

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
GREENBELT DIVISION

METROPOLITAN REGIONAL  
INFORMATION SYSTEMS, INC., )

Plaintiff, )

v. )

AMERICAN HOME REALTY NETWORK, INC. )

Defendants, )

AMERICAN HOME REALTY NETWORK, INC., )

Counterclaimant, )

v. )

METROPOLITAN REGIONAL  
INFORMATION SYSTEMS, INC., )

and )

NATIONAL ASSOCIATION OF REALTORS, )

and )

DOEs Nos. 1 – 25, )

Counterclaim Defendants. )

REDACTED

Civil Action No. 12-cv-954-AW

SECOND AMENDED COUNTERCLAIM

Counterclaimant, AMERICAN HOME REALTY NETWORK, INC., (hereinafter, "Counterclaimant" or "AHRN") by its counsel, pursuant to leave of Court by Order of June 10, 2013 [D.E. 160, at 2], hereby files this Second Amended Counterclaim pursuant to Fed. R. Civ. P. 15(a)(1)(B), and complains of counterclaim defendants METROPOLITAN REGIONAL INFORMATION SYSTEMS, INC. AND NATIONAL ASSOCIATION OF REALTORS and DOES Nos. 1-25 (collectively "Counterclaim Defendants," or "Defendants") as follows:

1. Counterclaimant, AMERICAN HOME REALTY NETWORK, INC. ("AHRN") is a corporation organized under the laws of the State of Delaware with its principal place of business at 222 7th Street, 2nd Floor, San Francisco, California, and is a licensed real estate broker in the State of California.

2. Counterclaim Defendant, METROPOLITAN REGIONAL INFORMATION SYSTEMS, INC. ("MRIS") is a corporation organized under the laws of the State of Delaware with its principal place of business at 9707 Key West Avenue, Suite 200, Rockville, Maryland. MRIS, the largest Multiple Listing Service ("MLS") in the United States, began this case with copyright infringement, Lanham Act, and state law tortious conversion and unjust enrichment claims against AHRN.

3. Counterclaim Defendant, NATIONAL ASSOCIATION OF REALTORS, ("NAR"), is a trade association organized under the laws of Illinois with its principal place of business at 430 North Michigan Avenue, Chicago, Illinois 60611. NAR establishes and enforces policies and professional standards for its over one million individual member brokers and their affiliated

agents and sales associates ("Realtors"), and 1,600 local and state member boards, which control approximately 80 percent of the roughly 1,000 MLSs in the United States. NAR's member brokers compete with one another in local brokerage referral services markets to represent consumers in connection with real estate transactions. NAR has encouraged, and has voted to fund, sham and overreaching copyright infringement claims by MRIS and other MLSs.

4. Counterclaim Defendants DOEs Nos. 1-25 are thought to be brokers and/or MLSs and their principals, who are part of the NAR orchestrated conspiracy against AHRN to suppress competition in the real estate industry for their mutual benefit. The true names and capacities of the Defendants named herein as Does Nos. 1-25 are unknown to Counterclaimant, who therefore sues them under these fictitious names. AHRN will amend this counterclaim to add their true names and capacities when they become known. On information and belief, during the course of the conspiracy, each of the Doe Defendants was and continues to be an agent and principal of each of the other Defendants; and each was, and is, acting in the course and scope of his authority.

5. At this time, AHRN does not name either Regional Multiple Listing Service of Minnesota, Inc. (hereinafter, "Northstar" or "RMLS") or HomeServices of America, (hereinafter, "HSA") as a party, although it notes that Northstar is the plaintiff, and HSA is a counterclaim defendant, in *Regional Multiple Listing Service of Minnesota, Inc., d/b/a NorthstarMLS v. American Home Realty Network, Inc.*, 0:12cv965 (D. Minn.) filed on May 18, 2012. As more facts are learned in discovery, if appropriate, AHRN will add Northstar and/or HSA as Doe

Defendants. For the same reasons and reserving the same right to add Preferred Carolina Realty, Inc. (hereinafter "PCR") as one of its Doe Defendants, AHRN does not at this time name PCR as a party, although PCR is the plaintiff in *Preferred Carolinas Realty, Inc., v. American Home Realty Network, Inc., d/b/a NeighborCity.com*, Civil Action No. 1:13-cv-00181 (M.D.N.C.), filed on March 4, 2013.

**A. THE PARTIES**

**1. Counterclaim Plaintiff AHRN**

6. Defendant and Counterclaim Plaintiff AHRN is a six year-old San Francisco real estate brokerage referral services and technology startup that provides information to home buyers and sellers, identifying the real estate agents best suited to assist them in purchasing or selling properties in their local market on a nationwide basis. AHRN, which is a licensed real estate broker in the State of California, owns NeighborCity™, an online residential real estate service and operates a website, [www.neighborcity.com](http://www.neighborcity.com). [www.neighborcity.com](http://www.neighborcity.com) allows consumers to search for homes for sale and obtain recommendations for the local real estate agents best suited to assist them with their purchase, as evaluated by its proprietary AgentMatch™ software system, utilizing the available universe of listing and transactional data. This transformative use of real estate data creates highly targeted recommendations of the real estate agents most likely to connect buyers and sellers in closing sales, an innovation formerly unavailable to the public.

7. AHRN has developed a real estate search engine that searches the

Internet for data on real estate listings, including "for sale" listings, "for sale by owner" listings, foreclosures, transaction records and real estate agents. AHRN's program also applies its proprietary algorithms to identify, rate and rank buy- and sell-side agents most suitable to represent potential buyers and sellers in proposed transactions and then monitors the customer's satisfaction with those introductions by obtaining related quantitative and qualitative data in the form of customer feedback through its analysis of transactional results.

8. Unlike other web sites where realtors pay to be ranked as "featured agents," AHRN does not sell advertising, sponsorships or accept any payments related to its real estate agent ratings and rankings. Instead, AHRN applies the same scoring heuristics and algorithms to every active real estate agent in the country.

9. The NeighborCity web site makes the residential real estate market more transparent by giving home buyers and sellers the information they need to make intelligent real estate decisions, especially when hiring a real estate agent and broker. Once a property is identified, AHRN's online services qualify and introduce homebuyers and sellers to relevantly experienced and vetted real estate agents who are available to represent them exclusively.

10. Consumers can use neighborcity.com to search for properties in their desired location. When a consumer clicks on a particular property, AHRN's algorithm identifies local real estate agents who are determined by the algorithm to be most effective at representing that buyer in the purchase of that property, as well as the most effective agents to represent the sale of that buyer's existing

property.

11. To efficiently match consumers with real estate agents, AHRN uses information about the property and then matches it against each agent's particular sales and listing history, analyzing each agent's professional performance from the homeowner's perspective, relative to other competing agents who assist in the listing, purchase and sale of comparable properties at about the same point in time, while making certain assumptions about the best interest of the homeowner or prospective homeowner, e.g. sellers want to sell their home for the highest price possible and in the least amount of time, while most buyers want the best suited home for their individual needs, at the lowest possible price.

12. AHRN also tracks each agent's effectiveness by identifying such information as the percentage of homes listed for sale that result in a sale, the difference between a property's asking price and the price for which it actually sold, the price per square foot, the days on market and days to sale, as well as other performance indicators relative to comparable listings and recent transactions. All of these various data points or "performance attributes" for each agent are compared relative to their peers (or direct competitors) through the dynamic and automated formation of a peer-index unique to each particular real estate agent, thus allowing a consumer to understand how well an agent has performed in the past relative to the universe of agents that could potentially serve them. All of this information provides consumers with critical performance indicators, not otherwise available, to effectively select a representative for

purchasing or selling a home.

13. Consumers in the residential real estate market have responded positively to the increased access to information about properties and real estate agents that AHRN provides. Prior to the litigation against it, AHRN had grown significantly in the prior year in terms of revenues, transactions referred and full-time employees.

## **2. National Association of Realtors**

14. NAR is a trade association that establishes and enforces policies and professional standards for its over one million individual member real estate brokers and their affiliated agents and sales associates ("Realtors"), and 1,600 local and state member boards of realtors. NAR's member brokers compete with one another in local brokerage referral services markets to represent consumers in connection with real estate transactions.

15. NAR's policies govern the conduct of its members in all fifty states, including all Realtors and all of NAR's member boards. Upon information and belief, NAR's member boards control approximately eighty percent of the approximately 1,000 MLSs in the United States.

16. NAR promulgates rules governing the conduct of MLSs and requires its member boards to adopt these rules. Among the Rules it has adopted are rules that prohibit, or strongly discourage, MLSs (1) from licensing their listing databases to member brokers and third parties, like AHRN, Redfin, HomeLight, and agentaquarium.com; (2) from ranking or otherwise evaluating agents; (3) "prohibiting use of the licensed data to sell referrals."

<http://www.realtor.org/articles/syndication-success-a-look-at-the-legal-considerations-of-effective-listing-data-licensing;>" and (4) using the MLS licensed data for unauthorized purposes.

17. NAR has a history of engaging in illegal anti-competitive behavior, and was the subject of an anti-trust claim brought by the United States Department of Justice, an action which resulted in a Consent Judgment in the *Matter of The United States of America v. National Association of Realtors*®, Case No. 05 C 5140, United States Federal District Court for the Eastern District of Illinois, filed November 7, 2008.

### **3. Multiple Listing Services**

18. Defendant MRIS, Northstar, and, upon information and belief, one or more of the Doe Defendants, are Multiple Listing Services. MLSs are entities to which virtually all real estate brokerages belong and pay periodic dues. In exchange for these dues, MLSs provide member brokerages access to an electronic database of supply, pricing, and property--characteristics information relating to past and current real-estate listings in the MLSs' respective Service Areas.

19. MRIS serves brokers in Maryland, Virginia, Washington, D.C. and parts of Pennsylvania, Delaware and West Virginia. See Complaint, ¶ 13. MRIS claims 85% of listed properties—as measured by dollar volume of closed transactions—in its service area. Northstar serves brokers in Minnesota, and the Doe Defendant MLSs serve brokers in their respective Service Areas. Defendant MLSs (including one or more of the Doe Defendants) are thus market-



wide joint ventures of supposed competitors that possess substantial market power, and to compete successfully, a brokerage referral service must be a member of these MLSs.

20. MRIS's database (and other MLSs' databases) allows MLS members to communicate information among themselves, information such as descriptions of listed properties for sale and offers to compensate other members if these other members locate buyers for the listing agent or broker. These databases also allow members representing buyers to search the listed properties to match buyers' needs.

21. By providing an efficient means of exchanging information on real estate listings, MLSs are intended to benefit real-estate buyers and sellers and, in turn, buyers of real-estate brokerage referral services in the MLS Service Areas. And since virtually all for-sale properties in a MLS's Service Area are listed with the MLS, buyers' agents must use a MLS when assisting buyers in making a purchasing decision in order to inform them of the availability of real estate on the market, each property's characteristics, and its seller's asking price.

22. The MLSs' dominant roles make access to the MLS databases—and therefore MLS membership—critically important for any brokerage referral services seeking to serve clients efficiently in an MLS Service Area. Indeed, access to the MRIS, Northstar and other MLS databases is critical to brokers' success in their respective Service Areas, as for the most part the MLSs are the only providers of this service in their respective Service Areas. Therefore, brokerages seeking to meaningfully provide real-estate-brokerage referral

services in an MLS Service Area must be MLS members. "Particularly in an area served by only one MLS, access to MLS resources may be critical for a brokerage referral service to successfully participate in the real estate market." *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 282 (4th Cir. 2012). See also DOJ Complaint [D.E. 25-3] at 7, ¶ 22. ("The vast majority of brokers believe that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. As a result, few brokers would withdraw from MLS participation even if the fees or other costs associated with that participation substantially increased").

