's services or for purchasing a share of stock in Defendant, the applicant must be informed in writing of the nature of the question and given the

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3/ At the option of the purchaser, the stock may be paid for in five annual installments on terms specified in the proposed judgment. The installment provision is designed to ensure that the cost of a share of stock can be spread over time so as not to present an unreasonable barrier to stock purchase.



opportunity to present information pertinent to the resolution of the question raised. 4/

The United States believes that, taken together, the above provisions of the proposed consent judgment will assure access to Defendant's services on a reasonable and non-discriminatory basis, thereby permitting all interested brokers to compete on an equal footing. The judgment reflects the conclusion that competition is best promoted by providing for membership in Defendant by interested brokers on both a non-stockholder and stockholder basis. All users, whether stockholders or not, are to be charged the same reasonable and non discriminatory fees for the use of Defendant's services, charges which shall be equal on a per use basis to all members. However, the judgment also recognizes that stockholder members of FMLS are entitled to a fair return on their capital which is invested in FMLS. Consequently, the judgment provides that an annual return to stockholders on invested capital, based upon U.S. Treasury Bill

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4/ The Court will retain general jurisdiction over the decree, including the power to modify those provisions relating to the purchase of stock and return to stockholders in light of unforeseen circumstances. For example, the decree provides that the maximum purchase price for a share of stock is \$25,000. This ceiling on the purchase price is intended to assure that the present stockholders of MLS do not conduct the operations of MLS in such a manner as to increase book value to a level that may make it financially burdensome for a new member to become a stockholder. The figure of \$25,000 was selected as a reasonable ceiling to accomplish this objective. If future price inflation should cause the present \$25,000 ceiling price to become unrealistically low, the court would have the power to adjust the ceiling price accordingly.



rates, is to be considered as part of the expenses of operating FMLS which are to be paid by all members, whether or not stockholders. Before any annual surplus of monies collected on expenses are returned to all members, as is required by the judgment, the judgment permits a U.S. Treasury Bill rate-based dividend to be paid to stockholders by Defendant, or to be retained by Defendant for their benefit. Thus, stockholders in Defendant are placed in the same position as, for example, consumers of electricity who are also stockholders in the public utility providing power. While as stockholders in the utility providing power they would receive a return on capital invested, their charge for using electricity would be the same as that for other, non-stockholder consumers of electric power.

The provisions of the judgment which require FMLS to sell stock to interested brokers at a price tied to the lesser of book value of a share (plus a small increment) or \$25,000, ensure that those willing to make a modest investment will be entitled to the same rights as other shareholders to a return on capital and to other rights incident to holding stock, such as the right to vote. By providing for stockholdership for a modest maximum investment, and by providing that this charge may be paid on an installment basis, the United States believes it has minimized the risk of existing stockholders seeking to manipulate the value of Defendant's asset base upward in an unreasonable fashion, either to discourage additional

applications for stockholder membership or to discourage non-stockholder membership by increasing the interest-based component of fees. This is true because those dissatisfied for any reason with non-stockholder membership have the right to purchase a share of stock on demand, provided they otherwise qualify for membership.

B. Other Prohibited Practices

(1) Prohibition on Moratoria on New Memberships. The proposed consent judgment prohibits FMLS from restricting or limiting the admission of new members through enactment of moratoria on new memberships, thereby making it clear that the provisions of the judgment discussed above are not to be frustrated by such a device.

(2) Elimination of Prohibition on Membership in Other Multiple Listing Services. The proposed consent judgment will prevent FMLS from prohibiting its members from belonging to, or otherwise using the services of, other multiple listing services. Defendant may prohibit its officers or directors from simultaneously serving as officers or directors of another listing service. It may also require its members to devote a reasonable number of uncompensated hours to the administration of Defendant's service, provided that obligation does not discriminate against any member of Defendant who is not a stockholder or against any member who uses, or participates as a member in the services of, another multiple listing service.

The proposed judgment thereby recognizes FMLS' legitimate interests in avoiding potential conflicts of interest on the part of its officers and directors and in assuring active participation by all members in its own administration.

The elimination of this restraint will free the Atlanta area from an arbitrary impediment to the development of alternative listing services. FMLS' members will be free to subscribe or belong to other multiple listing services without fear of losing the benefits of FMLS membership.

#### IV.

##### Scope of the Proposed Judgment and Provisions for Compliance Therewith

By its terms the judgment applies to Defendant and to each of its officers, directors, members, employees, retained agents, subsidiaries, successors and assigns, and to all other persons who act in concert with Defendant, provided that such persons have actual notice of the judgment by personal service or otherwise.

Defendant is required to provide notice of the Final Judgment to the real estate boards in each of the 19 counties listed in the Complaint. The proposed consent judgment also requires that Defendant provide a copy of the Final Judgment to each of its officers, directors, member firms, employees and retained agents, and to furnish to the Court and to Plaintiff an affidavit that it has done so. Defendant is similarly



required to provide a copy of the Final Judgment to each successor to any officer, director, employee and retained agent of FMLS, and to each new member firm.

The proposed consent judgment also provides that Defendant shall require, as a condition of the sale or disposition of all or substantially all of the total assets or stock of FMLS to a person seeking to perform the same services as Defendant, that the acquiring party agree to be bound by the provisions of the Final Judgment, and that each such acquiring party is to file with the Court, and serve upon Plaintiff, its consent to be so bound.

Finally, the proposed consent judgment requires that for five years Defendant is to conduct an annual examination of its operations to determine compliance with the provisions of the judgment. The findings of the examination shall be filed with the Court and Plaintiff, and submitted to the officers and directors of Defendant. Within six months after the entry of the Final Judgment, Defendant is to submit to Plaintiff for its approval a description of how the examination is to be conducted.

