

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA )

v. )

THE MULTI-LIST SERVICE OF )  
CAPE GIRARDEAU, MISSOURI, INC.; )  
ASHLAND REALTY COMPANY; )  
BRIDGEPORT REALTORS, INC.; )  
OWENS REALTY COMPANY; )  
CENTURY 21 AMERICAN REAL ESTATE; )  
CAPITOL HILL REALTY, INC.; )  
EMERALD REALTORS, INC. dba )  
CENTURY 21 KEY REALTY; )  
TOWN & COUNTRY REALTY; )  
WUNDERLICH REALTY; HEARTLAND REALTY; )  
DAVID DOHRMEYER; ROGER SKINNER; )  
FRED EGGLEY; CARL BLANCHARD; )  
BARBARA TRAVERS; KAREN MOGELNICKY; )  
T. DELORES KRAUSS; BARBARA BAKER; )  
BETTY LOU RYAN; GERALD MCELREATH; )  
WESLEY WADE; JEANNE R. OWENS; )  
HERBERT L. ANNIS; THELMA ANNIS; )  
CAROL MOUTELL; CHARLES MOUTELL; )  
CLINTON WUNDERLICH, )

Defendants. )

CIVIL ACTION

NO. S 90-95C

FILED: 7/16/90

Judge Limbaugh

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 files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of all the defendants except T. Delores Krauss in this civil antitrust proceeding.

NATURE AND PURPOSE OF THE PROCEEDINGS

On July 16, 1990 the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, seeking to enjoin the defendants from engaging in an alleged combination and conspiracy to suppress competition in the supply of real estate brokerage services in Cape Girardeau County and the north half of Scott County, Missouri, and the area adjacent thereto in southern Illinois (hereinafter "Cape Girardeau area"), because the combination and conspiracy is in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The complaint alleges that the defendants and their co-conspirators agreed:

- (1) to deny the benefits of membership in the Multi-List Service of Cape Girardeau, Missouri, Inc. ("Cape MLS") to a real estate firm that offered discount brokerage services in the Cape Girardeau area;
- (2) to refrain from providing certain discount brokerage services to prospective home sellers in the Cape Girardeau area;
- (3) to impose unreasonable restrictions on membership in the Cape MLS; and

(4) to permit Cape MLS members to deny new membership applications for any reason they chose.

The complaint alleges that the effect of the conspiracy has been to restrain competition in the supply of residential real estate brokerage services in the Cape Girardeau area. The complaint requests that the defendants be enjoined from adopting or enforcing any rule or policy that would unreasonably restrain admission into the Cape MLS or any other multiple listing service, or unreasonably restrict the competitive conduct of the members of the Cape MLS or any other multiple listing service. It also requests that the defendants be enjoined from participating in any combination or conspiracy to fix fees for real estate brokerage services, to limit the brokerage services to be offered or performed by any real estate agent, to specify terms or conditions under which any real estate agent will refuse to deal with any other real estate agent or its customers, or to boycott or refuse to deal with any real estate agent.

The United States and the consenting defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act, unless the United States withdraws its consent. Entry of the proposed Final Judgment will terminate the action as to the consenting defendants, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed judgment and to punish violations of the proposed Judgment.

II

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

1. The Cape Girardeau Real Estate Brokerage Business

Cape Girardeau real estate firms and their agents, including the individual and broker defendants in this action, provide brokerage services to facilitate and expedite real estate sales transactions, including residential real estate transactions. These services include publishing information about properties that are being offered for sale, attempting to locate potential buyers; providing suggestions to owners for improving the value and salability of their properties; providing sellers with relocation information and referring them to real estate firms in other geographic areas; locating potential properties for prospective buyers and arranging for prospective buyers to inspect properties; providing prospective buyers with pertinent information about a community such as relative property values, most recent selling prices, schools, parks and recreation facilities, cultural events, fire and police protection, restaurants, shopping, mass transportation, property taxes and real estate practices; apprising potential buyers of possible financing alternatives; assisting in the formation and negotiation of offers, counter offers, and acceptances; and helping to schedule and prepare for closings of real estate transactions.

Real estate firms and their agents charge fees or commissions for their brokerage services, which are generally

paid by sellers at the closings of real estate transactions. Commissions are usually split between real estate firms and agents that enter into agreements with sellers to advertise properties and search for potential buyers ("listing agents") and real estate firms and agents that find the ultimate buyers ("selling agents").

Real estate firms and their agents compete with one another to become listing agents and selling agents. This competition allows property owners to attempt to contract with listing agents that will supply the desired range of brokerage services at the lowest possible fee and for prospective buyers to enlist the assistance of selling agents that are most responsive to their needs.

