

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOME QUARTERS REAL ESTATE
GROUP, LLC,

Plaintiff,

-v-

MICHIGAN DATA EXCHANGE, INC., d/b/a
MIREALSOURCE, and REALCOMP II, LTD.,

Defendants.

Case No. 2:07-cv-12090-SJM-RSW

Hon. Stephen J. Murphy III
Magistrate Judge R. Steven Whalen

Jury Trial Requested

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**DEFENDANT MICHIGAN DATA EXCHANGE, INC. d/b/a
MIREALSOURCE'S RESPONSE TO SECOND AMENDED
COMPLAINT, RELIANCE ON JURY DEMAND,
AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

MiRealSource, Inc., formerly Michigan Regional Data Exchange, Inc., d/b/a
MiRealSource ("MiRealSource"), by and through its attorneys, Butzel Long, in response to the
Second Amended Complaint, sets forth the following Answer:

Preliminary Statement

MiRealSource objects to Plaintiff's Preliminary Statement on the grounds that it does not comply with the rules of pleading set forth in the Federal Rules of Civil Procedure. Subject to and without waiving the foregoing objection, MiRealSource denies any wrongdoing individually or in concert with Defendant Realcomp II, Ltd. ("Realcomp") or that it has damaged HQ in any way. MiRealSource further denies all other allegations of the "Preliminary Statement," except as specifically stated below.

MiRealSource agrees that it operates a multiple listing services ("MLS") for residential properties located in southeast Michigan and that its shareholders include real estate professionals, some of whom sometimes compete with each other and that some MiRealSource MLS participants also participate in other multiple listing services, including the Realcomp MLS.

MiRealSource states that for several months it suspended HQ's access to the MiRealSource MLS because HQ violated MiRealSource's rules to which HQ had agreed to comply and violated the intellectual property rights of MiRealSource and its members. MiRealSource further states that it restored HQ's access to the MiRealSource MLS when HQ agreed to cease its wrongful conduct and comply with the MiRealSource rules.

Except as stated above, MiRealSource lacks knowledge or information sufficient to form a belief as to the allegations concerning Plaintiff Home Quarters Real Estate, LLC ("HQ") or Defendant Realcomp.

Jurisdiction and Venue

1. MiRealSource agrees that this Court has subject matter jurisdiction of this action, provided that by answering the Complaint and participating in this lawsuit it does not waive its previously raised position that HQ's claims are subject to arbitration.

2. MiRealSource denies the allegations in Paragraph 2 concerning MiRealSource, except that MiRealSource states that those allegations concerning the effect of MiRealSource's activities on interstate commerce are conclusions of law to which no response is required. MiRealSource lacks knowledge or information sufficient to form a belief as to the allegations concerning HQ or Defendant Realcomp.

3. MiRealSource agrees that venue in this district is proper.

Parties

4. MiRealSource is without knowledge or information sufficient to form a belief as to the allegation contained in Paragraph 4.

5. MiRealSource agrees that it operates the MiRealSource MLS. The number of listings in the MiRealSource MLS and the number of real estate professionals and offices using the MiRealSource MLS varies from time to time; accordingly, MiRealSource lacks knowledge or information sufficient to form a belief as to those allegations. Except as stated above, the allegations contained in Paragraph 5 are denied.

6. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 6.

Multiple Listing Services and the Traditional Real Estate Office

7. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 7.

8. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 8.

HQ's Innovative Business Model

9. MiRealSource denies that it has engaged in unlawful actions or has caused HQ damage, and is otherwise without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 9.

10. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 10.

11. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 11.

12. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 12.

13. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13.

14. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 14.

15. MiRealSource denies that it acted to unreasonably restrain trade and/or "put" HQ out of business. MiRealSource is without knowledge or information sufficient to form a belief as to all other allegations contained in Paragraph 15.

16. MiRealSource denies the allegations contained in Paragraph 16.

Defendants' Unlawful Actions in Restraint of Trade

17. MiRealSource agrees that it operates the MiRealSource MLS and that its shareholders are real estate professionals, some of whom sometimes compete with each other, and that some

MiRealSource MLS participants also participate in other multiple listing services, including the Realcomp MLS. MiRealSource further agrees that it has established rules regarding, among other things, membership in MiRealSource and use of the MiRealSource MLS. MiRealSource is without knowledge or information sufficient to form a belief as to the allegations of this paragraph as they pertain to Realcomp. MiRealSource denies all other allegations contained in Paragraph 17.

18. MiRealSource denies the allegations of paragraph 18, but agrees that beginning in spring 2002, HQ was granted access to the MiRealSource MLS for a trial period, subject to all applicable rules, including those set forth in the MiRealSource Rules and Regulations, Bylaws, Policy and Procedures Handbook, and any other agreement between MiRealSource and HQ (collectively “Governing Documents”).

19. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19.

20. MiRealSource agrees that MiRealSource MLS members are authorized to access and use certain MiRealSource MLS listing data, subject to the Governing Documents. MiRealSource can neither admit nor deny that such data was “MLS Compilation Data” as defined by HQ because of the vagueness of the definition. MiRealSource agrees that Exhibit A is a copy of MiRealSource’s Rules and Regulations for a portion of the relevant period, but denies that: (i) Exhibit A was in place at the time HQ’s membership in MiRealSource was suspended; or (ii) that the Rules and Regulations were the only documents governing HQ’s access and use of MiRealSource MLS listing data or other MLS information and services. MiRealSource denies any other allegations

21. MiRealSource denies the allegations contained in Paragraph 21 because the Governing Documents prohibited HQ from downloading listing data and from allowing HQ's agents and/or buying clients from accessing data except in accordance with the Governing Documents, which prohibitions were knowingly and intentionally violated by HQ.

22. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22.

23. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23.

24. MiRealSource agrees that in May 2003, MiRealSource suspended HQ's access to the MiRealSource MLS as a result of HQ's violations of the Governing Documents.

25. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25.

26. MiRealSource denies that it acted in concert with Realcomp. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in Paragraph 26.

27. MiRealSource agrees that HQ's access was restored in August 2003, when HQ agreed to comply with the Governing Documents. MiRealSource denies all other allegations contained in Paragraph 27.

28. MiRealSource agrees that in May 2003, MiRealSource suspended HQ's access to the MiRealSource MLS as a result of HQ's violations of the Governing Documents. MiRealSource denies any other allegations contained in Paragraph 28.

29. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29.

30. MiRealSource denies the allegations contained in Paragraph 30 as they relate to MiRealSource.

31. MiRealSource is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31.

32. MiRealSource denies the allegations contained in Paragraph 32 as they relate to MiRealSource.

33. MiRealSource denies the allegations contained in Paragraph 33 as they relate to MiRealSource.

34. MiRealSource is without knowledge or information sufficient to form a belief as to the number of HQ's registered buying and/or selling clients. MiRealSource denies all other allegations contained in Paragraph 34.

35. MiRealSource denies the allegations contained in Paragraph 35.

Count I

36. MiRealSource asserts again and incorporates by reference all preceding paragraphs.

37. MiRealSource denies the allegations contained in Paragraph 37.

38. MiRealSource denies the allegations contained in Paragraph 38.

39. MiRealSource denies the allegations contained in Paragraph 39.

40. MiRealSource denies the allegations contained in Paragraph 40.

41. MiRealSource denies the allegations contained in Paragraph 41.

42. MiRealSource denies the allegations contained in Paragraph 42.

43. MiRealSource denies the allegations contained in Paragraph 43.

Count II

44. MiRealSource asserts again and incorporates by reference all preceding paragraphs.

45. MiRealSource denies the allegations contained in Paragraph 45.

46. MiRealSource denies the allegations contained in Paragraph 46.

47. MiRealSource denies the allegations contained in Paragraph 47.

48. MiRealSource admits the allegations contained in Paragraph 48.

49. MiRealSource denies the allegations contained in Paragraph 49.

Except as set forth above, MiRealSource does not respond to the allegations of Counts III and IV (paragraphs 50-63) as such counts are not directed against MiRealSource.

WHEREFORE, MiRealSource respectfully requests this Court to dismiss the Second Amended Complaint with prejudice and enter judgment in favor of MiRealSource, together with an award of costs, expenses, attorney fees and such other relief that the Court may deem just and proper.

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RELIANCE ON JURY DEMAND

Defendant MiRealSource, Inc., formerly Michigan Regional Data Exchange, Inc., d/b/a MiRealSource, by and through its undersigned counsel, hereby relies upon Plaintiff's jury demand.

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AFFIRMATIVE AND OTHER DEFENSES

MiRealSource, Inc., formerly Michigan Regional Data Exchange, Inc., d/b/a MiRealSource (“MiRealSource”), by and through its undersigned counsel, for its affirmative and other defenses, states as follows:

1. Plaintiff fails to state a claim for which relief can be granted.
2. Plaintiffs have not suffered antitrust injury caused by the actions of MiRealSource.
3. Plaintiffs have not suffered injury by reason of anything which violates the antitrust laws.
4. The claims are barred because the actions of MiRealSource were unilateral, reasonable and justified.
5. The challenged conduct at issue in the Complaint has significant procompetitive efficiencies that outweigh any alleged anticompetitive effects.
6. MiRealSource did not enter into a contract, combination or conspiracy to unreasonably restrain trade.
7. To the extent that any claimed injuries occurred four years prior to the commencement of this Action, they are barred by the statute of limitations.
8. Plaintiff’s claims are barred by the doctrine of waiver, laches, or estoppel.
9. Plaintiff has failed to exercise reasonable care and diligence to mitigate damages.
10. Plaintiff’s damages are speculative and cannot be reasonably ascertained.
11. Plaintiff’s claims are barred by the doctrine of unclean hands, in pari delicto, and public policy and Plaintiff has brought this case to harass or burden MiRealSource.
12. Plaintiff’s claims are barred by MiRealSource’s valid copyrights.