#### **4. Brokers and Agents**

23. Defendants MLSs are owned by associations of member real estate brokers. Brokers and independent contractor real estate agents affiliated with such brokerage firms compete with each other to represent would-be sellers and/or prospective buyers of residential real estate. Brokers are contractually obligated by their MLSs to submit their real estate listings to their MLS's databases.

24. Brokers, through their participation in their local Realtor Association, MLS Boards of Trustees and in NAR have created rules that govern MLS members' conduct and business practices and have set standards for admitting new members. Through these rules, Defendants and other MLSs have profited by illegally inhibiting competition over the method by which they provide real-estate-brokerage referral services to customers (i.e., property sellers) in the MLS Service Areas and have illegally stabilized and inflated the prices that these

customers pay for real estate-brokerage referral services and limited consumer options.

**B. JURISDICTION AND VENUE**

25. This Second Amended Counterclaim is filed under Section 4 of the Clayton Act, 15 U.S.C. § 15, to prevent and restrain violations by Defendants of Section 1 of the Sherman Act, 15 U.S.C. §§ 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 1332, 1337(a), and 1367.

26. Venue is proper in this district under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the counterclaims occurred, and the Defendants are subject to personal jurisdiction, in this district.

27. This Court has personal jurisdiction over MRIS, a Delaware corporation, because it maintains its principal place of business at 9707 Key West Avenue, Suite 200, Rockville, Maryland.

28. This Court has personal jurisdiction over NAR, a trade association organized under the laws of Illinois, with offices at 500 New Jersey Avenue, NW, Washington, DC 20001-2020 because it regularly transacts business in Maryland and under the Maryland long-arm statute, Md. Code Ann., Cts. & Jud. Proc. § 6-103(b)(1) and § 6-103(b)(4) by virtue of its conspiracy to restrain trade and monopolize with, among others, MRIS.

29. This Court has personal jurisdiction over Doe Defendants under the Maryland long-arm statute, Md. Code Ann., Cts. & Jud. Proc. § 6-

103(b)(1) and § 6-103(b)(4), by virtue of their contract, combination or conspiracy to restrain trade.

30. Defendants are engaged in interstate commerce. MRIS, and Does Nos. 1- 25 broker, market and sell real estate throughout the United States. NAR has members nationwide to whom it provides information and assistance and against whom it enforces its policies and standards. Defendants' activity represents a regular, continuous and substantial flow of interstate commerce, and therefore, their wrongful activities have a substantial adverse effect on interstate commerce in the United States.

**C. NATURE OF THE ACTION**

31. AHRN brings this action against the Counterclaim Defendants' concerted anti-competitive conduct that includes: (1) an MRIS-instigated and NAR-backed MLS industry-wide adoption of a copyright "Program" to: (a) fraudulently register sham copyrights of purported compilation copyrights in automated electronic databases, the technology and copyrights of which belong to others and (b) to claim copyrights in unregistered and uncopyrightable textual elements and photographs in the MLSs' databases that are owned by others; (2) the threatened and actual enforcement of the fraudulently registered copyrights against innovators like AHRN with sham litigation; (3) a group boycott by MLSs, including MRIS, enforced by NAR through adoption of pseudo-regulatory rules limiting their respective members' ability to share public domain listing data with innovative brokers like AHRN, Redfin and others that provide real estate agent ratings; and rankings and/or exclusively

provide client referrals, as a group boycott of such innovators; (4) a group boycott by brokers and agents, prohibiting them from accepting referrals from, or doing business with AHRN; and (5) NAR's recent entry into direct competition with AHRN with free-of-charge predatory pricing of its competing agent evaluation service.

32. AHRN, as a licensed real estate broker which connects customers to agents and other brokers and ranks and rates real estate agents, competes with NAR, NAR's member MLSs, such as MRIS and Northstar, and the MLSs' brokers. NAR has entered into direct competition with AHRN by offering RatedAgent service through the REALTOR® Excellence Program funded by the Center for Specialized REALTOR® Education, a NAR subsidiary operated by Quality Service Certification, Inc. ("QSC"). This action by NAR is in addition to NAR's existing competition with AHRN in the market for real estate leads through NAR's partnership with Move, Inc. and the realtor.com website.

33. As to MRIS, both AHRN and MRIS provide real estate listings to the public (a service) but each is compensated for this service in different ways. MRIS receives subscription fees, and AHRN receives a percentage of the broker's commission if the broker accepts an AHRN client-referral and a deal resulting from the referral results in a closed transaction. MRIS has alleged that AHRN's website diverts traffic from its (and its brokers') website(s) and deprives MRIS of exclusive control over its listings, simply by virtue of its existence. MRIS has power in this market as it controls and regulates dissemination of the listing

information within its service area and virtually all brokers doing business in the service area join MRIS.

34. The MLSs' brokers compete with AHRN over who controls referrals to agents to close transactions. The listing brokers would prefer to generate traffic directly to their own websites, thereby making client referrals without the assistance of AHRN. That allows them to charge their agents a referral fee in addition to their standard commission. The listing agent and broker both want to receive all of the customer inquiries made on the Internet via the major real estate portals and websites, so that they earn a commission on both the buy- and sell-side of each transaction, as opposed to just the sell-side commission which is typically half of the total commission paid in a transaction. AHRN makes referrals to agents determined to be the best suited by its AgentMatch® algorithm, which agent is typically not an agent of the listing broker, and therefore, an independent representative. The MLSs' and MRIS's control over listing information and the restrictive manner in which it is licensed, published, used and disseminated, helps their large broker members who control a disproportionate share of the available inventory get a significantly higher share of commissions for both sides of a transaction, and deprives real estate consumers of the right to independent representation in real estate transactions. AHRN and other innovative brokers can break this pattern by making referrals to agents outside the listing brokerage.

35. NAR's, MRIS's, and Northstar's adoption of the sham copyright Program, enforcement activity and rules constitute violations of the federal antitrust and federal and state unfair competition laws.

36. NAR, MRIS, Northstar, other MLSs and their industry consulting firms, and allied law firms, under cover of the "Program," have made false statements: (a) publicly disparaging AHRN with accusations of "theft," "piracy" and similar terms; (b) misrepresenting in their applications to register with the United States Copyright Office that their compilation copyrights covering their databases are "unpublished," when in fact their databases are published through wide dissemination to subscribers and licensees for purposes including display to the public; and (c) misrepresenting in such applications that purportedly copyrighted content were "works for hire." Such misrepresentations to the Copyright Office were made in order to obtain lower copyright registration fees than would have applied to compilation copyrights for published databases and conceal

On information and belief, other MLSs lack such records as well.

37. NAR's, MRIS's, Northstar's and others' false statements violate state unfair competition laws.

38. MRIS's lawsuit against AHRN in this Court, and Northstar's lawsuit against AHRN in Minnesota are in furtherance of NAR's efforts to drive AHRN out of business and eliminate AHRN as a competitor in the market

for real estate broker services. AHRN seeks damages and injunctive relief to bar Defendants' unlawful predatory conduct and to prevent harm to consumers in the market for residential real estate brokerage referral services.

39. Defendant MRIS is a regional MLS operating in Maryland, Virginia, Washington, D.C. and parts of Pennsylvania, Delaware and West Virginia. See Complaint, ¶ 13. NAR, MRIS and its member-brokers, and other MLSs have taken notice of AHRN's increasing popularity with real estate consumers, and have banded together at the behest of, with encouragement by, and with the promise of financial support from, NAR. In collaboration with NAR and other MLSs, MRIS wrongfully seeks to stop AHRN from listing property for sale on its neighborcity.com website before it becomes a larger threat to NAR's and other MLSs' interests in preserving their rigid hold on property listing information and directing consumers to large brokers who thus capture commissions from both sides of residential real estate transactions.

40. As NAR, the MLSs, and their member-brokers have done before when innovative businesses attempt to enter the real estate market, Defendants seek to prevent competition by maintaining an iron grip on real estate data that is critical to consumers. In furtherance of that anti-competitive goal, Defendants have agreed not to license to AHRN any allegedly copyrighted material from their respective websites with the intent of "[t]hrowing a world of hurt" on AHRN and destroying its business. See ¶ 94 *infra*; Mosey email [D.E. 25-9].

41. Defendants' exclusionary practices continue a pattern in the real estate industry in which traditional brokerages have undertaken various



measures to suppress competition whenever challenged by an innovative business model. Such conduct has prompted lawsuits by the Department of Justice ("DOJ") and investigations by the Federal Trade Commission ("FTC"), all seeking to promote access to property information for new entrants to the real estate industry who challenge the traditional broker model. Defendants' conduct is simply another strategy by powerful real estate brokers to suppress information from which they derive value, and eliminate competition from internet-based referral services, to the detriment of consumers. The DOJ lawsuit against NAR barred NAR and the MLSs from "adopting rules implementing the anti-referral provision or an MLS restriction that denies access to operators of internet-based referral services." DOJ Competitive Impact Statement, 73 Fed. Reg. (no. 158), 47,613, 47,617 (August 14, 2008). Absent this court's intervention, Defendants' illegal conduct will continue unabated.

**D. PRINCIPLES OF COPYRIGHT LAW**

42. The origin of the copyright laws, Article 1, Section 8, clause 8 of the U.S. Constitution, confers power to Congress: "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The Supreme Court has held that: "[f]or a particular work to be classified under the head[ing] of writings of authors,... originality is required." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (U.S. 1991) (internal punctuation omitted) *quoting The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

43. Section 101 of the Copyright Act of 1976, 17 U.S.C. §101, defines a "compilation" for purposes of a compilation copyright as:

a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

44. Section 103(b) of the Act further provides:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. *The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.*

(Emphasis added).

45. In 1987, the Copyright Office of the Library of Congress issued Circular 65, titled "Copyright Registration for Automated Databases," which states the following:

Databases may be considered copyrightable as a form of compilation, which is defined in the law as a work "formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."

Circ. 65 at 3.

46. Circular 65 (at 3) also specifies what compilation copyrights do not protect:

Copyright protection is not available for:

- ideas, methods, systems, concepts, and layouts;
- individual words and short phrases, individual unadorned facts; and,
- the selection and ordering of data in a database where the

collection and arrangement of the material is a mechanical task only, and represents no original authorship; e.g., merely transferring data from hard copy to computer storage.

47. The 1991 Supreme Court decision in the *Feist* case, as the MRIS and Regional MLS cases here, involved alleged infringement of compilation copyrights, which implicate the "bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. No one may claim originality as to facts ... because facts do not owe their origin to an act of authorship." 499 U.S. at 347.

48. *Feist* involved a request to license a telephone directory in which Rural Telephone Service claimed copyright. That request to license was refused, and as here, the refusal by Rural Telephone Service was "motivated by an unlawful purpose to extend its monopoly in telephone service to a monopoly in yellow pages advertising." *Feist, supra*, at 343, quoting *Rural Telephone Service Co. v. Feist Publications, Inc.*, 737 F. Supp. 610, 622 (Kan. 1990).

49. The Supreme Court in *Feist* noted "that there can be no valid copyright in facts is universally understood," *id* at 344.

Many compilations consist of nothing but raw data *i.e.*, wholly factual information, not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered in one place....

*Id.* at 345.

50. In *Feist*, the Supreme Court also held that: "To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Id.* at 361.

51. Title 17 U.S.C. § 101 provides that: a 'work made for hire' is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

*See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989).

52. The Copyright Office's instructions for completion of Form TX, the application form for registration of compilation copyright in an automated electronic database, include the following:

What Is a "Work Made for Hire"?

A "work made for hire" is defined as (1) "a work prepared by an employee within the scope of his or her employment"; or (2) "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the works shall be considered a work made for hire." If you have checked "Yes" to indicate that the work was "made for hire," you must give the full legal name of the employer (or other person for whom the work was prepared). You may also include the name of the employee along with the name of the employer (for example: "Elster Publishing Co., employer for hire of John Ferguson").

