

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

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 9:07-CV-3435-SB
)	
v.)	
)	
MULTIPLE LISTING SERVICE OF)	
HILTON HEAD ISLAND, INC.,)	
)	
Defendant.)	
_____)	

**RESPONSE OF THE UNITED STATES TO PUBLIC
COMMENT ON THE PROPOSED FINAL JUDGMENT**

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), the United States hereby responds to the one public comment received during the public comment period regarding the proposed Final Judgment in this case. After careful consideration of the comment, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On October 18, 2007, the United States filed the Complaint in this matter alleging that the defendant, the Multiple Listing Service of Hilton Head, Inc. (“HHMLS”), enforced certain rules

that restrained competition among real estate brokers in Hilton Head, South Carolina. The United States filed a proposed Final Judgment and a Stipulation signed by the United States and the defendant consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA. Pursuant to those requirements, a Competitive Impact Statement (“CIS”) was filed in this Court on October 16, 2007; the Proposed Final Judgment and CIS were published in the Federal Register on November 27, 2007; and a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published for seven days on November 28, 2007 through December 4, 2007. HHMLS filed the statement required by 15 U.S.C. § 16(g) on February 22, 2008.

One comment, described below, was received during the 60-day period for public comments, which ended on February 2, 2008.

II. SUMMARY OF THE COMPLAINT’S ALLEGATIONS

HHMLS is a joint venture of over one hundred competing licensed residential real estate brokerages and other licensed real estate professionals in the Hilton Head, South Carolina area. HHMLS provides a variety of services to its members, including maintaining a database of current and past listings of properties for sale in the Hilton Head area. Brokers who seek to provide brokerage services in the Hilton Head area regard membership in the MLS as critical to their ability to compete.

The Complaint alleges that HHMLS, through a variety of rules and practices: 1) denied membership to brokers who would likely compete aggressively on price or through innovative business models; 2) stabilized prices and restricted consumer choice by prohibiting member

brokers from allowing their customers to choose which brokerage services they wish to purchase; and 3) authorized its Board of Trustees to adopt rules that would regulate commissions and impose discriminatory requirements on Internet-based brokers. By adopting and enforcing these rules and practices, the Complaint alleges that HHMLS restrained competition, reduced consumer choice and stabilized prices for real estate brokerage.

III. SUMMARY OF RELIEF TO BE OBTAINED UNDER THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to restore competition in the Hilton Head real estate brokerage market by eliminating rules that make it difficult for new brokers to enter the market and by eliminating rules that restrict competition among incumbent brokers. More specifically, the proposed Final Judgment will prevent HHMLS from adopting rules or engaging in practices that 1) exclude active, licensed real estate professionals from participation in the MLS; 2) deprive some members of services it furnishes to other members; 3) discriminate against members based on factors such as office location or scope/method of service (such as a fee-for service model or an Internet-based brokerage model); 4) require members to perform brokerage services in excess of those required by state law; 5) prescribe the terms of agreements between members and their customers or clients; 6) bar qualified listings from the MLS; 7) set compensation standards or guidelines; 8) charge fees for member changes in ownership; 9) require members to maintain an office or reside in any particular location; and 10) alter any of its three membership classes without prior approval of the United States.

IV. STANDARD OF REVIEW

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e), as amended. In making the "public interest" determination, the Court should apply a deferential standard and should withhold its approval only in very limited conditions. *See, e.g., Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 783 (D.C. Cir. 1997). Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint. *Id.* (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

In making the public interest determination, the Tunney act states that the Court shall 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).

The United States described the court's application of the Tunney Act's public interests standard in the Competitive Impact statement filed with the Court on October 16, 2007.

V. SUMMARY OF PUBLIC COMMENT AND THE RESPONSE OF THE UNITED STATES

During the sixty-day comment period, the United States received one comment from Richard B. Saunders. Mr. Saunders is the broker/owner of RE/MAX Island Realty of Hilton Head Island, South Carolina and a member of HHMLS. His comment is attached in the accompanying Appendix. After reviewing the comment, the United States continues to believe that the proposed Final Judgment is in the public interest.