Qualifications and standards of conduct for individuals who provide or desire to provide real estate brokerage services in the Cape Girardeau area are specified by the states of Missouri (for application in the Missouri portion of the Cape Girardeau area) and Illinois (for application in the Illinois portion of the area). State laws prohibit unlicensed individuals from providing real estate brokerage services. State real estate commissions administer the licensing process and are responsible for ensuring that applicants to whom licenses are granted have fulfilled various specified character, age, education, and experience criteria. The state real estate commissions are also responsible for enforcing rules that regulate the conduct of individuals who are licensed to provide real estate brokerage services.

The complaint alleges that residential real estate brokerage services constitute a relevant product market. Because of state licensing requirements and for other reasons, real estate firms generally are the only firms capable of offering a full range of residential real estate brokerage services. Home owners and prospective buyers could not obtain comparable substitute brokerage services from other firms in the event of a small but significant nontransitory increase in the fees charged for residential real estate brokerage services.

The complaint alleges that the Cape Girardeau area constitutes a relevant geographic market for the provision of residential real estate brokerage services. Home sellers and buyers in the area use the brokerage services of real estate firms located there. Real estate firms located outside the Cape Girardeau area do not have the time or sufficient knowledge about the Cape Girardeau area to provide competitive residential real estate brokerage services in the area. Home sellers and buyers in the area would not seek brokerage services from real estate firms located outside the area if the firms in the area implemented a small but significant nontransitory increase in the fees charged for their brokerage services.

## 2. The Cape MLS

The Cape MLS is a not-for-profit corporation located in Cape Girardeau, Missouri. It is operated by real estate firms and individuals that provide brokerage services in Cape

Girardeau County or the north half of Scott County, Missouri, including the other defendants in this action.

The Cape MLS operates a computerized listing service through which its members can quickly and efficiently exchange information about real estate properties in the Cape Girardeau area for which they are seeking buyers. Through the listing service, a Cape MLS member can convey to other members substantial information about the properties that are being offered for sale, including photographs, asking prices, room descriptions and sizes. Every two months, the Cape MLS compiles and distributes to its members a book providing information about each property currently listed with its service. In addition, the Cape MLS semi-annually prepares for its members books providing information about each property that has been listed in its service and sold within the prior six months.

The Cape MLS also provides lockboxes that its members can use to store keys to properties that are being offered for sale. The lockboxes are kept near the entrance of the property and can be opened with master keys issued only to agents of the Cape MLS members. The lockboxes allow Cape MLS members to show properties to prospective buyers without arranging appointments with property owners.

Only Cape MLS members and their employees are entitled to use Cape MLS services. Home sellers and buyers in the Cape Girardeau area have received considerable benefits from these services.

A prospective home seller wants to obtain maximum exposure of his or her property as quickly as possible. This helps to improve the prospect for a rapid sale at a good price. In the Cape Girardeau area, this goal is best satisfied by listing property in the Cape MLS's listing service. No other mechanism exists for quickly conveying comparable information to the largest possible pool of prospective buyers at comparable costs. Many home owners in the Cape Girardeau area will not contract for brokerage services with a real estate firm that is not a Cape MLS member.

Prospective home buyers want a real estate firm to identify properties in which they may be interested and arrange for inspections. A real estate firm that quickly identifies a large number of potentially acceptable properties for a prospective buyer to inspect will significantly increase the prospects for arranging a sale.

Cape MLS members have a significant competitive advantage because they can use the listing service as a screening tool to quickly select potential homes for inspection by prospective buyers. Members can also obtain from the Cape MLS information to advise prospective home sellers and buyers on property values, and can use the Cape MLS's lockbox service to permit inspections of properties at the most convenient times for prospective buyers.



Because of the importance to prospective home sellers and buyers of the services provided by the Cape MLS, real estate firms that are denied access to those services are at a significant competitive disadvantage relative to Cape MLS members. Nonmember real estate firms either could not provide, or would need to spend significantly more time and money to provide, prospective home sellers and buyers with services comparable to those offered by the Cape MLS Members.

Cape MLS members dominate the market for residential real estate brokerage services in the Cape Girardeau area. Cape MLS members employ almost all of the real estate agents in the Cape Girardeau area that receive their principal income from commissions earned on residential real estate sales transactions. Cape MLS members are the listing agents or selling agents in the vast majority of residential real estate transactions in the area, and most residential properties offered for sale in the area are listed in the Cape MLS's listing service.

### 3. Description of the Alleged Violation

The United States' complaint in this case alleges that the defendants and co-conspirators engaged in a conspiracy that unreasonably restrained competition in the provision of residential real estate brokerage services in the Cape Girardeau area by enacting and enforcing certain Cape MLS bylaws and by excluding from membership in the Cape MLS a real

estate firm that offered discount brokerage services to prospective home sellers.