Form TX, attached as Exhibit A, at p. 1.

## **E. FACTUAL STATEMENT**

### **1. Origin of the Conspiracy**

53. In 2005, the United States Department of Justice brought suit against NAR for violating Section 1 of the Sherman Act, in promulgating and

enforcing rules on its members that discriminated against and excluded Internet-based real estate brokers in order to maintain NAR-supported brokers' real estate sales commissions at inflated values. *U.S. v. NAR*, Civil Action No. 05C-5140 (E.D. Ill. September 8, 2005) ("DOJ Complaint") [D.E. 25-3]. The complaint in that case demonstrates that the public interest lies with competition, noting that "[b]y virtue of industry-wide participation and control over a critically important input, MLS joint ventures have market power in almost every relevant market." *Id.*, ¶23. The Division recognized that brokers with innovative, Internet-based business models present a competitive challenge to brokers who provide listings to their customers only by traditional methods. *Id.*, ¶ 29.

54. The government sought to enjoin NAR "from maintaining or enforcing a policy that restrains competition from brokers who use the Internet to more efficiently and cost effectively serve home sellers and buyers, and from adopting other related anti-competitive rules." DOJ Complaint [D.E. 25-3] at ¶ 1.

55. On November 18, 2008, the Department of Justice entered a consent decree with the NAR, settling the Complaint with a Final Judgment by imposing certain prohibitions on the real estate industry. See DOJ Consent Decree [D.E. 25-4]. NAR accepted prohibitions imposed upon it against promulgating and enforcing any rule that *inter alia*:

- Prohibits, restricts, or impedes, a web-based broker from providing to its customers all of the listing information that is permitted under traditional methods: mail, fax, etc.; see Consent Decree at 5; (Prohibition A);
- Unreasonably disadvantages or unreasonably discriminates against a web-based broker who provides to its customers all of the listing information that is permitted under traditional methods: mail, fax,

etc., *id.* (Prohibition B)

- Prohibits, restricts, or impedes the referral of customers whose identities are obtained from a website by a web-based broker to any other person, or establishes the price of any such referral, *id.*, (Prohibition C);
- Imposes fees or costs upon any broker who operates a website or upon any person operating a website for a broker that exceed the reasonably estimated actual costs incurred by a Member board in providing listing information to the broker, *id.*, (Prohibition D).

56. During the spring of 2013, NAR entered the real estate agent evaluation and ranking market in direct competition with AHRN in a "pilot program" with several realtors' associations that own MLSs.

57. The relevant market in this action consists of residential real estate brokerage referral services in the markets in which Defendants operate (the "Relevant Markets"). MLSs are local cooperatives run by local broker-members, usually affiliated with the National Association of Realtors ("NAR"), who pool and disseminate information on homes available for sale in their regions. Each MLS combines its members' data and then makes it available to all of its member-brokers, which enables more efficient exchange of information among brokers. According to an April 2007 Joint Report by the Federal Trade Commission and the U.S. Department of Justice entitled "Competition in the Real Estate Brokerage referral services Industry," MLSs are so important to the operation of real estate markets that, as a practical matter, any broker who wishes to compete effectively in a market must participate in the local MLS and brokers must have access to their local multiple listing service (MLS) to compete effectively. Because brokers usually set the rules for each others' participation in the MLS, it

is possible for one dominant group of brokers to establish rules that disfavor other brokers who compete in a manner they dislike.

58. The August 27, 2009 Final Judgment upon consent in *United States v. Consolidated Listing Service, Inc.*, Case No. 2:08-CV-01786-SB (D.S.C.), stated that the defendant MLS "shall not adopt, maintain, or enforce any Rule, or enter into or enforce any agreement or practice, that directly or indirectly . . . discriminates against or disadvantages any Member or Licensee based on the Member's or Licensee's office location, pricing or commission rates, *business model*, contractual forms or types used, or services or activities the Member or Licensee performs or does not perform for any home buyer or home seller[.]" (emphasis supplied). See 2:080-CV-01786-SB (D.S.C.) DOJ Consent Decree at 5.

59. Other courts have similarly found that anti-competitive MLS rules are unreasonable, "[w]hen broker participation in the [MLS] is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1374 (5th Cir. 1980). Defendants' conduct is the old guard real estate industry's next effort to stifle competition.

**2. MRIS's Invitation to Conspire To Exclude Competition By Adopting a Proposed "Program" To Register Sham Copyrights and Defraud The Copyright Office**

60. In 2005, David Charron, President and CEO of MRIS; Erik M. Feig, MRIS General Counsel; and J.T. Westermeier, outside counsel to MRIS, then-listed as a Partner at DLA Piper Rudnick Gray Cary (in 2006 version), jointly

wrote a two part "Guidance Paper," issued in several versions, including with the title "Strengthening the Foundation: The Real Estate Listing Content Copyright FAQ and An Updated Program to Administer and Enhance the Value of Real Estate Listing Content," Version 2.0 (April, 2006), inviting the MLS industry to join "The Program." Guidance Paper, part 1, Exhibit A to First Amended Complaint [D.E. 68-1], Guidance Paper, part 2, see [D.E. 25-11].

61. The object of The Program was first and foremost to defeat "the emergence of several high profile initiatives proclaiming 'new' and 'improved' alternative business models that they propose will dramatically change the real estate industry." *Id.*, part 1, at 1 [D.E. 68-1].

62. The Guidance Paper proposed that the MLSs industry defeat the new alternative business model entrants in the real estate brokerage referral services business by subverting the copyright process by claiming the existence of, and encouraging the enforcement of, copyrights in unregistered and uncopyrightable listing data consisting of facts assembled in compilations, in disregard of the Supreme Court's holding in *Feist* that "100 uncopyrightable facts do not magically change their status when gathered in one place." See 499 U.S. at 345.

63. The Program urged the MLS industry to play a semantic game with new market entrants, the Copyright Office and the public whereby the MLS industry would stop referring to "listing data" and call the data "listing content," Guidance Paper at 8, in order to, as one commentator described, "help dismantle the argument that listings are a compilation of public material and should be in



the public domain." <http://ourappraisal.blogspot.com/2006/04/multiple-listings-public-utility-study.html> The Guidance Paper notes; "While listing content may not, on the surface, have the degree of creativity we associate with a song or a story or other types of so-called 'creative' works, there should be little question that listing content is protectable by copyrights." Guidance Paper, part 1, at 9.

64. The Program also urged "[m]aking each property listing a joint work owned by the broker and the MLS for copyright purposes. This joint work is created by merging each listing broker's and MLS's respective copyright contributions into a merged, unitary property listing with co - ownership of the respective copyrights. Joint ownership is a key building block of the Program." *Id.*, part 2, at 18.

65. The Program also devised a strategy, including: (a) the mashing of non-copyrightable listing data from different sources, after renaming it listing "content" in the MLSs database and (b) for the MLSs to register such listing content under compilation copyright procedures for automated electronic databases, claiming the registrations would cover both "the compilation and collection of content in the database, but extend to the jointly owned copyrighted content in each individual listing." *Id.*, part 2, at 19.

66. One purpose of the Program was for the MLSs to create enforcement programs, send cease-and-desist letters and litigate against the new business model brokers.

67. The Program's other purpose was a "practical strategy" to evade the Copyright Office's fee structure for individual copyright and published database copyright registrations. From the Guidance Paper:

Given the number of listings in a typical MLS database and the number of updates occurring on a daily basis, as a practical matter registering the claims of copyright ownership in each individual listing with the U.S. Copyright Office is impractical and not cost effective. What we contend is needed is a practical strategy that protects the copyrights in each individual property listing as well as the compilation and collection of property listings contained in the MLS database.

*Id.*, part 2, at 22.

68. MRIS and the authors of the Guidance Papers conducted a comprehensive publicity campaign to attract other MLSs to join The Program. Versions of the Guidance Paper were featured in RealtyTimes and Real Trends, distributed at "MLS Topics in the Tropics", a conference sponsored by The Realtor® Association of Greater Fort Lauderdale February 22 - 4, 2005, at Ft. Lauderdale, Florida, the Realty Alliance annual meeting in Sacramento, California on March 30, 2005, and presented to the San Francisco Association of Realtors on June 3, 2005. *Id.*, part 2, at 17 fn\*.

69. In addition, one of the authors of the Guidance Paper, MRIS CEO David Charron, in a recent biographical profile, is listed as a former member of the NAR MLS Policy Committee, Charron bio, attached as Exhibit B.

### **3. NAR Adopts The Guidance Paper**

70. MRIS's campaign to promote the Guidance Paper's Program to invite a conspiracy was successful. In the spring of 2006, NAR explicitly adopted the Guidance Paper's Program by issuing a model Copyright Office form TX for a

Compilation Copyright registration application which: (1) in answer to question 2a, checked the box answering "yes" to the question: "Was this contribution to the work a 'work made for hire'?" and (2) in answer to question 3b, gave the last day of the quarter, March 31, 2006, as the date of publication. NAR model form TX attached as Exhibit C.

71. NAR instructed its member MLSs,

In Space 6: Derivative Work or Compilation, the application should state that the materials included in this compilation are preexisting materials and the information in this section should also make it clear that these materials were "selected" and "arranged," in order to assure that the compilation receives copyright protection.

MLS Copyright Compilation Registration, <http://www.realtor.org/law-and-ethics/mls-copyright-compilation-registration>. This NAR publication also provides

"MLS Registration Tips" as follows:

- MLS compilations are largely collections of factual information regarding the properties listed for sale by members. According to the Copyright Act, the copyrightable interest in factual compilation is in the author's original "selection, arrangement and coordination" of that information. These should be treated as special words to be used whenever describing the compilation and MLS's role in creating the compilation in any description of the compilation.
- MLS compilations always contain public domain information (facts) or materials that were previously published about the subject properties filed with the service. Keeping this in mind when reviewing the suggested language in the instructions for completing section 6(a) and (b) should make your choices obvious.
- The deposit requirement can be met by producing printouts for fifty different properties showing the fields of information collected with regard to properties. This shows your selection of which facts to collect and how those facts have been arranged and coordinated with each other, thus demonstrating the MLS's creativity in creating the MLS compilation.

<http://www.realtor.org:8119/sites/default/files/applications-and-forms/2006/mls-registration-tips-2006.doc>.

72. The MRIS Guidance Paper's recommendations, adopted and endorsed by NAR, that the MLS industry register copyrights covering listing databases as "unpublished" and as "works for hire" compilations by MLS employees, instead of published compilations by third parties, saves the MLS industry and deprives the Copyright Office of millions of dollars per year in registration fees because of the difference in fees between quarterly and daily registration.

73. The MRIS Guidance Paper's recommendation that the MLS forego registration of listing photographs in group registration copyrights and instead claim the photographs as individually covered by the registration of the listing database compilation simultaneously saves the MLS industry, and deprives the Copyright Office, hundreds of millions of dollars annually.

74. Absent the MLSs' huge savings by following MRIS's recommended sham registration Program, the MLS industry could not afford to maintain professed copyright protection in its listing databases and could not use the claims of copyright infringement to control competitors' use of public domain listing data.

**4. MLSs Follow MRIS's Example and NAR's and MRIS's Advice to Fraudulently Register Sham Copyrights in MLS Databases**

75. Title 17 U.S.C. § 506 sets forth the criminal provisions in the Copyright Law. Section 506(e) provides:

False Representation.— Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

76. MRIS's 2005 and 2006 Guidance Papers urged the MLS industry to follow MRIS's example in claiming that the copyrighted "works" in their electronic databases were works for hire by MLS employees. The 2005 Guidance Paper, at 15, provided:

The agreement between the broker and its agents should include a "work for hire" copyright ownership provision assigning and transferring to the broker the ownership of the copyrights in any property listings created by the agent.