Mr. Saunders expresses support for the intent of the proposed Final Judgment, but he has a concern about an HHMLS practice relating to the electronic data feed of MLS listings that HHMLS provides its members to enable them to advertise listings on an Internet website. Brokers use an electronic data feed to provide information over the Internet in two ways: 1) to advertise listings on a publically accessible website in order to attract prospective clients and 2) to provide brokerage services over the Internet to clients who have already entered into a “consumer-broker” relationship. As an example of the latter, a broker whose business model includes an Internet brokerage component may create a website, often referred to as a Virtual Office Website or VOW, that is accessible only to customers who have registered on the website and agreed to terms of use. Such a broker uses the electronic data feed to provide customers with the same type and quality of listings information that a traditional broker would provide to a client in his office.

According to Mr. Saunders, HHMLS provides its members with a lesser data feed for advertising purposes than it provides to non-member, non-brokers, such as Realtor.com (an advertising website sponsored by the National Association of Realtors), or to itself for populating

its own website. In a follow-up conversation with Department of Justice staff, Mr. Saunders explained that HHMLS has excluded certain data fields – including property address – from the electronic feed it provides to members for advertising. He claims this exclusion reduces the functionality of HHMLS members’ public advertising websites. For example, without electronic access to the address field, a member cannot efficiently provide a mapping function on its publicly-accessible marketing website.

Under the Tunney Act, a Court’s public interest determination is limited to whether the government’s proposed Final Judgment remedies the violations alleged in its Complaint. The Government alleged, among other things, that HHMLS’s rules deterred the emergence of Internet-based brokerage. As a consequence, the Proposed Final Judgment requires that HHMLS not discriminate against brokers based on the method by which they would provide listings data to their customers. Thus, HHMLS would have to provide to a broker whose business model contains an Internet brokerage component the same electronic data feed it provides to other brokers who service clients through traditional means. Mr. Saunders, however, is concerned about the availability of listings data for use in Internet advertising, not about restrictions on data used to provide brokerage services via a password-protected Internet site. Internet advertising was not a subject of the Government’s investigation leading to the complaint in this matter and the Complaint contains no allegation that encompasses the practice about which Mr. Saunders complains. Accordingly, factoring Mr. Saunders’ concern into the public interest assessment here would inappropriately construct a “hypothetical case and then evaluate the decree against that case,” something the Tunney Act does not authorize. *United States v. Microsoft Corp.*, 56 F.3d at 1459. In any event, the Proposed Final Judgment does not insulate the practice about

which Mr. Saunders complains from antitrust scrutiny. The antitrust laws will continue to apply to HHMLS and would proscribe conduct by the Defendant that runs afoul of applicable legal standards.

VI. CONCLUSION

After careful consideration of the public comment, the United States concludes that the entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. Accordingly, after publication in the *Federal Register* pursuant to 15 U.S.C. §§ 16(b) and (d), the United States will move this Court to enter the Final Judgment.

Respectfully Submitted,

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April 9, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2008, I caused a copy of the foregoing Response to Public Comments to be served on counsel for Defendant via ECF in this matter in the manner set forth

below:

By: /s/ Barbara M. Bowens
BARBARA M. BOWENS

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Counsel for Defendant

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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UNITED STATES OF AMERICA,

Plaintiff,

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**MULTIPLE LISTING SERVICE OF
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APPENDIX: PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

COMMENT SUBMITTED BY RICHARD B. SAUNDERS



December 31, 2007

John Reed
Litigation III Section
Antitrust Division
US Department Of Justice
Washington, DC 20530

Subject: United States Department of Justice vs Hilton Head Island Multiple Listing Service


Dear Mr. Reed,

Assuming that comments are still welcome by the Department of Justice regarding the Proposed Final Judgment with the Multiple Listing Service of Hilton Head Island, SC, it is apparent to me that the intent of the document is an attempt to treat all parties relative to our MLS in an equal and unbiased manner, an effort we at RE/MAX Island Realty fully support.

In our opinion what the document does not address is that in our opinion every MLS Member should be treated equal regarding information on real properties ultimately supplied to the consumer regardless of whom is supplying the information. Specifically, we believe that our MLS should supply the identical data feeds to all members of the Hilton Head MLS as is currently submitted to third party providers such as realtor.com and even used by the MLS itself on their own web site that is being marketed in and outside the state of South Carolina. That is not the case today and that glaring deficiency should be addressed and corrected. Our member firms are being discriminated against by their own MLS! This situation should be corrected for that would benefit all members as well as the ultimate consumer.

Should you have any questions or comments, please do not hesitate to contact me at your convenience. Thank you very much.

Sincerely,


Richard B. Saunders, CRB, GRI, SRES
Broker/Owner
RE/MAX Island Realty



Dick Saunders
Broker / Owner

RE/MAX Island Realty

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