The complaint alleges that the defendants and co-conspirators adopted and enforced various bylaws for the Cape MLS which established unreasonable conditions and procedures for obtaining membership in the Cape MLS and which in practice unreasonably restricted the conduct of Cape MLS members and their employees. These bylaws imposed conditions on applicants for membership in the Cape MLS that were more restrictive than the criteria specified by the state real estate commissions for obtaining a license to provide real estate brokerage services. The bylaws also prohibited Cape MLS members from engaging in conduct that was not unlawful or prohibited by the state real estate commissions. The complaint specifically refers to Cape MLS bylaws 3.01, 3.02, 3.03 and 3.04, and unnumbered bylaws 1, 2 and 3, which were passed at a special Cape MLS board meeting on March 9, 1988.

Bylaw 3.01 required applicants for membership into the Cape MLS to remain in business in Missouri for one year before filing their applications. Bylaw 3.02 required membership applicants to pay a fee (\$2500) that significantly exceeded the costs of processing their applications and admitting them to membership. Bylaw 3.03 required membership applicants to submit with their applications fifteen qualifying properties to be listed with the Cape MLS's listing service. Bylaw 3.04 required membership applicants to receive a favorable vote on

their applications from a majority of the current Cape MLS members, and allowed current members to vote against applications for any reason they chose.

Unnumbered bylaw 3 prohibited Cape MLS members from offering discount brokerage services in which property listed with the Cape MLS's listing service could be shown to a prospective buyer without having a real estate agent present. Unnumbered bylaws 1 and 2 prohibited Cape MLS members from engaging in other, unspecified but lawful and potentially competitive conduct.

On March 9, 1988, the defendants and co-conspirators excluded from membership in the Cape MLS a real estate firm in the Cape Girardeau area that offered discount brokerage services to prospective home sellers. The complaint alleges that there was no legitimate reason for the exclusion, which was accomplished in a vote taken pursuant to Cape MLS bylaw 3.04. Rather, the purpose of this exclusion was to retaliate against and minimize competition from the firm that offered discount services. At the same time, the defendants and co-conspirators adopted the three unnumbered bylaws discussed above.

### III

#### EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The purpose of the proposed Final Judgment is to enjoin the consenting defendants from continuing or resuming the alleged conspiracy. In this connection, Section IV(A) of the Final

Judgment requires the consenting defendants to delete the Cape MLS bylaws discussed above. Section IV(B) allows those defendants to enact replacement bylaws that do not unreasonably restrict either membership in the Cape MLS or the competitive conduct of the Cape MLS's members. Section V(A) of the Judgment enjoins the consenting defendants from enforcing the bylaws that are required to be deleted by Section IV(A).

Section V(B) enjoins the consenting defendants from participating in any way in the adoption, maintenance or enforcement of any rule, bylaw, regulation, policy or decision of the Cape MLS or any other multiple listing service that is comparable in competitive effect to the Cape MLS's bylaws that are required to be deleted. Section V(C) enjoins those defendants from affiliating with, or becoming or continuing as a member in, any multiple listing service that has any rule, bylaw, regulation, policy or decision comparable in competitive effect to the Cape MLS's bylaws that are required to be deleted.

Section V(D) enjoins the consenting defendants from participating in any conspiracy to fix, establish or maintain: (1) fees for real estate brokerage services; (2) the brokerage services to be offered or performed or not to be offered or performed by any real estate agent; (3) any terms or conditions on which any real estate agent will deal or refuse to deal with any other real estate agent or its customers; or (4) any boycott or refusal to deal with any real estate agent.

Section VI(A) requires the Cape MLS to provide copies of the Final Judgment to all present and future members and applicants for membership. Section VIII provides that the Final Judgment will expire 10 years after it is entered.

#### 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 attorney 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 defendants.

#### V

##### PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the consenting defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the Antitrust

Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The Act provides a period of at least 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 wants to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. 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:

Kent Brown, Chief  
Midwest Office  
Antitrust Division  
United States Department of Justice  
Suite 3820 Kluczynski Federal Building  
230 South Dearborn Street  
Chicago, Illinois 60604

Under Section IX of the proposed Judgment the Court will retain jurisdiction over this matter for the purpose of enabling any of the parties to apply to the Court for such further orders or directions as may be necessary or appropriate for the construction, implementation, modification, or enforcement of the Judgment, or for the punishment of any violations of the Judgment.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment provides all the relief as to the consenting defendants necessary to cure the violations alleged in the complaint. The Judgment will enjoin the consenting defendants from continuing or resuming operation of the alleged conspiracy and will also enjoin the specific rules, bylaws and practices that were adopted, enforced, or used in furtherance of the conspiracy. Entry of the Judgment will prevent the consenting defendants from using the Cape MLS or any other multiple listing service as a vehicle to restrain competition in the supply of residential real estate brokerage services.

Because the Judgment provides all of the relief against the consenting defendants that the United States would have sought through a trial, the United States did not seriously consider any alternatives to the Judgment. The case will continue as to the remaining nonconsenting defendant.

VII

DETERMINATIVE DOCUMENTS

No documents were determinative in formulating the proposed Judgment, and the United States therefore has not attached any such documents to the Judgment.

Dated:

Respectfully submitted,

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