77. The April 2006 Guidance Paper, at 6, recommended the "work for hire" statement:

Copying materials originally authored by another does not grant you a copyright since doing so does not meet the originality requirement. The exceptions to this general rule relate to specific circumstances where you obtain rights by operation of law (e.g., works created as "works made for hire") or where copyrights are assigned to you by the rights holder.

See also *id.* at 31-32.

78. NAR's 2006 model form TX unequivocally urged MLSs to adopt the practice of making false work for hire statements to the Copyright Office in their compilation copyright applications for their respective databases.

79. MLSs have since that time consistently made the work for hire statements to the Copyright Office in their applications to register compilation copyright in their electronic databases, uniformly consistent with NAR's recommendation in its model Form TX, and with MRIS's publication and

promotion of the 2005 Guidance Paper and the 2006 Guidance Paper recommending the practice. For example:

- Multiple Listing Service, Inc. of Wisconsin began to make false "work for hire" statements in Registration No. Tx0006455955 issued October 13, 2006. Compare to Registration No. Tx0006437519 issued June 30, 2006, attached as Exhibit D;
- NorthstarMLS began to make the false "work for hire" statements in Registration TX0006452248 issued October 25, 2006. Compare to Registration No. TX0006440511 issued July 5, 2006, attached as Exhibit E;
- Mid-Florida Multiple Listing Service began to make false work for hire statements in Registration No. TX TXu001370027 issued August 20, 2007. Compare to Registration TXu00136295 issued June 11, 2007, attached as Exhibit F;
- Regional Multiple Listing Service, Inc. of Portland, Oregon began to make false work for hire statements in Registration No. TXu001683354 issued February 25, 2008. Compare to Registration No. Txu001334450 issued October 18, 2006, attached as Exhibit G; and
- Arizona Regional Multiple Listing Service, Inc. began to make false work for hire statements in Registration No. Txu001598792 issued November 14, 2007. Compare to Registration No. TXu001366289 issued July 7, 2007, attached as Exhibit H.

80. MRIS's and other MLSs' work for hire statements are false, because MRIS employees, and, on information and belief, employees of other MLSs do not take the photographs of residential real estate properties listed in their respective databases and the MLSs do not specially commission photographers to take such photographs. See 17 U.S.C. § 101 (definition of "work made for hire") *supra* at ¶ 52.

81. MRIS's and other MLSs' work for hire statements are also false, because MRIS employees, and, on information and belief, employees of other MLSs, do not author the text describing residential real estate listed in their

respective databases and the MLSs do not specially commission others to author such text.

82. The purpose of the false work for hire statements is to obviate the requirement to list photographers and authors so as to conceal from the Copyright Office MRIS's admitted and, on information and belief, other MLSs' similar

83. MLS copyright registrations resulting from applications containing false "work for hire" claims or false claims that the MLS is an "employer for hire" are invalid because the Copyright Office would not have registered the copyrights knowing the "work for hire claims" were false.

84. The agent subscriber who uploads the photographs and text to the MLS database does not own the photographs or text associated with the real estate listing, because the real property listing is owned by the owner of the listed property; the only rights granted to an agent under a typical listing agreement are rights to be the exclusive agent for the sale of the property for a specified period of time. To the extent the agent claims ownership in the photographs and text, it is as an agent for the owner of the listed property. Thus, even if the MLS maintained records of the ownership and authors of photographs and text respectively, and records of assignment and ownership of the photographs and text, that recordkeeping would be ineffective to transfer any purported copyright in the photographs and text to the MLS without a written agreement signed by

the owner of the listed property, which MRIS admits \_\_\_\_\_, and, on information and belief, other MLSs also

85. In addition to issuing the false "work for hire" requirement, NAR in May 2006 adopted the following Model Rule:

Ownership of MLS Compilation\* and Copyright

Section 11. By the act of submitting any property listing content to the MLS, the participant represents that he has been authorized to grant and also thereby does grant authority for the MLS to include the property listing content in its copyrighted MLS compilation and also in any statistical report on comparables. Listing content includes, but is not limited to, photographs, images, graphics, audio and video recordings, virtual tours, drawings, descriptions, remarks, narratives, pricing information, and other details or information related to the listed property. (Amended5/06)[.]

Section 11.1. All right, title, and interest in each copy of every multiple listing compilation created and copyrighted by the \_\_\_\_\_ Association of REALTORS® and in the copyrights therein, shall at all times remain vested in the \_\_\_\_\_ Association of REALTORS®.

2013 NAR MLS Handbook, C. Model Rules and Regulations for an MLS Operated as a Committee of an Association of REALTORS, at 69 (footnote omitted).

86. Like the "work for hire" claim in model Form TX, the quoted "granting clause" language from the NAR MLS Handbook is an example of NAR adopting misleading recommendations of the MRIS Guidance Paper as a Rule. See 2005 Guidance Paper at 15-16; 2006 Guidance Paper at 31.

87. MRIS does not own the text in its Database, because Paragraph 4.5 of MRIS's Subscriber License and Access Agreement ("SLAA") disclaims



ownership by MRIS of listing information submitted to its Database. Paragraph 4.5 provides that:

Title to the information supplied by the Subscriber such as listing information shall remain with Subscriber's undersigned Principal Broker Subscriber. All listing information submitted by MRIS® Subscriber to MRIS® for inclusion in the MRIS® System shall be owned by MRIS® Principal Broker Subscriber.

88. On September 27, 2010, at a NAR meeting in Chicago, one session featured a discussion that included:

MLS' [sic] debate the merits of consolidation, revenue streams, *data ownership and their 'true role'* • Real estate brokers struggle to survive on narrow margins • Realtors struggle to earn U.S. median income • *Everybody wants realty data for free* • Innovators want no barriers to innovation • Thought leaders want their views adopted • New business models and technologies continue to disrupt (Freemium) • RETS is not all it could be[.]

(*emphasis added*) Travis Wright, RESO REDUX, at ¶16, (Oct. 4, 2010), <http://www.slideshare.net/maxandriley/reso-redux-by-travis-wright>. Wright is the Executive Director of RESO, the Real Estate Standard Setting Organization ("RESO"), formerly part of NAR.

89. This coded discussion description is a clear signal to drive disruptive innovators out of business with the "true role" of the MLS copyright Program.

90. NAR held its annual meeting in Anaheim, California from November 11 to 14, 2011. On information and belief, the NAR annual meeting featured discussions of the perceived threat AHRN poses to the industry and what the industry could do to shut down AHRN. Further, NAR, at a specific time

yet unknown, advised its members to follow MRIS's recommended sham compilation copyright registration process, whether the facts warranted it or not.

91. Beginning in November, 2011, just before the Anaheim meeting, AHRN began to receive what would become, after the Anaheim meeting, a torrent of cease-and-desist letters from brokers and MLSs. Substantially similar cease and desist letters in form and content, 33 in all, have continued into 2012 and 2013 and uniformly allege copyright infringement and threaten legal action.

92. Eleven (11) additional letters are from brokers objecting to AHRN's referral program; and three (3) letters involve complaints to governmental agencies related to alleged copyright infringement and/or licensing violations.

93. On November 15, 2011, the morning after the Anaheim NAR meeting closed, AHRN received one of these cease-and-desist letters from an attorney for Northstar in Minnesota. Three days later, on November 18, 2011, AHRN received a cease-and-desist letter from MRIS, as well as phone calls and email inquiries from various MLSs and their hired consultants that stated they were in attendance and/or hosted various sessions conducted at the NAR 2011 annual meeting.

94. On December 22, 2011, AHRN was copied on an email from John Mosey of Northstar to his attorney Mitchell Skinner, in which Mosey complained of a sense that after "dropping C&D's [Cease-and-Desist Letters] on the head of the bad fellow," i.e. Jonathan Cardella, AHRN's CEO, nothing had

changed, and he called for following up the "full force and fury" of the cease-and-desist letters with:

- "Collective action;
- "Imparting a "world of hurt" on Cardella;
- Using copyright litigation as the means to do that;
- Sharing the cost of litigation among the MLSs;
- "Connecting the dots between all of the MLSs;"
- "Sending a message that our copyrights are enforceable and we are serious about punishing anyone who doesn't take us seriously."

See Mosey email [D.E. 25-9].

95. On information and belief, MRIS's Complaint filed on March 19, 2012, another filed on April 18, 2012, by Northstar in Minnesota, *Regional Multiple Listing Service of Minnesota, Inc., d/b/a NorthstarMLS v. American Home Realty Network, Inc.*, 0:12cv965 (D. Minn.), and yet another filed on March 4, 2013, by PCA in North Carolina, *Preferred Carolinas Realty, Inc., v. American Home Realty Network, Inc., d/b/a NeighborCity.com*, Civil Action No. 1:13-cv-00181 (M.D.N.C.) are the direct and concerted action discussed and sought by the participants at the Anaheim NAR Annual Meeting.

96. These actions by brokers and multiple listing services immediately followed AHRN's roll-out of updated professional profile pages for 850,000 agents, in March of 2012. Those profiles feature agent performance scores and ranking metrics based on their transaction and listing histories. Redfin, which in 2011 launched a similar feature, internally referred to as "Scouting Report," and other companies that introduced similar real estate agent profile pages were forced to discontinue publication of those pages under pressure from MRIS and other MLSs within days after their respective launches.

97. On or about June 2012, NAR General Counsel Janik:

advised local MLS's to send Cease and Desist letters if data has been taken, and to save any correspondence received or found from them purporting to be speaking on behalf of our members without authorization. We are doing so on behalf of the Berkshire MLS. NAR also asked us to tell our members to be patient while lawsuits are fought on behalf of all...

[http://www.berkshirerealtors.org/archive\\_news\\_event.taf?ID=704#.Ub8toe](http://www.berkshirerealtors.org/archive_news_event.taf?ID=704#.Ub8toe)

vgl51.

**5. NAR's Echo Chamber of Groups, Consultants, Law Firms**

98. The real estate industry in general, and the MLS sector of the industry in particular, has a number of groups, consultants and law firms which broadcast, amplify, and offer the means to achieve and implement the industry's anticompetitive goals, including, but not limited to:

- Real Trends, whose founder Steve Murray is an early and enthusiastic supporter of the MRIS/Charron/Feig/Westermeier promotion of the "Program;"
- The Cove Group, a group of 20 MLS CEOs, to which John Mosey, CEO of Northstar belongs and touts as its "sole purpose is to share ideas and experience with the goal of effecting positive change and helping brokers improve their profitability;"
- Clarity Consulting, real estate information technology consultants, whose founder Gregg Larson has long time ties to NAR.
- Larson/Sobotka PLLC, a law firm, and Larson/Sobotka Business Advisors LLC, a consulting firm, which also, on information and belief, created, own or sponsor the Council of Multiple Listing Services ("CMLS"). CMLS meetings, through presentations of its partners, such as on September 26, 2012 at a "Legal Counsel Seminar in Boston, advance the MRIS/Charron/Feig/Westermeier Program;
- CMLS is described by John Mosey as "where all things MLS are front-and-center and where collective action is marshaled whenever some issue or event affects the industry;"

Industry Visionary, Interview of John Mosey <http://www.frogpond.com/John-Mosey-FP4-196>;

- Brian Larson gave "a crash course in copyright fundamentals and ownership, including what elements are protectable, how to protect elements within a compilation, not just the compilation, registration issues, and copyright registration rule changes. This will also include a discussion of current MLS industry piracy litigation;"

CMLS Legal Counsel Seminar (Sept. 26, 2012) <http://www.cmls2012.com/legal-seminar/>;

- Marc Manos of Nexsen | Pruet, a lawfirm which recently sent a cease and desist letter to AHRN on behalf of Carolina MLS, addressed "business models for MLSs to collaborate with each other in enforcing intellectual property rights, protecting the attorney client privilege when having discussions with other industry participants, communication among competitors and industry participants, and avoiding antitrust claims."