#### V.

##### Appropriateness of the Proposed Judgment

The relief encompassed in the proposed consent judgment is designed to prevent any recurrence of the activities alleged in

the complaint. The prohibitions contained in the judgment should ensure that in the future Defendant will not adopt unreasonably restrictive or anticompetitive membership or operating practices.

The judgment provides two methods for determining Defendant's compliance with the terms of the judgment. First, the United States is given access, upon reasonable notice, to the records of Defendant to examine these records for possible violations of the judgment, and to interview officers, directors, members, employees or agents of Defendant. Second, Defendant may be required to submit written reports with respect to any matter contained in the proposed consent judgment.

In the Department's view, disposition of the lawsuit without further litigation is appropriate in that the proposed consent judgment provides all of the relief which the Government sought by filing its complaint.

## VI.

### 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 to recover three times the damages such person has suffered, as well as costs and reasonable attorney fees. The proposed final judgment would in no way affect the rights of any present or potential private plaintiff to sue for monetary damages.

Section 5(a) of the Clayton Act, as amended, (15 U.S.C. § 16(a)) allows a judgment to be invoked as prima facie evidence in private litigation only where the judgment operates as an estoppel between the parties. Since this proposed final judgment does not operate as an estoppel in any way as between the parties in this case, it would not have such prima facie effect.

## VII.

### Procedures Available for Modification of the Proposed Judgment

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed consent judgment should be modified may submit written comments to Donald A. Kinkaid, Chief, Atlanta Field Office, Antitrust Division, United States Department of Justice, 1776 Peachtree Street, N.W., Suite 420, Atlanta, Georgia 30309 -- telephone (404) 881-3828, within the 60-day period provided by the Act. These comments, and the Department's responses to them, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed judgment at any time prior to its entry if it should determine that some modification of it is necessary. The proposed consent judgment provides that the Court will retain jurisdiction over this action, and the parties may apply to the Court for such orders as may be necessary or appropriate for its modification, interpretation or enforcement.



## VIII.

### Alternatives to the Proposed Consent Judgment

The Department considers the injunctive provisions of the proposed consent judgment to be of sufficient scope and effectiveness to make continued litigation unnecessary, as the judgment provides all of the relief which reasonably could have been expected after trial. The Department therefore did not consider a trial to be a reasonable alternative.

The proposed judgment results from extensive negotiations between the United States and Defendant. From the Department of Justice's standpoint, at issue were two basic considerations. The first was how to ensure that the tangible competitive advantage of access to FMLS' services was made available to appropriate persons. The second was how to ensure that access to FMLS' services would be made available to those persons at a reasonable cost. To that end, a number of alternative proposals were considered and either abandoned or rejected, as outlined below.

At one time, the Department had under consideration a proposed method of settlement which would have left FMLS' membership requirements in place, but which would have required FMLS to make its listing and comparable sales books, week-old listing books, lock box keys and computer data, available to MML on a reciprocal basis. However, MML was unwilling to become a party to any such proposal and the United States resumed settlement discussions with Defendant alone.

Other alternative means of placing a non-member of FMLS on substantially the same footing as a member were explored. Initially, discussions centered around devising a method to provide a non-member access to FMLS' computer terminals, lock box keys and listing and comparable sales books, while at the same time permitting FMLS' members to belong to or use the services of another listing service. However, an adequate solution to the problem along these lines proved unobtainable. Thereafter, the parties gradually worked toward the proposal now before the Court.

Discussions between the parties also included the possibility of providing for a class of non-stockholder membership in FMLS, with new entrants alone subsidizing a reserve fund designed to redeem the shares of existing stockholders at an amount in excess of book value. This approach to the problem was at one point modified to include consideration of a stock redemption reserve funded by both stockholders and non-stockholders. The concept of having non-shareholders, whether alone or in conjunction with shareholders, buy out shareholders was rejected as placing an unfair burden on nonstockholders, who would receive no equity interest in return.

The Department also had under consideration at various other times proposals to: (a) tie the number of votes to which a stockholder was entitled to the stockholder's volume of business using the Defendant's services; (b) reduce the term of



the judgment to less than ten years; (c) create a class of non-stockholder membership which would pay the same fees to use the service as stockholders, without providing for the option to purchase stock; and (d) include in the judgment a provision which would prevent or limit costs for antitrust suits filed against FMLS being assessed against new members.

It was concluded that in order to prevent discrimination against any class of FMLS members, the opportunity to obtain voting rights by purchasing stock was essential. Consequently, relief that did not provide a means of obtaining voting privileges was not considered appropriate. Proportional voting, according to the member's usage of the service, appeared facially attractive. However, it was felt that the concept required further discussion and analysis outside the confines of ongoing litigation. Relief lasting less than 10 years was not considered of sufficient duration to cure long-existing problems. Preventing or limiting the assessment of the costs of defending antitrust suits against new members was seriously considered. However, it was felt that, on balance, prompt implementation of the relief obtained outweighed the value of pursuing a difficult and minor issue under the facts of this case.

The present concept of affording a qualified person access to Defendant's services on either a stockholder or non-stockholder basis and allowing stockholder members a return on invested capital arose from the full and considered



exploration of numerous proposals. After due consideration, it was concluded that Defendant's existing members were entitled to be placed in a position analogous to that of persons who were both stockholders in a public utility and users of that utility's services. They are entitled to a return on invested capital, but will have to pay the same fees as non-stockholders for the Defendant's services.

IX.

Other Materials

There are no materials or documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 16(b)) that were considered determinative in formulating the proposed judgment.

Dated:

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JOHN R. FITZPATRICK

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