13. Plaintiff's claims are subject to arbitration.

14. MiRealSource intends to rely upon any other defenses that may become available or are made known by discovery proceedings and reserves the right to amend this Answer to assert such defenses. Further, by setting forth these affirmative defenses, MiRealSource does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiffs.

WHEREFORE, Defendant MiRealSource respectfully requests this Court to dismiss the Complaint with prejudice and enter judgment in favor of MiRealSource, together with an award of costs, expenses, attorneys fees and such other relief that the Court may deem just and proper.

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COUNTERCLAIMS

Defendant/Counter-Plaintiff MiRealSource, Inc., formerly Michigan Regional Data Exchange, Inc., d/b/a MiRealSource (“MiRealSource”), by and through its undersigned counsel, here states its counterclaims as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over MiRealSource’s claims against HQ under 28 U.S.C. §1331 and 28 U.S.C. §1367.
2. Venue in this Court is proper under 28 U.S.C. §1391.

Parties

3. MiRealSource is a corporation organized under the laws of Michigan, with its principal place of business at 5700 Crooks Road, Suite 102, Troy, Michigan. MiRealSource previously did business as and/or succeeded in legal interest to Michigan Regional Data Exchange, Inc. and Michigan Multiple Listing Service, Inc.
4. HQ is a Michigan limited liability company.

MiRealSource’s MLS

5. MiRealSource provides participating shareholders and other authorized participants a multiple listing service (“MLS”) for residential properties located in southeast Michigan.
6. MiRealSource has promulgated Rules and Regulations regarding the MLS. Together with the Rules and Regulations, MiRealSource’s Bylaws and MiRealSource’s Policies and Procedures, along with all other agreements between MiRealSource and HQ, constitute the “Governing Documents” of HQ’s membership in MiRealSource and participation in the MLS. (Copies of MiRealSource’s Rules & Regulations, Policy & Procedures Handbook, and Bylaws,

effective as of the time HQ's membership in MiRealSource was suspended, are attached hereto as Exhibits 1, 2, and 3, respectively.)

7. HQ agreed to be bound by the Governing Documents.

Advertising Listings from the MLS

8. The Governing Documents provide that any listing taken on a contract to be processed by MiRealSource is subject to MiRealSource's Governing Documents immediately upon the signatures of the sellers being obtained.

9. Under the terms of the Governing Documents, all right, title and interest in the copy of every multiple listing compilation created and copyrighted by MiRealSource remains vested with MiRealSource.

10. MiRealSource offers a Broker Reciprocity Program, through which participating brokers agree to allow other participating brokers to advertise each others' listings.

11. The Governing Documents prohibit participants from advertising the listings of other brokers without the prior written consent of the listing brokers or unless the brokers have joined the Broker Reciprocity Program.

12. HQ did not sign up to participate in the broker reciprocity program and therefore HQ had no rightful authority to advertise the listings of other brokers absent the prior written consent of other brokers.

Confidentiality of MiRealSource's MLS

13. MiRealSource protects the listings information contained in the MLS on a secure network and grants access to participants (primarily Shareholders and approved affiliates) via a secure data feed. The security of MiRealSource's network is ensured using customary business practices.

14. The MLS contains listings information and other related information (collectively “Listings Information”) that MiRealSource considers confidential and proprietary.

15. The Governing Documents define and limit the rights of MiRealSource members to use the Listings Information.

16. The Governing Documents define and limit the rights of MiRealSource members to access Listings Information.

17. Unfiltered distribution of Listings Information to a client is clearly prohibited by the Governing Documents.

18. The Governing Documents also prohibit, among other things, the repackaging and reselling of Listings Information to the general public, posting outdated Listings Information, and unreasonably distributing Listings Information.

MiRealSource’s Fees

19. The Governing Documents establish the fees, fines, and other costs (“Charges”) associated with membership in MiRealSource.

20. The Charges owed by a member are a function of, among other things, how many brokers and affiliates are operating under the name of the member.

21. The failure to pay dues may lead to the automatic termination of the member’s participation in the MLS.

HQ’s Violation of the Governing Documents

22. In approximately late April 2003, MiRealSource learned that HQ had breached its obligations under the Governing Documents.