*Id.*

## **6. NAR and MRIS's Group Boycott**

99. Within a year after NAR signed the Consent Decree in November 2008, it promulgated rules in November 2009 that defined web-based brokers with alternative business models out of the Consent Decree's protections and requirements, by prohibiting alternative brokerage models that were less than full service by ruling that to qualify for membership, a brokerage and broker must actively endeavor to cooperate to list properties:

Mere possession of a broker's license is not sufficient to qualify for MLS participation. Rather, the requirement that an individual or firm offers or accepts cooperation and compensation means that the participant actively endeavors during the operation of its real estate business to list real property of the type listed on the MLS and/or to accept offers of cooperation and compensation made by listing brokers or agents in the MLS. "Actively" means on a

continual and ongoing basis during the operation of the participant's real estate business. The "actively" requirement is not intended to preclude MLS participation by a participant or potential participant that operates a real estate business on apart-time, seasonal, or similarly time-limited basis or that has its business interrupted by periods of relative inactivity occasioned by market conditions. Similarly, the requirement is not intended to deny MLS participation to a participant or potential participant who has not achieved a minimum number of transactions despite good faith efforts. Nor is it intended to permit an MLS to deny participation based on the level of service provided by the participant or potential participant as long as the level of service satisfies state law. (Adopted 11/08)

NAR 2013 Handbook on Multiple Listing Policy ("NAR MLS Handbook"), at 88.

100. NAR's Handbook next pays lip service to complying with the requirement not to exclude Virtual Office Websites ("VOW"), as if VOW's were necessarily limited to the traditional brokerage model:

The key is that the participant or potential participant actively endeavors to make or accept offers of cooperation and compensation with respect to properties of the type that are listed on the MLS in which participation is sought. This requirement does not permit an MLS to deny participation to a participant or potential participant that operates a "Virtual Office Website" (VOW) (including a VOW that the participant uses to refer customers to other participants) if the participant or potential participant actively endeavors to make or accept offers of cooperation and compensation. An MLS may evaluate whether a participant or potential participant actively endeavors during the operation of its real estate business to offer or accept cooperation and compensation only if the MLS has a reasonable basis to believe that the participant or potential participant is in fact not doing so. The membership requirement shall be applied in a nondiscriminatory manner to all participants and potential participants. (Adopted 11/08)

*Id.*

101. The language in the Handbook quoted above was attached as Exhibit B to the Consent Decree, after the fact, without opportunity for public comment under the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h),

without notice and discussion of the Exhibit B as an Attachment in the Final Judgment, Stipulation, and Competitive Impact Statement, see 73 Fed. Reg., (No. 158), 47,613 (August 14, 2008); without notice to the public, *id.*; and without identification or discussion in the United States' Motion for Entry of the Amended Proposed Final Judgment Proposed and Memorandum in Support, see *U.S. v. NAR*, Case 1:05-cv-05140, D.E. 243 (N.D. Ill., November, 7, 2008) among the "Minor Amendments to the Proposed Final Judgment." *Id.* at 2-4.

102. Either Exhibit B is not part of the Consent Decree or is nullified by the following language in the Consent Decree:

Notwithstanding any of the above provisions, and subject to Section IX of this Final Judgment, nothing in this Final Judgment shall prohibit NAR from adopting, maintaining, or enforcing Rules that are generally applicable on their face and that do not, in their application, unreasonably restrict any method of delivery of Listing Information to Customers.

*Id.* D.E. 243-2 at 9-10.

103. In response to the sudden flood of cease-and-desist letters after the Anaheim NAR Annual Meeting, AHRN responded to each letter with an offer to negotiate a license for use of the listing data from the MLS. In each case, AHRN's overture to license was rebuffed out of hand without negotiations. Each rejection used the same format and essentially the same language.

104. In the instances in which AHRN was able to reach agreement or had negotiations with real estate brokers over referral agreements with AHRN and AHRN's use of listings information, the brokers repudiated such agreements starting in January 2012. Upon information and belief, this repudiation was in response to pressure from the MLSs.

105. Each letter to AHRN from the CEO, Vice President or general counsel of a broker states in remarkably similar, and in most cases, identical language essentially that:

It has come to my attention that American Home Realty Network, Inc. d/b/a NeighborCity ("NeighborCity") has been soliciting or may intend in the future to solicit agents of \_\_\_\_\_ to ask them to execute referral agreements that purport to bind \_\_\_\_\_.

Please be advised that \_\_\_\_\_ has no interest in entering into any referral or other agreements with NeighborCity, and \_\_\_\_\_....

Accordingly, to the extent any agent has executed an agreement with NeighborCity that purports to bind \_\_\_\_\_ that agreement is void and of no legal effect. Alternatively, \_\_\_\_\_ hereby terminates any such agreement.

106. AHRN has received nearly identical "it-has-come-to-my-attention" broker letters intending to stop solicitations of referral agreements by AHRN and repudiating referral agreements with AHRN from brokers in such diverse locations as Louisville, Kentucky; Fort Mitchell, Kentucky; Winston Salem, North Carolina; Edina, Minnesota; Lancaster, Pennsylvania; Severna Park, Maryland; Fallbrook, California; Davenport, Iowa; Emeryville, California; Leawood, Kentucky; Suwanee, Georgia; Danville, Illinois; and Troy, North Carolina.

107. The NAR held its Midyear Meeting in Washington D.C. between May 14 and 19, 2012. On information and belief, NAR's Board voted on Saturday, May 19, 2012 to fund the instant MRIS lawsuit and Minnesota Northstar lawsuit against AHRN.

108. NAR's vote to fund MRIS's, Northstar's and, on information and belief, PCR's, litigation against AHRN constitutes concerted, predatory action



against AHRN, which, if successful, will deprive consumers of valuable and independent agent information and harm consumers of referral services.

109. On information and belief, the cease-and-desist letters, as well as the refusal and repudiation letters related to broker or agent referrals were coordinated by discussions and agreements among NAR, MLSs and brokers.

110. At its May 2012 Mid-Year Meeting in Washington, D.C., the NAR Board of Directors approved new rules to further exclude competitors like AHRN from using MLS data on its websites and in its applications:

[A]pproved a set of comprehensive amendments to NAR's Internet Data Exchange (IDX) policy and MLS rules to clarify that "participant websites" are those in which MLS participants have actual and apparent control of the sites. ... Control means participants can add, delete, modify, or update their information, and a reasonable consumer would recognize the information as the participant's.

Separately, the board acknowledged the growing complexity of MLS technology issues by creating an MLS Technology and Emerging Issues Subcommittee, which will anticipate and analyze MLS technology issues.

Approved \$161,667 in legal assistance for seven cases, involving ... 4) challenging misappropriation of MLS data by a third-party Web site....

See, <http://www.realtor.org/governance/board-of-directors/report-from-the-may-19-board-of-directors-meeting>.

111. According to the Berkshire MLS's Legal Update from NAR 2012 mid-year meeting, NAR General Counsel:

"[NAR General Counsel] Lauri [Laurene K.] Janik advised local MLSs "to send Cease and Desist letters if data has been taken, and to save any correspondence received or found from them purporting to be speaking on behalf of our members without authorization. We are doing so on behalf of the Berkshire MLS. NAR also asked us to tell our members to be patient while lawsuits

are fought on behalf of all...[sic]. I also spoke with Realtor.com and will file a request that they place special tracking on our data to stop the theft if found."

Sandy Carroll, Legal Update from NAR Midyear Meeting, Report of Recent Actions by Board and NAR Report (Jun 6, 2012) [http://www.berkshirerealtors.org/archive\\_news\\_event.taf?ID=704](http://www.berkshirerealtors.org/archive_news_event.taf?ID=704).

112. In the Spring of 2013, with NAR now a direct competitor of AHRN in the nationwide market for real estate agent ratings, on information and belief, NAR has encouraged regional boards of realtors to step up their efforts (1) to keep their member agents from entering into referral agreements with AHRN; to breach or repudiate referral agreements agents have entered with AHRN; and (3) to pressure agents into demanding that their names be stricken from AHRN's list of potential referral agents.

113. On May 2, 2013, Petra Drouin, an agent with Century21 Action Realtors of Minot, North Dakota, responded to an offer of a referral by AHRN that: "we have been advised by are [sic] MLS to not accept your referrals so I will be declining this and any future referrals."

114. On or about May 2, 2013, Kent Meister, an agent with Keller Williams Realty of Coon Rapids, Minnesota, informed an AHRN customer service representative that he wanted his name removed from the AHRN referral list because he was contacted by his local board of realtors, presumably referring to the owner of NorthstarMLS, and the board warned him to request removal from the AHRN list, citing Northstar's Minnesota lawsuit against AHRN.

115. On or about May 30, 2013, Sandi Lamar, an agent with broker Howard Hanna Real Estate Services in Upper St. Clair, Pennsylvania, advised

an AHRN customer service representative that, although she would like to enter a referral agreement with AHRN, she had been informed by the brokerage's legal department that outstanding copyright issues prohibit entry of such an agreement because it would give AHRN access to the brokerage's proprietary information.

116. On or about May 30, 2013, Paulette Carroll, of Keller Williams Classic Realty in Clear Lake, Minnesota refused a customer referral from AHRN and advised an AHRN customer service representative that NAR had directly advised her brokerage not to work with AHRN.

117. NAR maintains a Rule requiring its MLS and broker members to comply with notice and submit to enforcement by NAR:

In states other than California, Georgia, Alabama, and Florida, whenever an association is confronted with a request or demand by an individual for access to the association's multiple listing service without membership in the association, member associations are advised that the association should immediately advise both the state association and the Member Policy Department of the National Association, and the recommended procedures will be provided to the member association with any other pertinent information or assistance. It is important that the state association and National Association be advised immediately if such request or demand for access to the association MLS as described is received.

NAR MLS Handbook, at 10.

118. Defendants have engaged in joint efforts to disadvantage competitors, including AHRN and Redfin, by directly denying or persuading or coercing suppliers or customers to deny relations the competitors need to compete. Such group boycotts enable observers with a rudimentary understanding of economics to conclude that the arrangements in question would have an anticompetitive effect on customers and markets. *N.C. State Bd. of*

*Dental Examiners v. FTC*, 2013, No. 12-1172, U.S. App. LEXIS 11006, at 34 (4<sup>th</sup> Cir., May 31, 2013).

119. Given that MRIS's SLAA acknowledges that it does not own the information supplied by the Subscriber, it cannot ascribe its ownership to the Principal Broker Subscriber.

120. Accordingly, MRIS, and, on information and belief, other MLSs, cannot comply with the statutory requirement of ownership of a valid copyright to photographs and text in their respective databases and cannot establish their infringement. *Feist, supra*, 499 U.S. at 361 (To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.)

121. MRIS and other MLSs do not select photographs for their respective databases of real estate listings. Photographs are selected by the owner of the listed property and by the listing real estate agent.

122. MRIS and other MLSs do not select the text of real estate listings for their respective real estate listings. The text is "selected" by the existing features of the property listed for sale and to a lesser extent, by the seller listing the property. The listing agent does not select the text of real estate listings because the listing broker and listing agents are contractually obligated to MRIS and, on information and belief, to other MLSs to enter their entire inventory of real estate listed for sale into the MLS listing database.

**7. Sham Litigation**

123. Each year, NAR holds an Annual Meeting. In 2011, it was held in Anaheim, California in November and a Mid-Year Meeting was also held in Washington, D.C., at which NAR's member MLSs and brokers convened to discuss matters of industry concern. At the November 2011 Annual Meeting, NAR led discussions about AHRN, and at the May 2012 Mid-Year Meeting in Washington, DC, the litigation by MRIS and Northstar against AHRN were discussed by the NAR Board.

124. Defendants MRIS, NAR and other MLS's have brought and have conspired to bring and threaten to bring further sham litigation against AHRN and others by seeking to enforce copyrights obtained by making false "work for hire" statements, knowing the that the statements are false and that the registered copyrights are invalid for that, and other reasons.

125. Defendants MRIS, NAR and other MLS's have brought and have conspired to bring or threatened to bring sham litigation against AHRN and others by seeking to enforce copyrights knowing that they could not prove ownership of the copyrights they sought to enforce because

cannot prove ownership of text in their respective real estate listing databases.

126. Defendants MRIS, NAR and other MLSs have brought and have conspired to bring or threatened to bring sham litigation against AHRN and others by seeking to enforce compilation copyrights knowing that MRIS and

other MLSs did not "select" either the photographs or listing text for inclusion in their respective databases.

127. Defendants MRIS, NAR and other MLS's have brought and have conspired to bring or threatened to bring sham litigation against AHRN and others by seeking to enforce compilation copyrights knowing that MRIS and other MLSs did not "coordinate" or "arrange" their respective compilation databases because the "coordination" and "arrangement" of MLS databases is dictated by industry standards; is performed by off-the-shelf database software, such as CoreLogic and other third party software; and/or is dictated by the IDX, RETS and VOW communications protocols. Coordination and arrangement dictated by such industry standards are not copyrightable. *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1341 (5th Cir. 1994).

128. On December 17, 2012, AHRN served its First Set of Interrogatories on MRIS which included Interrogatory 11 as follows:

For each of the photographic images in the registered MRIS Database that MRIS claims AHRN has infringed through its NeighborCity.com website, identify the photographer, date of creation, any copyright assignment records and/or proof of ownership by MRIS of the respective photographic image.

129. On April 18, 2013, MRIS served its unverified Revised and Supplemental Objections and Responses to AHRN's First Set of Interrogatories and First Set of Requests for Production of Documents and Things ("Supplemental Responses") on AHRN. On May 21, 2013, MRIS again served the Supplemental Responses, this time with the verification signature of MRIS's General Counsel Erik M. Feig, dated April 18, 2013. A copy of the relevant

excerpts of the Supplemental Responses is attached as Exhibit I. In those Supplemental Responses, MRIS admits the following:

130. MRIS's, Northstar's, and other MLSs' compilation copyrights obtained pursuant to The Program promoted by MRIS and NAR are invalid because they violate 17 U.S.C. § 103(b), *Feist* and Circular 65.

131. On March 4, 2013, Preferred Carolinas Realty, Inc. ("Preferred Carolinas"), a subsidiary of American Home Services, Inc. brought another sham copyright infringement suit against AHRN in the Middle District of North Carolina, Civil Action1: 13-cv-00181-TDS-LPA, notwithstanding that: (a) AHRN had referral agreements with Preferred Carolinas' brokers permitting the use of the allegedly copyrighted photographs and (b) it was Carolina Multiple Listing Services, Inc. ("CarolinaMLS") that sent a cease-and-desist letter to AHRN. On information and belief, Preferred Carolinas sued AHRN at CarolinaMLS's request and with the promise of NAR funding.

132. On information and belief, the MRIS, Northstar and other MLS listing databases are based on third party-created software layouts in templates of fields and field descriptors into which brokers or their assistants – often by selecting from drop-down lists - insert individual numbers, words and short phrases comprising individual unadorned facts they have obtained from prospective sellers of residential real estate. Indeed, MRIS and Northstar, and as much as half the real estate industry, use the same MLS Matrix database

software by CoreLogic, see, <http://www.northstarmls.com/content/northstarmls-matrix>; and see also, <http://www.mris.com/mris-products/core-products-services/matrix/>.

133. According to CoreLogic, "Matrix is an enterprise-class MLS system that provides real estate brokers and agents with a flexible, high-performance platform for managing real estate listings."

The professional real estate tools that make up the MLS are Matrix and Keystone. Keystone is the tool used to enter listing information, Matrix is where you will search, save, print and email listings.

MRIS Keystone User Manual, at p.3,

[www.mris.com/\\_res/downloads/KeystoneUserManual.pdf](http://www.mris.com/_res/downloads/KeystoneUserManual.pdf).

134. The selection, coordination and arrangement of data in MLS listing databases are standard in the MLS industry, dating back to paper MLS book days. The collection and arrangement of the material in MLS listing databases is only a mechanical task of data entry, representing no original authorship, and merely transfers data from such sellers that were previously maintained in hard copy to computer storage.

135. If authorship is involved, it would be involve the creativity of CoreLogic not the MLSs. CoreLogic's 10K filed with the Securities and Exchange Commission for the year ending December 31, 2011, claims that it has 27 issued patents, 67 pending patent applications and 115 copyrights. 10K at 11.

136. The MLS industry previously referred to the listing information contained in hard copy listing books as "listing data." This is the data that the



MRIS Guidance Paper's Project recommends referring to as "listing content," a recommendation that MLSs have adopted in their dealings with the Copyright Office. The selection, coordination and arrangement of the compilations of listing data do not meet the minimum Constitutional level of creativity required for the registration of compilation copyrights.

137. "CoreLogic enters licensing agreements with its customers granting a license to use [its] products and services, including its software and databases." *Id.* at 12. The presumably nonexclusive licenses would necessarily include CoreLogic's software patents and copyrights, whether registered or not, covering the Matrix database software's coordination and arrangement of data. MRIS cannot claim compilation copyrights in the compilation of data inserted into preset data fields created by others.

138. Listing data in the MRIS, Northstar and other MLS listing databases include layouts for fields in a process that includes entry of data into webpage or software data fields or containers into which brokers or their assistants insert standard photos of generic front views of houses and key rooms, such as living rooms, kitchens and bedroom(s), usually taken by photographers unidentified in compilation copyright registrations. See, Northstar MLS, Core Services, <http://www.northstarmls.com/content/core-services> ("Add/Edit System-Click the Add/Edit tab in Matrix to add new listings, edit current listings, change a listing's status, add photos....").

139. The photographs in MLS listing databases are not necessarily selected, arranged or coordinated in any way that is unique or creative and their

addition to other listing data does not change the lack of copyrightability of the compilations in the MLSs' listing databases. Indeed, the exterior front photo of any property is required for each listing and is typically has to be in the first position in the order of photos, by default in most MLS systems.

140. MRIS has not attached the listings database, or the submissions of portions thereof to the Copyright Office, to its complaint or motion for preliminary injunctions.

141. MRIS has not registered copyrights covering either the individual textual listing elements or photographs in its listing database. Northstar has not registered individual textual listing elements in its listing database and has registered only 50 sample photographs out of thousands of photographs in its listing database.

142. Nevertheless, MRIS' and Northstar's copyright infringement complaints against AHRN, and other MLS's cease-and-desist letters to AHRN, bootstrap the presumption of validity of the compilation copyright of the database as a whole, to attach uncopyrightable facts in their listing databases. MLSs falsely maintain that the underlying facts are copyrighted merely because their compilation copyright registrations are for databases they falsely claim are unpublished works for hire.

143. Indeed, as to MRIS, it does not even own or validly "license," let alone register, copyrights in any of the listing data. MRIS's Subscription Agreement provides that:

Title to the information supplied by the Subscriber such as listing information shall remain with Subscriber's undersigned Principal

Broker Subscriber. All listing information submitted by MRIS® Subscriber to MRIS® for inclusion in the MRIS® System shall be owned by MRIS® Principal Broker Subscriber.

MRIS Subscriber and Access Agreement [D.E. 29-1] at ¶ 4.5.

144. MRIS also claims copyrights in photographs of listed residential real estate included in its database and displayed on its homesdatabase.com web site of real estate listings. MRIS's Terms of Use for uploading photographs purports that the act of hitting the "enter" key on a computer to upload the photographs to MRIS's database for display on its website assigns the unregistered photographs to MRIS. This does not meet the standard of 17 U.S.C. §204(a), which requires a signed writing from the assignor of a copyright. MRIS admits

See MRIS Answer to AHRN

Interrogatory No. 11, Exhibit I.

145. On information and belief, NAR has conducted no, or insufficient, due diligence on the merits of MRIS's copyright claims to fund such litigation. Nonetheless, NAR's payment or offer of payment for or financial contribution to MRIS and Northstar's litigation is an endorsement by NAR of the merits of their respective claims.

146. In short, MRIS and on information and belief, other MLSs' compilation copyright registrations covering automated electronic databases contain constituent elements that are not selected by MLSs, but by third parties, and are arranged and coordinated by third parties and/or are dictated by industry

standards; are not works for hire by MLS employees or commissioned by MLSs, who have no record of assignments - all in accordance with NAR Rules.

147. Defendants and Does Nos. 1-25 have conspired to adopt the MRIS Guidance Paper's Program by issuing NAR Rules to the same effect to register hundreds of thousands of invalid compilation copyrights; threaten to and actually enforce such invalid compilation copyrights; threaten to and actually seek enforcement of individually uncopyrightable and unregistrable listing data and generic photographs in sham litigation against AHRN to raise its barriers to entry to the market for residential real estate broker services in the United States. Defendants have used the threats of such sham litigation, and/or withholding of listing data under the guise of compilation copyright registrations, against others, including, but not limited to, Redfin, Trulia, AgentAquarium.com and others who have withdrawn from the market real estate broker referral services, particularly services that evaluate and rank real estate brokers or publish buy-side agent recommendations next to listing information. In fact, while still in business, on information and belief, the Houston Association of Realtors has also been pressured into dropping its agent rating system. See, Andrea V. Brambila, [Google Ventures backing agent matching site](http://www.inman.com/news/2012/11/14/google-ventures-backing-agent-matching-site), InmanNEWS (Nov. 14, 2012), <http://www.inman.com/news/2012/11/14/google-ventures-backing-agent-matching-site>.

148. Litigation and threats of litigation based on such copyright registrations in accordance with NAR Rules are a sham.

## 8. NAR's Anticompetitive Rules

149. NAR has adopted policies and rules that adopt the anticompetitive premise and goals of the MRIS Guidance Paper's "Program." Such rules were designed to make it more difficult for MLSs to share listing data with third parties.

In November 2009, NAR adopted the revision to its MLS Policy Statement 7.58, which, among other things, prevents brokers from using their MLSs' IDX data feeds "for any purpose other than display on their websites." The revision provided that the policy "does not require Participants to prevent indexing of IDX listings by recognized search engines." The revision allowed Google and its competitors (the "recognized search engines") to index brokers' IDX sites. It even permitted brokers to encourage search engines to do so. NAR staff later clarified "recognized search engines" by saying that it means sites that consumers would recognize as general search engines.

7DS Associates, On Franchise IDX, Industry Rules, and Complaints (May 20, 2011), <http://7dsassociates.com/2011/05/franchise-idx-industry-rules-complaints/>

150. A February 9, 2010, post on Larson/Sobotka PLLC and Larson/Sobotka Business Advisors LLC's weblog cites another such NAR rule in NAR's Statement of MLS Policy 7.85, and appears similarly intended:

Use of listings and listing information by MLSs for purposes other than the defined purposes of MLS requires participants' consent. Such consent cannot be required as a condition of obtaining or maintaining MLS participatory rights. MLSs may presume such consent provided that listing brokers are given adequate prior notice of any intended use unrelated to the defined purpose of MLS, and given the opportunity to affirmatively withhold consent for that use.

Brian N. Larson, Brokers' rights to control uses of their data and the RPR license agreement, MLS Tesseract, (Feb. 9, 2010),

<http://www.mlstesseract.com/search/label/Listing%20syndication>; and See NAR Handbook on Multiple Listing Policy [HMLP], 2010 ed., at 28.