23. HQ’s breaches included (i) advertising the listings of other broker’s without the prior written consent of those brokers; (ii) unreasonably distributing MLS Information by

repackaging and reselling the Listings Information to the general public; (iii) improperly distributing Listings Information by “copying” Listings Information off of the MLS and “pasting” that Listings Information directly to its own website; (iv) posting outdated and non-current listings to its website; and (v) improperly obtaining and disclosing Listings Information.

24. In May 2003, MiRealSource suspended services to HQ because of the ongoing violations of the Governing Documents.

HQ’s Failure to Make Payments

25. HQ has failed to pay Charges owed to MiRealSource.

26. On information and belief, HQ failed to properly identify the number of brokers and affiliates operating under the HQ name and thereby deprived MiRealSource of Charges to which it was properly entitled.

COUNT I

(Breach of Contract—Improper Access/Improper Disclosure of Listings Information)

27. MiRealSource realleges and reincorporates the allegations contained in each of the preceding Paragraphs.

28. MiRealSource and HQ had a valid and binding agreement, pursuant to which HQ agreed that it would not disclose Listings Information except as provided for in the Governing Documents.

29. HQ did in fact disclose Listings information in violation of the Governing Documents by (i) advertising the listings of other broker’s without the prior written consent of those brokers; (ii) unreasonably distributing Listings Information by repackaging and reselling the Listings information to the general public; (iii) improperly distributing listings information by “copying” Listings Information off of the MLS and “pasting” that Listings Information

directly to its own website; (iv) posting outdated and non-current listings to its website; and (v) improperly obtaining and disclosing Listings Information.

30. MiRealSource has satisfied all of its contractual obligations to HQ.

31. MiRealSource has been damaged by HQ's breach.

COUNT II

(Breach of Contract—Failure to Pay)

32. MiRealSource realleges and reincorporates the allegations contained in each of the preceding Paragraphs.

33. MiRealSource and HQ had a valid and binding agreement to pay the Charges.

34. HQ has failed to pay the Charges owed.

35. HQ failed to properly report to MiRealSource the number of brokers and affiliates operating under the HQ membership.

36. MiRealSource has satisfied all of its contractual obligations to HQ.

37. MiRealSource has been damaged by HQ's breach.

COUNT III

(Violation of the Computer Fraud and Abuse Act)

38. MiRealSource realleges and reincorporates the allegations contained in each of the preceding Paragraphs.

39. The Federal Computer Fraud and Abuse Act ("CFAA") provides that it is a violation of the Act to:

knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and the means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any one year period; 18 U.S.C. §1030(a)(4).

40. The CFAA further provides that persons who “intentionally access a computer without authorization or exceeds authorized access, and thereby obtains-- ... (C) information from any protected computer,” shall be liable under a civil action. 18 U.S.C. §1030(a)(2).

41. The CFAA also provides that it is a violation of the Act to:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer; (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or (C) intentionally accesses a protected computer without authorization, and as a result of such conduct causes damage and loss.” 18 U.S.C. §1030 (a)(5).

42. Furthermore the CFAA provides that “any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief...” 18 U.S.C. §1030 (g).

43. Finally, the CFAA provides that the term loss means “any reasonable cost to any victim” and includes “the cost of responding to a defense, conducting a damage assessment. . . and any revenue lost, cost incurred, or other consequential damages incurred....” 18 U.S.C. §1030 (e) (11).

44. HQ knowingly and improperly exceeded its authorized access to MiRealSource’s computers with the intention of defrauding MiRealSource and improperly distributing Listings Information to its clients in violation of the Governing Documents.

45. HQ knowingly and without authorization caused the transmission of Listings Information, which caused damage to MiRealSource, in disregard of the Governing Documents.

46. On information and belief, HQ knowingly and improperly caused certain Listings Information to be removed from MiRealSource’s secure computer network and placed the

Listings Information on HQ's insecure computer network and, as a result, placed MiRealSource's confidential and proprietary Listings Information in a less secure position.

47. On information and belief, HQ knowingly and intentionally exceeded its authorized access to MiRealSource's secure computer network and improperly took Listings Information from a protected computer with the intent to distribute the Listings Information.

48. MiRealSource was damaged by all of HQ's acts, whether viewed individually or collectively, in excess of \$5,000.

WHEREFORE, MiRealSource requests this Court (i) enter a judgment in its favor and against HQ, (ii) issue an Order declaring HQ in breach of its agreements with MiRealSource and awarding damages, costs and fees accordingly, (iii) issue an Order declaring HQ in violation of the Computer Fraud and Abuse Act and awarding damages, costs and fees accordingly, and (iv) award any other such relief that this Court deems appropriate.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 25, 2009 he electronically filed the foregoing paper with the Clerk of the Court via the ECF system which sent notification of such filing to:

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