151. In August 2011, NAR issued a report of its Internet Data Exchange Presidential Advisory Group ("IDX PAG") to review several IDX-related issues and concerns, and to develop recommendations for consideration by the NAR Leadership Team which admitted the anticompetitive nature of Policy 7.85. It offered the following as the rule's rationale:

The PAG felt that allowing the "franchisor display" provision to remain in place would inevitably require further expansion of IDX display rights to like organizations (e.g. real estate brokerage referral services networks, regional brokerage referral services firms) and potentially others whose interests are not aligned with those of the REALTOR organization, MLSs, or MLS participants, and over whom MLSs would have little or no control with respect to unanticipated and unauthorized repurposing of participants' listings.

Report and Recommendations of the Internet Data Exchange Presidential Advisory Group (August 2011), <http://www.councilofmls.com/wp-content/uploads/2011/10/IDX-PAGReport-cdn-11-v-2-4.pdf>, See Exhibit B to First Amended Complaint [D.E. 68-2].

152. NAR offers informal interpretations of its rules according to Robert Hahn, Managing Partner of 7DS Associates and a frequent speaker at industry events, including Inman Connect, RETechSouth, and NAR Annual Convention;

I received a couple of emails from sources within the MLS industry that came from NAR's General Counsel's office.

NAR's interpretation is that the new "opt-in" rule should be interpreted in light of MLS Policy Statement 7.85, which requires participant consent "for any use of their listings that are not part of the defined purpose of MLS". The practical effect is that the franchisors are treated like any third party publisher site, such as Zillow. Under this interpretation, the MLS must provide a franchise-by-franchise opt-in methodology, and cannot go with the blanket all-franchises opt-in.

The email goes on to make clear that NAR does not expect the MLSs to have to make extensive changes to their systems or undertake expensive modifications. The belief within NAR is that very few brokers will actually opt-in....

Interestingly enough, the email makes clear that the franchisor must get permission not only from all of the brokers in order to display their listings, but must get permission from a local franchisee who is a participant of the MLS. So in theory, if there is only one Century 21 broker in a given MLS, that broker can block Century 21 corporate from putting any IDX listings on its website, *even if every other broker has opted-in*. That makes the burden for the franchisors higher than if they were just a third-party publisher.

7DS Associates, *supra*.

153. The 7DS Associates web posting concludes on its own that anticompetitive intent is the correct interpretation of NAR's motive behind the NAR rules.

The NAR emails are revealing in one respect. It appears that the understanding of the NAR staff, which includes the General Counsel's office, is that the Board of Directors vote was motivated in huge part by the desire of brokers to "take back control" of listings. I think this is right, at least in part, but only in part.

I think the real motivation wasn't simply to "take back control" of listings, but to prevent *further loss of control* over listings.

*Id.* (emphasis added).

#### **9. NAR Direct Competition With AHRN at Below Cost Pricing**

154. In March 2013, NAR announced its entry into the real estate agent evaluation and ranking market in direct competition AHRN through a NAR subsidiary, the Center for Specialized Realtor Education under an agreement with Quality Service Certification Inc. (QSC"), NAR has established pilot projects with Realtor® associations in Illinois; Minnesota, including the two owners of NorthstarMLS; California; Colorado; and Georgia. The pilot projects are further

evidence of predation by the NAR-led conspiracy to drive AHRN out of the agent evaluation and ranking market.

155. First, NAR's rating service is being offered free of charge, in return for an email address of the customer. Free of charge is evidence of below cost, predatory pricing to drive AHRN out of the market. NAR already seeks to deprive AHRN of a key in-put required for offering its service but NAR's rating undercuts AHRN by a free service.

156. Second, NAR's agent rating service was not announced by anyone from marketing or by a new product manager, but by Laurene Janik, NAR's General Counsel. Janik is in charge of, among other things, MLS policy, and has spearheaded NAR's solicitation of cease and desist letters from NAR's MLS and broker members and led the charge to prohibit MLSs and their broker members to refrain from entering into, and repudiating executed, referral agreements with AHRN. Thus, Janik, in addition to enforcing the group boycott, now engages in predatory pricing, not the traditional role of general counsel.

157. Third, in addition to the predatory pricing of the rating service, it is a ruse for NAR and its members to suppress legitimate evaluation and ranking of agents for the benefit of consumers. Rather than offer unbiased algorithm-based evaluation and ranking of agents as AHRN does, NAR's ranking service depends on QSC sending customer satisfaction surveys to clients of participating brokerages. QSC Chief Operating Officer Kevin Romito acknowledges that: "... there's a big fear of ratings in our industry. It's the Wild West out there — NAR



wants to help Realtors own the process." <http://www.inman.com/2013/03/12/nar-backing-test-agent-rating-surveys/#>.

## **10. The Conspiracy**

158. The contracts, combination or conspiracy of NAR and its MLS members against non-traditional real estate brokers began on May 17, 2003 when NAR's Board of Directors voted to adopt a policy governing use of MLS data in connection with Internet brokerage services offered by non-traditional web-base real estate brokers; mandated its member boards to implement the NAR policy by January 1, 2006; and, as of September 8, 2005, 200 member boards had implemented the policy and received NAR approval of their implementing rules. DOJ Complaint ¶30.

159. On or about March 2, 2005, while the Justice Department investigation leading to the filing of its Sherman Act Section 1 complaint against NAR on September 8, 2005, was pending, MRIS issued its Guidance Paper providing a roadmap for fraudulently registering copyrights and inviting the MLS industry to join a conspiracy to register and enforce the fraudulently registered copyrights.

160. In the Spring of 2006, MRIS's CEO Charron, a member of NAR's MLS Policy Committee, and MRIS General Counsel Erik Feig reissued a revised Guidance Paper making clear that it was targeting "'new' and 'improved' alternative business models" that threatened to change the real estate industry. 2006 Guidance Paper at 1.

161. Also in the Spring of 2006, NAR adopted and endorsed the proposals in MRIS's 2005 Guidance Paper by issuing its Model Registration Application. On information and belief, Senior Vice President and General Counsel, Laurene K. Janik, who oversaw the NAR MLS Policy Committee was instrumental in NAR's adoption of the Guidance Paper by its publication of the Model Copyright Application for registration. Janik is "responsible ... for multiple listing ... matters." <http://www.realtor.org/svprequest.nsf/>.

162. The MLS industry adopted MRIS's and NAR's fraudulent copyright applications, including NorthstarMLS and MRIS, which, in spite of having first proposed the fraudulent copyright "Program," waited until NAR endorsed the Program and several other MLS implemented it to implement the Program itself.

163. NAR in the Spring of 2006, thus initiated new phase of the conspiracy while it was being sued by the Department of Justice for its previous MLS policy. The object of the conspiracy was to put in place the copyright Program to keep new business model participants in the real estate industry from changing the industry from the traditional brick-and-mortar business model of real estate brokers and using fraudulently obtained copyrights as the tool to block any change.

164. In November 2009, after NAR entered the Consent Decree with the Department of Justice, NAR issued a new rule prohibiting the use of IDX data feeds for any use other than display on the recipients' website.

165. On October 4, 2011, Redfin discontinued its "Scouting Report" service, an agent evaluation and ranking service on its website due to MLSs' and

other "data providers" prohibiting Redfin from accessing their data, including MRIS's market in Washington, D.C.; Sacramento, California; East Bay area of San Francisco; and Westchester County, New York; among others. [http://blog.redfin.com/blog/2011/10/scouting\\_report\\_the\\_morning\\_after.html](http://blog.redfin.com/blog/2011/10/scouting_report_the_morning_after.html); <http://www.redfin.com/real-estate-agents/search-scouting-report>.

166. From November 11 to 14, 2011, NAR and its members met in Anaheim, California for NAR's Annual Meeting.

167. On or about March 12, 2013 NAR General Counsel Janik announced NAR's free of charge agent-rating service.

#### **11. Anti-Competitive Effects**

168. NAR has market power in the nationwide market for Multiple Listing Services; agent evaluation and ranking services and agent lead referrals. MLSs also have market power in their local service areas. The vast majority of brokers believe that they must participate in the MLS operating in their local market in order to adequately serve their customers and compete with other brokers. See, e.g., DOJ Complaint [D.E. 25-3] at 7. As a result, few brokers would withdraw from MLS participation, even if the fees or other costs associated with that participation substantially increased.

169. By virtue of industry-wide participation and control over a critically important input, MLS joint ventures have market power in every relevant real estate market.

170. Viewed as a whole, Defendants' coordinated: (a) fraudulent copyright registrations; (b) unfounded cease-and-desist letters to AHRN, (c)

refusal-to-deal letters to AHRN; (d) repudiation-of-referral agreement letters to AHRN and, on information and belief, to Redfin; (e) sham lawsuits against AHRN; (f) agreement or offer to pay for or contribute to the costs of litigation against AHRN by MLSs and real estate brokers; (g) success in driving Redfin out of the real estate agent evaluation and ranking services market; and (h) predatory pricing by NAR, which was intended to and did have anti-competitive effects on consumers in the market for real estate brokerage referral services and on AHRN in that market. Anti-competitive effects include the elimination of price competition and price maintenance on brokerage referral services above market levels nationwide, impeding and blocking market entry by AHRN and other innovative providers of broker analyses and impeding and blocking innovation in real estate brokerage referral services.

171. The contracts, combination and conspiracy by NAR, MRIS and other MLSs have had and will continue to have anticompetitive effects in the relevant markets, including:

- a. suppressing technological innovation;
- b. reducing competition on price and quality;
- c. restricting efficient cooperation among brokers;
- d. making express or tacit collusion more likely; and
- e. raising barriers to entry.

See DOJ Complaint ¶ 45.

172. Lured by lucrative commissions generated by sales of high priced properties in many different MLS service areas, innovative brokerages offering competitively significant alternatives to traditional methods emerged. If NAR, MRIS and Doe Defendants hadn't restricted innovative brokerages, such as

Redfin, AHRN and others from competing in MLS Service Area, these brokerages would have provided customers of real-estate-brokerage services with competitive options and, in the process, placed downward pressure on the prices charged by defendants, who offer traditional methods of providing real-estate-brokerage services.

173. Defendants' conduct is the type that antitrust laws were intended to prevent because it denied consumers the benefits of innovation in product development and lower prices. See, R.W. Hahn, R.E. Litan, J. Gurman, *Bringing More Competition to Real Estate Brokerage*, Real Estate Law Journal, Summer 2006 at 86, 89-90.

174. This contract, combination, or conspiracy is not reasonably necessary to accomplish any pro-competitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

175. Defendants' activities, and the violations alleged in this Second Amended Counterclaim, affect home buyers and sellers located throughout the United States by suppressing competition for brokerage services and price competition—by suppressing the diversity of brokers providing services, and therefore competition for brokerage services, that reduction in competition has the direct effect of suppressing price competition in real estate sales commissions.

## **12. False and Misleading Statements**

176. MRIS, with the active support, encouragement, endorsement and financial assistance of NAR has made and is making numerous false and

misleading statements in its Guidance Paper, in presentations of its Guidance Paper, in other presentations, on its website and elsewhere, including but not limited to, the following:

- (a) Stating the MRIS Guidance Paper's copyright "Program" is in accordance with the law;
- (b) Stating that MLSs are employers for hire for text, photographs in MLS databases, and the databases themselves; and that text, photographs and compilations are "works for hire;"
- (c) Stating the validity of MRIS's compilation copyrights registered under the strategy and process of MRIS's Guidance Paper's "Program," when in actuality any copyright would be the property of CoreLogic, Inc.;
- (d) Stating the validity of MRIS's claims of unregistered individual copyrights covering textual elements and photographs in the CoreLogic database;
- (e) Stating MRIS acquires valid copyrights to photos and real estate listings from its members through a "click wrap," "Terms of Use" ("ToU") assignment by the member's or assistant's uploading of photos into MRIS's database for display on its website;
- (f) Including false and misleading copyright notices on photos on MRIS's homesdatabase.com website and third party websites to which it syndicates the listing data;
- (g) Falsely and misleadingly informing its members that uncopyrightable real estate listing information can be treated as copyrightable musical lyrics by referring to real estate listing data as "content."

177. NAR has republished or encouraged its members to republish MRIS's false and misleading statements on its web site. In presentations to NAR's MLS members and their broker members, and based on NAR's endorsement of MRIS's false and misleading statements, NAR has itself, and has encouraged others to refer to AHRN as "stealing" information, as a "thief" or of "theft," as a "pirate," "pirating" or of "piracy." E.g., NAR-member Berkshire County Board of Realtors' website accused Neighbor City of "taken [sic] our MLS

listing data without license, authorization or agreement (we call that stolen in these parts) and are rating agents.... Termed: Data pirates of the year." Carroll, *supra*.

178. MRIS's and NAR's false and misleading statements and misrepresentations are material because they are likely to influence other MLSs, including Northstar and others, and their member brokers not to deal with AHRN and refuse to license their listing data and photographs to AHRN and others, including MLS's, their broker members and their actual and potential competitors.

179. MRIS's and NAR's false and misleading statements and misrepresentations have actually deceived a substantial portion of their MLS affiliates, their broker members and their actual and potential competitor audiences.

180. AHRN and other actual and potential competitors have been and are likely to be further injured by MRIS's and NAR's false and misleading statements and misrepresentations. MRIS's and NAR's activities interfere directly with AHRN's ability to make referrals and to collect payment for the referrals it makes to NAR member brokers and agents.

181. MRIS and NAR have placed their false and misleading statements and misrepresentations in interstate commerce by publishing them on their web sites, sending emails to their members, repeating the false and misleading statements and misrepresentations at MLS and broker conferences around the country, which in turn have resulted in further publications of MRIS's and NAR's

false and misleading statements and misrepresentations by the industry echo chamber of consulting firms and law firms.

182. AHRN's NeighborCity.com web site has seen substantial decreases in traffic; decreases in acceptance of referrals by brokers and agents, and increases in the repudiations of existing referral agreements and obligations to pay AHRN fees due under those agreements in markets where MRIS's and NAR's false and misleading statements and misrepresentations have had their greatest prominence.

183. MRIS's and NAR's false and misleading statements and misrepresentations have lessened AHRN's goodwill associated with its NeighborCity.com web site, its trademark and services.

**F. CAUSES OF ACTION**

Counterclaimant AHRN asserts the following claims:

**COUNT I**

**Maryland Unfair Competition**  
(Against NAR and MRIS)

184. Counterclaimant AHRN hereby incorporates paragraphs 1-183 by reference as if fully set forth herein.

185. NAR's and MRIS's false statements, group boycott, and litigation activities constitute unfair competition.

186. NAR's and MRIS's unfair competition includes fraud, deceit and trickery.

187. NAR's and MRIS's unfair competition has damaged, threatens further damage and jeopardizes AHRN's business.



**COUNT II**

**Unfair Competition, Cal. Bus. & Prof Code §17200 et seq.  
(Against All Defendants)**

188. Counterclaimant AHRN hereby incorporates paragraphs 1-187 by reference as if fully set forth herein.

189. Defendants have engaged in unlawful business acts or practices, as alleged herein, all in an effort to gain unfair competitive advantage over AHRN.

190. These unlawful business acts or practices were committed pursuant to business activity related to group boycott and sham litigation against AHRN.

191. The acts and conduct of Defendants constitute fraudulent, unlawful, and unfair competition as defined by Cal. Bus. & Prof. Code §§ 17200, *et seq.*

192. Defendants' conduct constitutes violations of numerous state and federal statutes and codes, including but not limited to, violation of section 43(a) of the Lanham Act, 15 U.S.C. §1125(a) and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §1.

193. Defendants have improperly and unlawfully taken commercial advantage of AHRN's investment in its NeighborCity.com site, technology and business model. In light of Defendants' conduct, it would be inequitable to allow Defendants to retain the benefit of the funds obtained through the unauthorized and unlawful false and misleading statements, group boycott and sham litigation.

194. Defendants' unfair business practices have unjustly minimized AHRN's competitive advantages and have caused, and are causing, AHRN to

suffer damages. As a result of such unfair competition, AHRN has also suffered irreparable injury and, unless Defendants are enjoined from such unfair competition, will continue to suffer irreparable injury, for which AHRN has no adequate remedy at law.

195. Defendants should be compelled to disgorge and/or restore any and all revenues earnings, profits, compensation, and benefits they may have obtained in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, including but not limited to, returning any revenue earned from the unlawful and unfair disparagement of AHRN and should be enjoined from further unlawful, unfair and deceptive business practices.

### **COUNT III**

#### **Sherman Act §1** (Against All Defendants)

196. Counterclaimant AHRN hereby incorporates paragraphs 1-195 by reference as if fully set forth herein.

197. At least by their agreements beginning in Anaheim, California in November 2011, Defendants NAR, MRIS, unnamed defendant Northstar, their respective member brokers, and certain Doe Defendants (collectively, the "Conspirators") made a conscious commitment to a common scheme designed to achieve an unlawful objective that constitutes a contract combination or conspiracy (the "Conspiracy").

198. However, the Conspiracy had its origins much earlier and dates at least to 2005, when MRIS and its principals and agents developed the Guidance Paper's Program for the MLSs, consisting of sham copyright registrations and

wrongful enforcement of these alleged copyrights in the "content" of property listings. The purpose of the Program is to stifle and eliminate competition in the industry and to limit public access to what should be publicly available data on residential properties for sale nationwide, including their asking price. The Conspiracy is also manifested in the adoption by MLSs of pseudo-regulatory rules limiting their members' ability to share public domain listing data with innovative brokers like AHRN, Redfin, Agentaquarium.com and others. The Conspiracy continues to this day and comprises separate economic and legal entities.

199. One unlawful objective of the Conspiracy was, and continues to be to impose unreasonable restraints of trade in individual state and local real estate markets served by MLSs and in the national real estate market, including, but not limited to Maryland, Virginia, the District of Columbia and parts of Pennsylvania, West Virginia and Delaware, Minnesota and other states ("Relevant Markets") from which AHRN has received cease-and-desist and other letters complaining about and disrupting AHRN's referral program. The Conspirators have market power in the Relevant Markets by virtue of the MLSs' dominant position in their respective service areas. The vast majority of brokers believe that they must participate in the MLS operating in their local market to adequately serve their customers and compete with other brokers.

200. A specific unlawful objective of the Conspiracy was, and continues to be to inhibit competition between AHRN and NAR, and among member real estate brokers of MLSs on one hand, and AHRN on the other, in the markets

for (a) agent evaluation and ranking services, and for (b) real estate agent leads. These objectives are manifested by NAR's entry into the market for agent evaluation and ranking services and the conduct of the Conspirators to interfere with and attempt to shut down AHRN's agent ranking and lead-generating agent matching program, its referral service and similar innovative programs developed by other real estate brokers and entities. These innovative programs are perceived as a threat to the traditional practices in the industry in which large brokers are positioned to receive commissions from both sides of a real estate transaction, rather than opening up competition for the buy-side commissions. The innovative programs of AHRN, and other brokers and entities, feared by the Conspirators, serve the pro-competition, pro-consumer objective that consumers receive relevant and timely information on the record and availability of buy-side agents in their local areas to assist them in finding, negotiating and closing real estate transactions.

201. Another specific unlawful objective of the Conspiracy was, and continues to be generally to inhibit innovation in the delivery of information to, and for the benefit of, buyers and sellers of residential real estate, i.e. consumers of real estate brokerage referral services. Such information better positions consumers in finding their best deals in the market and strengthens their position in negotiating real estate purchase deals, particularly when assisted by able buy-side real estate brokers and agents that independently and exclusively represent their interests. NAR is making the real estate market less efficient by depriving the consumer of the ability to select the most qualified agents for their Deal,

thereby driving up Brokerage services costs and reducing the return for consumers and market liquidity. NAR is paid an annual fee per member, so more efficiency and transparency translates to the threat of fewer NAR members and fewer fees, thus NAR's motivation is consistent with the objective of the Conspiracy.

202. Another specific and unlawful objective of the Conspiracy was, and continues to be to illegally raise entry barriers for potential innovative competitors such as AHRN, and eventually drive AHRN and others out of the Relevant Markets. In furtherance of this objective, the Conspirators have agreed and implemented restrictive rules and policies (a) to claim copyrights in data which they know to be uncopyrightable, or, alternatively, to which they have no ownership rights, but which is essential to conducting a customer referral real estate business, and to refuse to license to AHRN such allegedly copyrighted property listing data, which is properly in the public domain and uncopyrightable, (b) to interfere with AHRN's referral agreements with agents and brokers, and (c) to threaten and commence sham copyright infringement legal actions against AHRN. These actions were taken by the Conspirators with full knowledge that AHRN's legitimate access to and use of such property listing data and AHRN's referral network are necessary to AHRN's success and viability as a provider of information to consumers and referrals to brokers and agents.

203. The Conspiracy's intended effects of creating barriers to entry by innovative brokers, reducing competition among brokers and limiting consumer information has, and will continue to illegally stabilize and inflate real estate

broker commissions, reduce consumer options for real estate brokerage referral services, and restrict the dissemination of timely real estate listing information on the internet, thereby limiting potential resale values, and generally restrict competition in the Relevant Markets.

204. The Conspirators' collective action among actual and potential competitors deprived the marketplace of independent centers of decision-making.

205. The anti-competitive acts of the Conspiracy have directly harmed competition and have injured AHRN's sales and goodwill, and have impaired AHRN's access to capital markets and investment funding, causing direct financial harm to AHRN in an amount to be determined.

206. The conspiracy to harm non-traditional participants in the real estate market, particularly the agent evaluation and ranking market and the real estate referral market are open-ended and continuous. The most recent overt acts in furtherance of the conspiracy occurred as recently as May, 30, 2013 when NAR and its member brokers denied AHRN referral agreements citing copyright issues. See *United States v. Md. & Va. Milk Producers Coop. Ass'n, Inc.*, No. 91-5182, 1992 U.S. App. LEXIS 22748, at 37-38 (4<sup>th</sup> Cir. September 15, 1992) (The statute of limitations period under Section 1 of the Sherman Act "begins to run, not from the date of the legally cognizable harm, but from the date of the last overt act.").

#### **PRAYER FOR RELIEF**

WHEREFORE, counterclaimant prays for judgment against

counterclaim defendants as follows:

- A. Award of compensatory damages in an amount to be determined;
- B. Award of lost profits or an adequate license or royalty fee in an amount to be determined;
- C. Award of declaratory relief;
- D. Award of treble, punitive or exemplary damages in an amount to be determined;
- E. Award of reasonable attorneys' fees;
- F. Order of preliminary and permanent injunctive relief, including but not limited to:
  - (a) Enjoin NAR and MRIS from taking any actions to implement their plan to exclude AHRN from the market for Internet-based services to real estate brokers and buyers and sellers of residential real estate.
  - (b) Enjoin NAR and MRIS from participating in any way in the conspiracy against AHRN to restrain trade and engaging in the exclusionary conduct alleged herein.
- G. Grant of such other and further relief as the court deems just and proper.

**JURY DEMAND**

Pursuant to Fed. R. Civ. P. 38, Counterclaimant AHRN hereby demands a trial by jury on all issues in its Second Amended Counterclaim triable of right to a jury.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Richard S. Toikka, hereby certify that on this the 24<sup>th</sup> day of June, 2013, a copy of the foregoing Redacted Second Amended Counterclaim and Jury Demand was served by electronic means using the Court's CM/ECF system upon:

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